1886

HARIDAS SANYAL v. PRAN NATH SANYAL.

suit, which is a suit for partition of the paternal *khanabari*, is not maintainable, because the parties have other lands which are held by them in *ijmali*."

Baboo *Durga Mohun Das*, and Baboo *Grish Chundra Chowdhuri*, for the appellants.

Baboo *Guru Das Banerji*, for the respondents.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—This was a suit for the partition of a *khanabari* belonging to the parties in this suit. The defendants objected that, if this particular *khanabari* only were partitioned, the result would be serious to them; that there are two other *khanabaris* adjoining the one in question, and that the partition ought to be applied to them also as well as to other joint-family property. The lower Appellate Court has decided that this suit for partition of this single *khanabari* could not be maintained, and has dismissed it.

We think that the weight of authority is in favor of the lower Appellate Court's decision. The cases are quoted by Mr. Mayne in his book on Hindu law (1). In the present instance we think that the decision of the Court below is reasonable as well as in accordance with law. The appeal is dismissed with costs.

P. O'K. *Appeal dismissed*

FULL BENCH.

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

1886 *March* 23.

MANGNIRAM MARWARI (PLAINTIFF) *v.* DHOWTAL ROY AND OTHERS (DEFENDANTS).*

Interest—Interest after filing of plaint—Interest at rate stated in bond—Discretion of the Court—Civil Procedure Code (Act XIV of 1882), *s.* 209.

Interest after date of suit is in the discretion of the Court, notwithstanding that a fixed rate of interest is mentioned as payable "up to realization" in the bond sued upon.

* Full Bench on Regular Appeal 266 of 1885, against the decision of the Second Subordinate Judge of Bhaugulpore, dated 10th December 1884.

(1) See Mayne's Hindu Law, s. 417, 3rd Ed., p. 469.

1886

MANGNIRAM MARWARI v. DHOWTAL ROY.

THIS was a suit brought on the 2nd September 1884 to recover Rs. 3,400 due as principal, and Rs. 6,520 as interest, on a mortgage bond in the ordinary form, dated the 14th February 1880, praying for the sale of the mortgaged properties, and in default of their proving sufficient, for a personal decree.

The bond declared that the principal sum should fall due in Bhadro 1287 (F.S.) (August—September 1880), and contained a covenant by the defendants running as follows:—"Should we fail at the above date to pay the said sum, we shall, without objection or hesitation, pay interest from the date of the bond to the day of realization at the rate of two per cent. per mensem; the interest of each two months on the aforesaid sum we shall pay in a lump sum; should we fail to pay each two month's interest at once, the interest of each of these two months shall pass into principal, upon which we shall also pay interest at the above rate."

The defendants admitted the bond, but contended that the interest was too high, and that compound interest ought not to be allowed. The Subordinate Judge found that the defendants had entered into the contract with their eyes open, and gave the plaintiff a decree against the properties mortgaged, and in the event of their insufficiency, a personal decree against the defendants for the amount of principal claimed with interest at the rate stipulated in the bond, and calculated thereunder up to the filing of the plaint, and interest at three per cent. per annum from the date of suit up to the date of realization.

The plaintiff appealed to the High Court on the ground (1) that interest should have been allowed up to the date of payment, at the rate stipulated in the bond; and (2), that failing that, they were entitled to interest up to the date of decree at the rate stipulated in the bond. The second point was alone contended for at the hearing of this appeal before Mr. Justice Wilson and Mr. Justice Field. Mr. Justice Wilson was of opinion that upon the true construction of s. 209 of the Civil Procedure Code, the rate of interest after plaint was in all cases in the discretion of the Court; whilst Mr. Justice Field, having regard to the decision in *Ord* v. *Skinner* (1) was of a different opinion;

(1) L. R., 7 I. A., 196; I. L. R., 3 All., 91.

1886

MANGNIRAM MARWARI v. DHOWTAL ROY.

the matter therefore was referred to a Full Bench. The following judgments were delivered in referring the case:—

WILSON, J.—This was a suit upon a mortgage bond executed by the defendants in favor of the plaintiff to secure the repayment on a fixed date of a loan of Rs. 3,400, with interest at two per cent. per mensem. The bond contains a covenant by the defendants that "should we fail at the assigned date to pay the said sum, we shall, without objection or hesitation, pay the said interest from the date of the bond to the day of realization at the above rate, namely, two per cent. per mensem. And we further covenant that the interest of each two months on the aforesaid money we shall pay in a lump sum. Should we fail to pay each two months interest at once, the interest of each of these two months shall pass into the principal, upon which we shall also pay interest at the above rate."

The Subordinate Judge has given a decree in the plaintiff's favor for the amount of the bond debt, with interest calculated as agreed down to the filing of the suit. From the filing of the suit to decree, and also upon the decree, he gave interest at a lower rate.

Against so much of this decree as deals with interest after suit brought the plaintiff has appealed. The only point contended for on the argument was that the Court was bound as matter of law to give interest and compound interest according to the bond down to decree.

If the Court had a discretion in the matter, it was not disputed, and could hardly be disputed, that that discretion was properly exercised. The loan was secured by mortgage; the rate of interest was 24 per cent., with rests at two months' interval and compound interest; the result being that the liability was nearly tripled in four years and a half.

It was pointed out that the agreement in this bond was expressly to pay interest "to the day of realization." I do not see that those words affect the case materially, for in any case a contract to pay interest on a debt would be construed, I presume, as a contract to pay as long as the debt was unpaid, unless the contrary appeared. We have therefore to deal with the bare question of law, whether in a decree for a debt, which debt bore an

1886

MANGNIRAM MARWARI v. DHOWTAL ROY.

agreed rate of interest, a Court is bound to give the agreed rate of interest down to decree, or whether it has a discretion in respect of the period between suit brought and decree. The answer to this question depends upon the construction of several enactments.

The first to be considered is Act XXVIII of 1855. That is entituled "an Act for the repeal of the Usury Laws." It recites that "it is expedient to repeal the laws now in force relating to usury." The Usury Laws previously in force (of which the principal were 13 Geo. III, c. 63, s. 3, and in Bengal certain sections of Regulation XV of 1793, Bengal Code) determined the rate of interest which might be contracted for and allowed, and provided for nothing else. There was nothing in them about how long interest should run, or down to what date the Courts should calculate it. Act XXVIII of 1855 is in substitution for these. Putting aside the repealing section, the saving clause and s. 4, which deals with another matter, there are four sections in the Act, ss. 2, 3, 5 and 6. Section 2 is this: "In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable."

Section 3 says: "Whenever a Court shall direct that a judgment or decree shall bear interest, or shall award interest upon a judgment or decree, it may order the interest to be calculated at the rate allowed in the judgment or decree upon the principal sum adjudged, or at such other rate as the Court shall think fit."

Section 5 deals with the rate of interest to be deposited under the regulation proceedings in cases of mortgage by way of conditional sale: and s. 6, with the calculation of interest upon adjustments of accounts.

In every one of these sections what is dealt with is simply the rate of interest. There is not a word anywhere about the time down to which it is to run—indeed any provision on this subject would have been quite beyond the purview of the Act.

I do not say that, if there were no later legislation, a Court

awarding interest on a debt would not be bound to give it down to decree, at the agreed rate, or the reasonable rate found by the Court, as the case may be. But if so, it would not be by reason of any provision in the Act; but upon the general principle that the rights of the parties, including any rights to interest, ordinarily remain unchanged until they become merged in a decree.

Another thing to be noted is that ss. 2 and 3, so far as they go—that is in regulating the rate of interest—are exhaustive and cover, s. 2, every suit in which interest is recoverable; and s. 3, every case of interest upon a decree.

The next exactment was s. 193 of the Civil Procedure Code, Act VIII of 1859. That section enacted:—

"When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest to be paid on the principal sum adjudged, from the date of suit to the date of payment at such rate as the Court may think proper."

This was repealed and superseded by s. 10 of the amending Act XXIII of 1861, which was to this effect:—

"When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum adjudged from the date of suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of suit; with further interest on the aggregate sum so adjudged and on the costs of the suit from the date of the decree to the date of payment."

For this was substituted s. 209 of the Procedure Code, Act X of 1877, which was identical with s. 209 of the Code now in force, Act XIV of 1882. That section is as follows:—

"When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit."

In these provisions it is plain that the attention of the Legislature was directed to that which was not dealt with in Act XXVIII of 1855, and which would have been beside the purpose of that Act, namely, the difference between the

1886

MANGNIRAM MARWARI v. DHOWTAL ROY.

period before suit and the period pending the suit, and the power which ought to be given to the Court in dealing with the latter of these periods. This is provided for in the earlier part of the present section. In the same way the later words of the section, dealing with interest upon decrees, empowers the Court to fix the time for which such interest shall run, a matter as to which Act XXVIII of 1855 was silent.

And the language of this section is perfectly general; there is nothing said of any distinction between the case of an agreed rate of interest and the case of no agreement on the point. The words are that "when the suit is for a sum of money due," the Court may order "interest at such rate as the Court deems reasonable" from the date of the suit to the date of the decree."

The construction of the section contended for on behalf of the appellant was to limit the application of the earlier part of the section to cases in which no rate of interest has been agreed upon, and read it as placing the matter of interest pending the suit in the discretion of the Court in such cases only. To this construction there are several objections. *First*, there is no trace in the language of the section of any such distinction. *Secondly*, this construction would make the enactment a dead letter; for in cases of no agreed rate of interest the matter was already placed in the discretion of the Court by s. 2 of Act VIII of 1855. *Thirdly*, the whole section consists of one unbroken sentence, and to whatever cases one part of that sentence applies, the whole must apply. The result of the construction contended for would be that the power to limit the interest on decree to a fixed time, given by the last words of the section, would be confined to cases in which no rate of interest has been agreed upon—a result which can hardly have been contemplated.

But it is necessary to examine the authorities. The point in question has often been before this Court on its Original Side. In *Anderson* v. *Srimonto* (1), Macpherson, J., held, after consideration, that he was not bound to give interest at an agreed rate after plaint.

(1) Coryton 3.

In *Dhunput Singh Dogare* v. *Sheikh Golam Hadi* (1), Levinge, J., took a different view, holding that the language of s. 2 of Act XXVIII of 1855 was clear and peremptory, and required him to allow interest in the case before him, at the agreed rate down to decree, and that s. 10 of Act XXIII of 1861 did not alter the law. The view taken by Macpherson, J., has for some years past been consistently acted upon by the Judges sitting on the Original Side of the Court. A number of cases showing this are collected in a note to page 188 of Belchambers' Practice of the Civil Courts. In *Carvalho* v. *Nur Bibi* (2), a Division Bench of the Bombay High Court decided to the same effect.

On the other hand it was held by a Division Bench of the Madras High Court in *Bandaru Swami Naidu* v. *Atchayamma* (3), that where there is an agreed rate of interest, interest at that rate must be awarded up to decree. The decision, however, of the Madras Court, as well of that of Levinge, J., was based upon the view that Act XXVIII of 1855 contained an enactment on the point in question, and I have given my reasons for differing from this view.

The only other authority, so far as I know, bearing upon the matter, is a passage in the judgment of the Privy Council in *Ord* v. *Skinner* (4). In that case the Court below had given a decree for money due, and had given interest up to decree at a rate which was found to be reasonable and which was in accordance with the practice of the parties. The objection raised before the Privy Council was "that the Court rate of interest is now six per cent., and that the interest decreed should have been calculated throughout at that rate." Their Lordships point out that the only enactment regulating the conduct of the Judge in respect to the allowance of interest, then in force, was s. 10 of Act XXIII of 1861. It is then said: "Of course the Court must exercise a judicial discretion in giving effect to this section, and would not be justified in granting an inordinate or unusual rate of interest.

(1) Coryton 12; 2 Hyde, 106.
(2) I. L. R., 3 Bom., 202.
(3) I. L. R., 3 Mad., 125.
(4) L. R., 7 I. A., 196 at p. 211; S. C. I. L. R., 3 All. 91.

1886

MANGNIRAM MARWARI v. DHOWTAL ROY.

Up to a certain time, however, 12 per cent. was notoriously the rate of interest prevalent in the mofussil wherever interest was allowed by the Court, and it has not been shown that there is any enactment which absolutely controls the discretion given by this Act of 1861 to the Judge. A practice indeed of giving upon the aggregate sum for principal, interest and costs, interest only at 6 per cent. does seem to have grown up; but that may have been in order to prevent the parties from abstaining from enforcing their decrees and allowing their demand to roll on at 12 per cent. The rate of interest, however, to be allowed on the principal debt up to the date of the decree ought to be that, if any, which has been fixed by contract, expressed or implied, between the parties; and it appears upon the accounts that the rate of interest allowed among the sharers themselves was that prevalent in the mofussil, *viz.*, 12 per cent. Hence their Lordships are of opinion that the Judge in calculating the rate of interest as he has done, has done nothing which he was not entitled to do."

The question now before us did not arise in that case at all; the language of their Lordships was used with reference to a different matter; and it seems to me that it is not an authority upon the point with which we have to deal.

I think that upon the true construction of s. 209 of the Procedure Code, the rate of interest after plaint is in all cases in the discretion of the Court, and I think the preponderance of authority is to the same effect. I should therefore dismiss this appeal with costs.

But there is a conflict of authority, and my learned colleague entertains doubts about the matter. I concur, therefore, in referring the question to a Full Bench.

FIELD, J.—I think that there is great force in the arguments used by my brother Wilson; but I confess that I have some difficulty in getting over the decision of the Privy Council in *Ord* v. *Skinner*. Their Lordships say at the end of their judgment: "The rate of interest, however, to be allowed on the principal debt up to the date of the decree ought to be that, if any, which has been fixed by contract, expressed or implied, between the parties; and it appears upon the accounts that the rate of interest allow-

ed among the sharers themselves was that prevalent in the mofussil, *viz.*, 12 per cent."—(see page 211 of the Report in L. R., 7 I. A.) The suit was between sharers, the plaintiffs being the children of James, one of the sons of the deceased Colonel Skinner, and the defendant being Alexander, another of the sons of the same person. It would appear then that from the fact of 12 per cent. being the rate of interest allowed among the sharers themselves, their Lordships of the Privy Council inferred an implied contract to pay this rate. It appears that the Judge in the Court below had allowed 12 per cent., *first*, up to the date of suit, and, *secondly*, upon the principal amount from the date of institution to the date of decree; and he further directed that the decree when compounded of the principal, interest and costs, should carry interest at 6 per cent. The contention before the Privy Council was that the interest decreed should have been calculated at 6 per cent. throughout, that is, both for the period before the date of institution and the period between the date of institution and the date of decree.

The proper interest to be allowed for the period between the date of institution and the date of decree was then a question raised before the Privy Council. No doubt this question took a particular shape, whether the Judge in the Court below was justified in giving 12 per cent.; while the question now before us is whether the Judge in the Court below was bound to give the rate agreed between the parties. But it may appear that the observation of their Lordships of the Privy Council is equally applicable to the question in either shape. Their Lordships say: "The rate of interest to be allowed on the principal debt up to the date of the decree ought to be that, if any, which has been fixed by contract, expressed or implied, between the parties;" and then, finding that there was an implied contract to pay 12 per cent., they express their opinion that the Judge in allowing interest at this rate had done nothing which he was not entitled to do.

As it is, however, desirable that the question should be settled and that the practice should be made uniform, I think that it will be well to refer the question to a Full Bench.

Mr. *Twidale* (with him Baboo *Dinonath Chuckerbutty*) for the

1886

MANGNIRAM MARWARI v. DHOWTAL ROY.

appellant.—Section 2 of Act XXVIII of 1885 allows the Court to decree interest at the rate agreed upon by the parties, and also lays down the rate of interest to be allowed on a decree, but nowhere does the Act lay down the time down to which interest is to run. *Dhunput Singh Dogare* v. *Sheikh Golam Hadi* (1) lays down that interest at the stipulated rate, no matter how usurious, will be awarded down to decree, but in *Anderson* v. *Srimonto* (2) interest at the stipulated rate was only allowed up to the date of suit; these were both decisions under the Interest Act. [GARTH, C.J.—Do not the words of s. 209 of the Code "*in addition to any interest adjudged on such principal sum*" apply to something outside the section, to interest which the Court may allow from the time of suit?] Section 209 does not apply where a rate has been agreed upon by the parties.

Interest at the rate agreed upon has been given up to decree in *Bhugwan Doss* v. *Tekait Than Narain Deo* (3), and in *Rashessur Surmah* v. *Kaleekanath Surmah* (4), and up to date of realization in *Shaikh Reasut Hossain* v. *Jusmut Roy* (5). See also the remarks of Wilson, J., in *Futtehma Begum* v. *Mahomed Ausur* (6). In *Carvalho* v. *Nur Bibi* (7) the stipulated rate was only allowed up to suit, but then the High Court refused to interfere with the discretion exercised by the lower Court, and that case does not refer to Act XXVIII of 1855. In *Bandaru Swami Naidu* v. *Atchayamma* (8), interest at the stipulated rate up to decree was allowed; and the case of *Ord* v. *Skinner* (9) is to the same effect.

[TREVELYAN, J.—Would not ss. 86—88 of the Transfer of Property Act apply to this suit?]

The right to bring such a suit as this is preserved by s. 2 of the Transfer of Property Act.

(1) Coryton's Rep., 12; 2 Hyde, 106.
(2) Coryton's Rep., 3.
(3) 23 W. R., 309.
(4) 11 W. R, 455.
(5) 15 W. R, 396.
(6) I. L. R., 9 Calc., 309, 314.
(7) I. L. R., 3 Bom., 202.
(8) I. L. R., 3 Mad., 125.
(9) L. R., 7 I. A., 196; I. L. R., 3 All, 91.

1886

MANGNIRAM MARWARI v. DHOWTAL ROY.

[GARTH, C.J.—This is a suit on an ordinary mortgage, and no objection as to the suit not lying was raised in the Courts below; on the other hand, under the Transfer of Property Act, the interest you would obtain would be higher, but the time for receipt would be extended.]

The form of decree given in the Schedule to the Code is the same as that contained in s. 86 of the Transfer of Property Act.

No one appeared for the respondents.

The opinion of the Full Bench was as follows:—

GARTH, C.J. (WILSON, CUNNINGHAM, PRINSEP and TREVELYAN, JJ., concurring).—The question, as I consider, which we have to decide in this reference, is, whether under the circumstances stated the Judge in the first Court was bound to give interest at the rate agreed upon between the parties; or, whether the rate of interest after plaint and before decree is always under such circumstances in the discretion of the Court?

I think that, having regard to s. 209 of the Procedure Code, the rate of interest after plaint is in the discretion of the Court.

It was, however, suggested during the argument that this case from the first should have been tried in accordance with the law laid down in the Transfer of Property Act (ss. 86 to 88); and that this being a suit for sale of the mortgaged property, the Court, under s. 86, was bound to make a decree ordering that an account be taken of what would be due to the plaintiff for principal and interest on the mortgage, and for his costs of suit on a day within six months from the date of declaring in Court the amount so due; and also ordering that in default of the defendant paying as therein mentioned, the mortgaged property, or a sufficient part of it, should be sold, and that the proceeds of sale should be paid into Court, and be applied in payment of what should be found due to the plaintiff; the balance being paid to the defendant or any other person entitled to receive the same.

It seems to me, however, that as the plaintiff has brought the present suit in accordance with the old procedure before the Transfer of Property Act passed, without any objection being taken to that course by the other side; and as the Court below

1886

MANGNIRAM MARWARI v. DHOWTAL ROY.

has dealt with the case upon that footing, and has given the plaintiff a decree for the immediate payment of the amount of the debt and interest; and as moreover both parties are still content with the case being dealt with on that footing, (subject of course to the question of the rate of interest) we ought not now to change the whole nature of the suit, and send the case back to the first Court to be tried upon a different principle.

Indeed this being a reference to a Full Bench on Regular Appeal, our duty, I consider, is simply confined to answering the question put to us, and when our answer has been given, the Court of Appeal will have to give the final decree.

I think, therefore, it is sufficient to say that the lower Court was not bound to give interest at the rate agreed upon in the mortgage-deed, but was at liberty to give any lower rate of interest it thought proper.

T. A. P.

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

1886 *March* 23.

BROJO BEHARI MITTER (PLAINTIFF) *v.* KEDAR NATH MOZUMDAR (DEFENDANT).*

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Pro-formâ defendant.

A brought a suit against *B*, claiming certain property as tenant of *C*, who was also made a defendant in the suit; this suit was on the merits decided in favor of *B*.

C then brought a suit against *B* for possession of the same property. *Held*, that such suit was not barred by s. 13 of the Civil Procedure Code.

REFERENCE to a Full Bench made by Mr. Justice Prinsep and Mr. Justice Trevelyan.

In 1880 one Uma Churn Bagdi, claiming to be entitled to possession of a certain tank as tenant of one Brojo Behari Mitter and others, brought a suit to recover possession thereof against Kedar Nath Mozumdar, and Brojo Behari as a *pro-formâ* defendant.

* Full Bench Reference on Special Appeal No. 698 of 1885, decided by Baboo Bhubun Chunder Mookerji, Second Sub-Judge of Hooghly, dated 15th January 1885, modifying the decision of Baboo Behari Lall Mookerji, Munsiff of Haripal, dated 17th March 1884.