

in execution of decrees transferred to the Collector under that section. The general provisions of the Code of Civil Procedure do not apply to proceedings held by the Collector for the execution of such decrees. The rules framed by the Government under the authority vested in it by section 320 are printed in Appendix A to the Rules of Court of the 4th of April, 1894. These rules do not contain any provisions similar to those of section 310A. Consequently, even if there had been no collusion between Tika, defendant, and the auction-purchaser, and if the application of the 24th of January, 1899, had not been withdrawn by Tika, the Collector was not competent to set aside the sale upon that application. The learned Counsel for the respondent has not been able to point out any order of Government which has made section 310A applicable to proceedings held by the Collector in such cases. That being so, the Court of first instance, in my opinion, rightly held that the plaintiff had no cause of action. The mortgage to him was made after the attachment of the property and before the auction sale. It was, therefore, void under the provisions of section 276 of the Code against all claims enforceable under the attachment, and cannot prevail against the auction sale which took place in pursuance of that attachment. The sale having been confirmed, has become final, and no suit can be brought to have it set aside. The lower appellate Court has overlooked the fact that section 310A of the Code of Civil Procedure had no application to the proceedings before the Collector. For the above reasons I allow this appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

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SHEO PRASAD
v.
MUHAMMAD
MOHSIN
KHAN.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

BRIJ BHUKHAN DAS (PLAINTIFF) v. SAMI-UD-DIN AHMAD KHAN AND OTHERS (DEFENDANTS).*

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Act No. IX of 1872 (Indian Contract Act), section 74—Act No. VI of 1899, sections 1 and 4—Bond—Stipulation for enhanced interest from date of bond in breach of covenant to pay interest—Penalty.

In a bond executed on the 8th of November, 1892, to secure a sum of Rs. 8,000, it was stipulated that interest should be paid every six months at the

* First Appeal No. 97 of 1900, from a decree of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 13th January, 1900.

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rate of 1 per cent. per mensem, but that in case of default in payment the mortgagor should pay interest at the rate of 2 per cent. per mensem from the date of the execution of the bond. On suit upon this bond to recover the principal sum secured with interest at the enhanced rate, it was *held* that the provisions of Act No. VI of 1899 were applicable, the question whether interest was recoverable at the enhanced rate having been put in issue since that Act came into force, although the bond might have been executed before.

Held also that under section 74 of the Indian Contract Act, as amended by Act No. VI of 1899, the stipulation for enhanced interest as from the date of the execution of the bond was a stipulation by way of penalty against which relief should be granted.

THE defendant Sami-ud-din Ahmad Khan borrowed from the plaintiff the sum of Rs. 8,000, as security for which he executed a bond dated the 8th of November, 1892. In the bond the rate of interest was fixed at Re. 1 per cent. per mensem payable every six months. The deed contained a provision that in case of default in payment of the interest at the time stipulated, the mortgagor should pay interest at the rate of Rs. 2 per cent. per mensem from the date of the execution of the bond. The plaintiff sued on the bond to recover the principal sum advanced with interest at the enhanced rate. Some of the defendants, who were impleaded as having derived interests in the mortgaged property from the mortgagor, resisted the suit mainly on the ground that there was no consideration for the bond. They also objected to the enhanced rate of interest charged in the bond. The lower Court (Subordinate Judge of Moradabad) found on the evidence that no interest at all was payable on the bond in suit, and gave the plaintiff a decree for the principal amount only with costs of suit. The plaintiff appealed to the High Court, as to the disallowance of interest, and the question was there raised whether Act No. VI of 1899, amending the Indian Contract Act, applied. The suit was filed on the 26th of April, 1899, and the Act in question came into force on the 1st of May 1899, but the defendants' written statements were not put in until July, 1899, and the issues consequently not framed until a later date.

Babu Jogindro Nath Chaudhri, for the appellant.

Mr. Muhammad Raof, Munshi Ratan Chand and Dr. Satish Chandra Banerji, for the respondents.

STANLEY, C. J., and BANERJI, J.—The main question which has been argued in this appeal is whether or not the plaintiff is entitled to interest on the principal sum expressed to have been advanced by him to the mortgagor in a mortgage, which was executed in his favour by the first defendant, Sami-ud-din Ahmad Khan. The suit is brought to recover the principal sum of Rs. 8,000 and interest, which was expressed to be secured by a bond, dated the 8th of November, 1892. In that bond the rate of interest was fixed at Re. 1 per cent. per mensem payable every six months. The deed contained a provision that in case of default in payment of the interest at the time stipulated, the mortgagor should pay interest at the rate of Rs. 2 per cent. per mensem, instead of 1 per cent. per mensem, from the date of the execution of the bond. The defendants to the suit are the mortgagor and 35 other defendants, all of whom derive interest in the mortgaged property from the first defendant. The mortgagor himself has not filed any defence, but three of the other defendants have done so, and the main defence which they have set up is that there was no consideration for the bond. The learned Subordinate Judge after reviewing the evidence came to the conclusion that there was consideration for the bond. He disbelieved the evidence of the witnesses who were examined on behalf of the defendants, and gave a decree for the principal amount expressed to be secured by the mortgage. Strange to say, however, he has found that the plaintiff was not entitled to any interest, because he surmised that under the circumstances under which the money was advanced interest was really included in the principal sum, that is he came to the conclusion as a matter of conjecture that the Rs. 8,000, the amount of the principal debt, included prospective interest. What period of time this prospective interest covered does not appear, nor does he attempt to solve that difficulty. Whether it was for one year or for two years, or for ten years, there is no suggestion in the judgment. The bond was payable on demand, so that there was no period in respect of which interest could with certainty have been calculated. The grounds upon which the learned Judge surmises that interest was included in the sum of Rs. 8,000 are these. He says:—"Sami-ud-din Khan wanted money at any

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cost. He became indebted to the plaintiff for Rs. 6,500 within a few months—three or four months—before the 15th October, 1892, when he gave a bond for Rs. 8,000 in the plaintiff's favour. A few days after, namely on the 8th November, 1892, he gave this bond in suit to plaintiff for another Rs. 8,000. A little later, namely on the 22nd November, 1892, he gave a third bond to plaintiff for Rs. 10,000." Then he observes:—"One should not, therefore, be surprised to find that the sum of Rs. 8,000 represented not only the amount paid in cash but also the amount of interest in advance." And later on he says:—"Under these circumstances I must hold that he is entitled to no interest whatever on the sum of Rs. 8,000." Now the learned Judge had before him the evidence afforded by the document itself, and by the endorsement on it made before the Sub-Registrar. In the document there is the acknowledgment of the advance of the entire Rs. 8,000, and by endorsement made by the Sub-Registrar it appears that the mortgagor admitted that he had received the entire sum of Rs. 8,000. To rebut this evidence not one particle of reliable evidence was given. What the Judge says of the evidence which was given in support of the defendants' contention is this. Of the two witnesses examined on behalf of the defendants, namely, Fateh Khan and Muhammad Bakhsh, he says, as to Fateh Khan, that "he had no personal knowledge of the bond in suit, and his very statements showed that he was a hired and tutored witness holding no position." Of the other he observes:—"The witness Muhammad Bakhsh states that no consideration was paid, that the plaintiff had given a *rukka* for the payment of the consideration, and that this *rukka* was given by the plaintiff as he took back the money from the defendant after having the bond registered. This story quite conflicts with Sami-ud-din's version, and leaves no room for doubt that the allegation as to the supply of a *rukka* to Sami-ud-din and the non-payment of consideration is entirely a fiction." He disbelieved also the evidence of Sami-ud-din, and had not before him any evidence whatever to rebut the presumption created by the recital in the deed itself and the acknowledgment before the Sub-Registrar that the Rs. 8,000 was paid. We are entirely at a loss to

understand how the learned Judge came to the conclusion that the Rs. 8,000 included prospective interest. Interest on the full sum must be allowed.

The further question arises as to what rate of interest should be allowed to the plaintiff. This raises a difficult question, if this case be not governed by the recent Act amending the Contract Act, namely Act No. VI of 1899. Under that Act, section 74 of the Contract Act, namely Act No. IX of 1872, was repealed, and the section substituted in its place provides in the explanation to the section that a stipulation for increased interest from the date of default may be a stipulation by way of penalty. It appears to us clear that the provision in the deed before us as to an increased rate of interest was a provision to which the provisions of the amended section were intended to apply. It is argued, however, that the amending Act is not applicable to the present case, inasmuch as it came into force a few days after the institution of the present suit. Under ordinary circumstances the Act would not have a retrospective effect. We find, however, that the issue as to the liability of the defendants to payment of the higher rate of interest was raised in the defence, and that the issues in the suit were not joined until some time after the passing of the Act. The question, therefore, arises whether or not the Act has operation by reason of the provisions of sub-section (3) of section 1. That sub-section provides that the Act shall apply to every contract in respect of which any suit is instituted, or which is put in issue in any suit after the commencement of this Act. It appears to us that this section comprises two cases, namely first, the case of any contract in respect of which any suit may be instituted after the commencement of the Act; and secondly, the case of any contract which is put in issue in any suit after the commencement of the Act. The contract in this case was put in issue in the present suit after the commencement of the Act, and consequently we think that the Act applies. If this be so, it lies in our discretion to say what is reasonable compensation under the circumstances for the breach of the defendant mortgagor's contract in respect of interest. We are of opinion that the rate originally fixed, namely Rs. 1 per cent. per mensem, is a reasonable rate, and we

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shall allow that rate of interest only. We do not think under the circumstances we should be justified in giving the higher rate of interest which is asked for. The result is that the appeal is allowed, the judgment of the lower Court modified by adding to the principal amount of the debt, namely the sum of Rs. 8,000, interest upon that sum at the rate of Re. 1 per cent. per mensem up to the date of payment. We extend the time up to the 20th of May, 1903, for payment of the mortgage-debt. The parties will pay and receive costs both in this Court and in the lower Court proportionate to failure and success.

[In this connection see *Ganga Dayal v. Bachchu Lal*, supra, p. 26, and *Janki Das v. Ahmad Husain Khan*, supra, p. 159.—ED.]

Decree modified.

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25 and 26.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Knox, and Mr. Justice Banerji.

WAHID-ULLAH AND ANOTHER (PLAINTIFFS) v. KANHAYA LAL
(DEFENDANT).*

Civil Procedure Code, sections 582, 588 (6), 589—Order of Appellate Court returning plaint for presentation to proper Court—Appeal—Act No. VIII of 1887 (Suits Valuation Act), section 11.

Section 588 (6) of the Code of Civil Procedure refers not only to orders passed by a Court of first instance, but to similar orders which an appellate Court may pass by virtue of section 582 of the Code. Where an order returning a plaint for amendment, or to be presented to the proper Court, is passed by a Court of appeal, an appeal will lie from such order in the manner provided by section 589 of the Code.

Bindeshri Chanbey v. Nandu (1) overruled, *Chinnasami Pillai v. Karuppa Udayan* (2), and *Goor Bux Sahoo v. Birj Lal Benka* (3) followed.

Where, however, an appellate Court makes an order returning a plaint for presentation to the proper Court, the Court of first instance having heard and decided the suit, it is the duty of the appellate Court under section 11 of the Suits Valuation Act, 1887, first to find, and to record its reasons for so finding, whether the error in valuation complained of has prejudicially affected the disposal of the suit on the merits.

*First Appeal No. 38 of 1902, from an order of Munshi Achal Behari, Extra Additional Subordinate Judge of Aligarh, dated the 10th of January, 1902.

(1) (1881) I. L. R., 3 All., 456.

(2) (1896) I. L. R., 21 Mad., 234.

(3) (1899) I. L. R., 26 Cal., 275.