PRIVY COUNCIL.

BALKISHEN DAS (PETITIONER) *v.* RUN BAHADUR SINGH (OBJECTOR).

P. C.* 1883.

June 21, 22. *July* 11.

[On appeal from the High Court at Fort William in Bengal.]

Decree—Construction of decree—Penalty—Higher rate of interest upon default in payment of instalment.

A decree, of which the terms had been arranged by solehnama between the parties, for payment of money by instalments with interest at six per cent., was construed to provide also for three contingencies, *viz.*, non-payment at due date, (*a*) of the first instalment, two consecutive instalments being in arrear at the same time; (*b*) of instalments, other than the first; (*c*) of the first instalment, simply. Upon the occurrence of (*a*), or of (*b*), execution might issue for the whole decretal money with interest thereon at twelve per cent. Upon the occurrence of (*c*) execution might issue for that instalment, with interest at twelve per cent. from the date of the decree.

The decree-holder having accepted payment of the first instalment on the footing of (*c*), *held* that he had not, by any admission or settlement, precluded himself from insisting on the above construction as to (*b*). *Held*, also, that these provisions for double interest were but a reasonable substitution of a higher rate of interest for a lower, in a given state of circumstances, and were not in the nature of a penalty against which equitable relief might be claimed.

APPEAL from a decree (27th February 1880) of the High Court setting aside an order (16th July 1879) of the Subordinate Judge of Gya made in execution of decree and substituting another.

The questions on this appeal related to the construction of a decree founded on, and reciting, a solehnama between the parties, and to the right of the appellant to execute to the extent of the provisions of that decree when properly construed.

On November 11th, 1870, Rani Ismidh Koer, since deceased, executed a security in favour of Rai Narain Das, also since deceased, and now represented by Balkishen Das, the appellant, for repayment of Rs. 1,75,000, with interest by half-yearly instalments. Default having been made in payment, Rai Narain

* *Present*: Lord WATSON, Sir B. PEACOCK, Sir R. P. COLLIER, and Sir R. COUCH.

1883

BALKISHEN DAS v. RUN BAHADUR SINGH.

Das sued the Rani to recover the amount due, which with a further loan came to Rs. 2,15,359. To this suit the respondent, who was heir in reversion to the estate in the hands of the Rani, (a Hindu widow) was added as defendant. During the progress of the suit an arrangement was come to for payment by instalments of Rs. 30,000 each; and a decree was made on the 29th March 1873, which gave rise to the present dispute. The decree, which stated the terms of a solehnama between the parties, contained the articles set forth in their Lordships' judgment.

The due date of the first instalment payable was September 25th, 1874, but it was not paid until a short time before the second instalment fell due. The decree-holder, accepting it, gave a receipt, dated 1st September 1875, containing the following statement of the mode in which the payment of Rs. 30,000 was appropriated:—

	Rs.	A.	P.
"Rs. 30,000, half of which is	15,000	0	0
Out of the principal mentioned in the kistbundi decree for the first instalment, *i.e.*, for Bhadon 1281 Fusli	21,280	0	0
Interest on Rs. 30,000 from the 29th March 1873, the date of the solehnama, to the 31st August 1875, the date of payment at the rate of 1 rupee per cent. per month, which, by reason of default of instalment, became payable under the terms of the solehnama embodied in the decree, at 1 rupee per cent. instead of 8 annas per cent.	8,720	0	0

Dated the 1st September 1875, corresponding with the 2nd Bhadon Sudi, 1932 Sambat, or 1282 Fusli."

On the 19th August 1876, shortly before the third instalment became due, the respondent remitted to the decree-holder Rs. 30,000, in payment of the second instalment, making up an account as follows:—"To principal Rs. 23,820; to interest Rs. 6,180." The last item of interest was apparently arrived at by calculating interest on the instalment from the 29th March 1873 to the 3rd September 1876 at 6 per cent. This the decree-holder

refused to accept. Afterwards, the money having been paid into Court, together with a further sum of Rs. 30,000 deposited on the 19th September 1877, on account of the third instalment, shortly before the fourth instalment became due, the decree-holder took the money out, it being understood that no special appropriation or adjustment was made or admitted.

On the 18th September 1877, the decree-holder filed the petition, out of which the present appeal arose, to realize Rs. 3,06,253, alleging that the judgment-debtor had, by failing to pay the instalments decreed, become liable to pay the balance of the decretal money with interest at twelve per cent. giving credit for the instalments received with interest at the enhanced rate deducted. To this the respondent filed his petition of objection. The order made by the Subordinate Judge of Gya, and the decree on appeal made by the High Court, are stated in their Lordships' judgment.

On this appeal—

Mr. *J. F. Leith, Q.C.*, and Mr. *R. V. Doyne* appeared for the appellant.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. T. Woodroffe* for the respondent.

For the appellant it was argued that the terms of the decree of 29th March 1873, followed by the actual defaults made by the judgment-debtor in paying the instalments, permitted the former to calculate the additional interest on the balance of the decretal money; on the first instalment from the date of the decree; and on the second and subsequent instalments from the dates at which each of them became due to the dates of payment.

For the respondent it was argued that the decree-holder was not, upon the true construction of the consent decree, entitled to interest at the enhanced rate upon the principal sum decreed. Moreover, independently of this construction, the general rule as to equitable relief against the operation of penalties intended to secure collateral objects, was applicable, and would prevent the recovery of interest at the rate on which the appellant insisted. The order of the High Court did substantial justice between the parties.

1883

BALKISHEN DAS v. RUN BAHADUR SINGH.

Reference was made to *Boley Dobey* v. *Sideswar Rao* (1); *Bichook Nath Panday* v. *Ram Lochun Singh* (2); *Paresnath Mukhopadhya* v. *Kristo Mohun Saha* (3).

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This is an appeal by Rai Balkishen Das, the representative of Rai Narain Das, from an order of the High Court at Calcutta, dated the 27th February 1880, by which an order of the Subordinate Judge of Gya, of the 16th July 1879, was set aside, and the order appealed from was substituted for it.

The determination of the questions which arise in the appeal depends upon what is the proper construction to be put upon the 3rd clause of a decree of the Subordinate Judge of Gya, dated 29th March 1873, in a suit in which Rai Narain Das was plaintiff, and the respondent, Raja Run Bahadoor Singh, was one of the defendants.

That decree was obtained by Rai Narain Das in pursuance of a solehnama or compromise, between the parties to the suit.

The amount decreed was Rs. 2,38,000 principal, with interest, and by the 2nd Article it was ordered, amongst other things, that—

"The plaintiff shall get interest on the decretal money at the rate of 8 annas per cent. per mensem from defendants. That the defendants shall pay annually Rs. 30,000 out of the principal and interest year after year by instalments to the plaintiff; and the plaintiff, after granting a receipt and filing a petition in the Court, shall take the said sum from defendants. Out of the annual amount of Rs. 30,000, whatever may be found due on account of interest, the decree-holder shall deduct the same on account of interest, and credit the balance to the principal. The first instalment shall be in one lump, on the 30th Bhadon 1281 Fusli. In future, year after year, each instalment shall be so paid in a lump sum on the last day of Bhadon of each year. The money covered by the instalment shall be sent to the decree-holder at Benares, and defendants shall pay the expenses incurred in sending the same."

The 3rd Article, which is the important one, is as follows:—

"If the first instalment be not paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments be not paid, then the plaintiff shall have the power to take out execution of the decree, and realize his entire decretal money, with interest at the rate of one rupee per cent. per mensem, from

(1) 4 B. L. R. Ap. 92. (2) 11 B. L. R. 135.
(3) 3 B. L. R. Ap. 105.

defendants, and their properties. In case of default, the decree-holder shall be entitled to take out execution, and realize interest on the entire decretal money from the date of such default to that of realization, at the rate of one rupee per cent. If the first instalment be not paid on the 30th Bhadon 1281 Fusli, then the decree-holder shall have the power to realize the principal with interest at the rate of one rupee per cent. per mensem from the date of this solehnama, to which your petitioners, defendants, shall have no objection. If at any time within the term defendants desire to pay any sum over and above Rs 30,000, the plaintiff shall have no objection to receive the same."

The first instalment, which fell due on the 30th Bhadon 1281, corresponding with the 25th September 1874, was not paid on that day. It was, however, paid on the 31st of August 1875, before the second instalment became payable, and a receipt for the same, dated the 1st of September 1875, was given by the decree-holder acknowledging the payment, and stating that Rs. 8,720 were appropriated to the payment of interest on Rs. 30,000 from the 29th March 1873, the date of the solehnama, to the said 31st of August 1875, the date of payment, at the rate of one rupee per cent. per mensem, which, by reason of the default of payment of the instalment on the due date, became payable under the terms of the solehnama or compromise embodied in the decree, at the rate of one rupee instead of eight annas per cent. per month.

Subsequently, after two instalments had been paid, and a third instalment had become due, an application was made by the decree-holder to the Subordinate Judge of Gya for execution of the full amount of the decree, with interest at the rate of one rupee per cent. per month, after deducting Rs. 60,000 on account of the two instalments which had been paid. That application was made upon the ground that default had been made in payment of the first instalment on due date, and of two consecutive instalments. The Subordinate Judge held that two consecutive instalments were not unpaid within the meaning of the third clause of the decree. He therefore ordered that the petition for the execution of the decree by realization of the entire decretal money in one lump, with interest at the rate of one rupee per cent. per month, should be rejected, but that for the instalment then overdue the decree should be executed.

Upon appeal the High Court, on the 29th July 1878, affirmed the decision, and no appeal to Her Majesty in Council from that

1883

BALKISHEN DAS v. RUN BAHADUR SINGH.

judgment has been preferred. It therefore stands unreversed. The Judges of the High Court stated that, in their opinion, the view taken by the Subordinate Judge of the arrangement between the parties was correct, and that the intention evidently was that no two instalments should be outstanding at the same time, and that, provided the debtor paid up the first instalment after due date, but in sufficient time to guard against a second instalment becoming overdue whilst the first remained unpaid, he was to be allowed to do so on payment of a double rate of interest as a penalty, but that, if he went further, and allowed two instalments to be actually due and unpaid at one and the same time, the arrangement would fall to the ground, and the whole amount of the decree would be realizable in a lump sum.

Independently of the fact that no appeal was preferred against that decision, their Lordships are of opinion that the construction of the decree was substantially correct, though they do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The solehnama was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent. under certain circumstances, and 12 per cent. under others.

In a subsequent judgment, dated the 25th February 1880, to which advertence will be made presently, the High Court say :—

"It was one of the terms of the solehnama that if at any time two instalments were due at the same time, the whole of the debt should be recoverable forthwith, and the interest, which otherwise was to be calculated at 6 per cent. per annum, should be calculated at 12 per cent.; and there was a further term in the solehnama that if the first instalment was not paid in due time, interest should be calculated at the rate of 12 per cent. instead of 6 per cent. from the date of default until realization.

"There is no specific mention in the solehnama of any other instalment than the first, but this being a decree of Court, we think that the language of it is capable of a more liberal construction than if it had been simply a deed between the parties, and we are of opinion that the same conditions must be considered applicable to default on every instalment which are made applicable in default of the first instalment."

Their Lordships think it right in this place to refer to that part of the judgment, in order to point out that, in their opinion, the decree-holder could not, under the first paragraph

of the 3rd clause of the solehnama, issue execution for the full amount of the judgment, with 12 per cent. interest, unless both the first instalment should not be paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments should be in default and unpaid at the same time. The High Court would read the words "first instalment" as if they had been "any instalment," and the words "on the 30th Bhadon 1281 Fusli," as if they had been "on the 30th Bhadon 1281 Fusli, or on the last day of Bhadon in any year, as the case may be." Their Lordships think that the words "first instalment" must be read in their strictly literal sense, and that the word "and" in that paragraph must be read in the conjunctive and not in the disjunctive, and consequently that the non-payment of the first instalment on the due date was a material part of the contingency contemplated by the first clause, and the allowing of two instalments to be in arrear at the same time the other portion of that contingency.

The only remaining question is whether, in default of payment of any instalment other than the first on the due date, interest from the date of such default until the realization of the instalment was to be paid upon the full amount of the principal remaining unpaid at the time or only upon the amount of the instalment.

The Subordinate Judge, in his judgment of the 16th July 1879, after giving his reasons, says: "Hence it clearly appears that the object aimed at by the solehnama was that in case of breach of instalment the decree-holder would get interest on the expired instalment at one rupee per cent. per month in the place of eight annas per cent. and he decreed accordingly." Both parties appealed to the High Court from that decision.

On the 25th February 1880 the High Court appear to have agreed with the Subordinate Judge in thinking that the increased rate of interest was to be paid on the amount of the instalment in default, and not upon the whole amount of the debt. Their judgment and decree are quite unintelligible. They order the decree of the Subordinate Judge to be set aside, and then they declare that the first instalment of Rs. 30,000, which had been paid, is to be treated as not having been paid; afterwards they declare that in adjusting the account between the parties it must

1883

BALKISHEN DAS v. RUN BAHADUR SINGH.

be taken that the said first instalment was duly paid on the 25th September 1854, and that all subsequent payments must be taken to have been properly made for the purposes of the subsequent instalment, and that in dealing with those instalments interest will be calculated at 6 per cent. per annum on the whole debt, and the capital will be paid off by the residue of such instalments, after providing for interest at that date. Then they order the judgment-debtor within six months from the date of the decree to pay to the decree-holder the said first instalment, with interest at 12 per cent., and that in default thereof the decree-holder may apply, and the Court reserves the power of reconsidering, and if necessary of altering the terms of the decree.

The reason given by the High Court for holding that, in default of payment of a second or subsequent instalment on due date interest is to be calculated upon the amount of the instalment, and not upon the amount of the whole decretal money, is that in the receipt given for the first instalment a portion of it, *viz.*, 8,720, is appropriated to the payment of interest at 12 per cent. upon the amount of the first instalment, and not upon the whole debt. It is said,—

"According to the strict construction of the solehnama, I myself have doubts whether the plaintiff would not be entitled to 12 per cent. interest upon the whole amount for the time being due between the due date of each instalment and the time it was actually paid, that is, from the date of default of payment until its realization; but inasmuch as the parties themselves, when the first instalment was paid, have put a construction upon this instrument, and have treated the interest as calculable on the Rs. 30,000 and not on the whole sum, and as the Judge of the Court below, as we understand his judgment, has decided in the same way, we think we ought not to interfere with that decision, because the effect of calculating interest only upon the instalment upon that first occasion may have misled the other side, and may very seriously prejudice them if any other construction is now put upon the instrument; for, if upon that occasion the plaintiff had claimed to be entitled to 12 per cent. upon the whole amount of the debt, and not to 12 per cent. on the instalment only, it is not improbable that the defendant might have been careful to pay up what was due, and not have continued in default, as he appears to have done."

Their Lordships are of opinion that, according to Article 3 of the decree of 1873, three contingencies were in the contemplation of the parties.

The first is, if the first instalment be not paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments be not paid. The second, "in case of default." The third, if the first instalment be not paid on the 30th Bhadon 1281 Fusli. The first has already been considered and dealt with. Upon the third the parties have put their own construction, and have voluntarily settled upon the basis of that construction, which their Lordships cannot say was wrong. The decree-holder is bound by it, and cannot, in the settlement of accounts, recover interest at 12 per cent. in respect of the default in payment of the first instalment from the date of the solehnama to the date of realization of that instalment except upon the amount of the instalment, interest upon the remaining portion of the debt during that period being calculated at 6 per cent. per annum.

In determining upon what amount interest at 12 per cent. per annum is to be allowed in consequence of a default in payment on the due date of the second or any subsequent instalment, the decree-holder is not bound by the construction put by him upon the 3rd clause, nor by any admission or settlement in respect of the default made in payment of the first instalment. The wordings of the second and the third contingencies respectively are very different. The second is clear and explicit. It declares that in case of default the decree-holder shall be entitled to take out execution and realize interest on the entire decretal money from the date of such default to the date of realization, at the rate of one rupee per cent. per mensem. The third declares that if the first instalment be not paid on the 30th Bhadon 1281 Fusli, then the decree-holder shall have the power to realize the principal, with interest at the rate of one rupee per cent. per mensem from the date of the solehnama.

It was contended that the words "in case of default" were intended to refer to the default provided against by the first contingency. But in their Lordships' opinion it cannot be construed as having that meaning, for it was declared that upon the happening of the first contingency the entire decretal money, with interest at 12 per cent., might be realized, whereas in case of default it was declared merely that interest on the entire decretal money might be realized at the rate of one rupee per cent. per mensem.

1883

BALKISHEN DAS v. RUN BAHADUR SINGH.

The instalment itself would be of course realizable under the decree, and out of it, according to the 2nd Article, interest at 6 per cent. upon the decretal money, except during the period for which interest at 12 per cent. was to be levied, would be payable.

If the words "in default, &c.," referred to the default contemplated in the first contingency, the words "the decree-holder shall be entitled to take out execution and realize, &c.," were useless and inapplicable, for words to the same effect had been previously used with reference to principal and interest; whereas in the 2nd Article they apply merely to the interest.

The words "the principal" in the third contingency, *viz.*, the non-payment of the first instalment on the due date, could not refer to the whole decretal money, otherwise the third contingency would be at variance with the first.

By the words, "in case of default," in the second contingency, their Lordships are of opinion that a default in payment on due date of any instalment, except the first, was provided for. They had no reference to the first contingency for the reasons already expressed. They did not refer to the non-payment of the first instalment, for that is specifically provided for, and to complete the first contingency it was necessary that in addition to the non-payment of the first instalment on the due date two consecutive instalments should also be unpaid at the same time.

The word "principal" in the third contingency, therefore, evidently referred to the principal of the first instalment, and not to the entire decretal money, as specified in the first and second contingencies. The parties, by putting that construction on the words of the third contingency, are clearly not bound to have the same construction put upon the clear words used with reference to the second contingency, *viz.*, "to realize interest on the entire decretal money."

It is scarcely necessary to refer to the argument that the stipulation for payment of interest at 12 per cent. per annum upon the whole decretal money was a penalty from which the parties ought to be relieved. It was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances.

1883

BALKISHEN DAS v. RUN BAHADUR SINGH.

Their Lordships are of opinion that the judgment and decree of the High Court of the 25th of February 1880 ought to be reversed, and that it ought to be declared that in adjusting the accounts between the parties, for the purpose of the proceedings in execution of the decree of 1873, the defendant is to be charged with the principal sum of Rs. 2,38,000 and interest at 8 annas per cent. per mensem from the date of the decree upon the said principal sum, or so much thereof as from time to time remains due after giving credit for all payments made on account, together with additional interest at the same rate on the first instalment from the date of the solehnama to the payment of such instalment, and also additional interest at the same rate on the principal sum remaining unpaid for the period between the day on which the second or any subsequent instalment became due and the day on which it was paid or realized, and that each instalment or any payment on account thereof as paid is to be credited first in discharge of the interest then due and the balance towards reduction of the principal.

Their Lordships will humbly advise Her Majesty to the above effect.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Mr. *T. L. Wilson.*

Solicitors for the respondent: Messrs. *Watkins* and *Lattey.*

ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

1884.
January 4.

THE BENGAL BANKING CORPORATION (PLAINTIFFS) *v.* S. A. MACKERTICH (ONE OF THE DEFENDANTS.)

Registration (Act III of 1877), *s.* 17 *cl.* (*h*)—*Agreement to Mortgage—Equitable Mortgage.*

Documents amounting to an equitable mortgage when creating an interest in land of the value of Rs. 100 or upwards, require registration under s. 17 of the Registration Act; but documents when amounting merely to an agreement to mortgage do not require registration under that section.

Such documents are therefore available in evidence as agreements to mortgage without registration, but for the purpose of proving an equitable mortgage they must be registered before they are available in evidence.