1886

EMPRESS OF INDIA v. KALIPRO-SONNO DOSS.

TREVELYAN, J. (after taking time to consider the question)—I have been asked by Mr. Gasper to call Brahmo Pershad Singh as a witness so as to give the defence an opportunity of cross-examining him. Brahmo Pershad Singh was the Inspector of the Sukhea Street Thanna and was called as a witness at the Police Court. I have been referred by Mr. Henderson to the provisions of s. 540 of the Criminal Procedure Code and to two English decisions on the subject. In a case in which there is a matter necessitating enquiry, or there is a question to be cleared up, and the witness proposed to be called is one upon whose testimony the Court could place confidence, I think I should call him, but I certainly should not call any witness on whose evidence I could not place reliance, at any rate in a case in which the prisoner is defended by counsel.

I have again read over the deposition of Brahmo Pershad Singh before the Police Magistrate, and I do not think I could put implicit reliance on his evidence. I therefore decline to call him. I do not think that the prosecution is bound to tender him for cross-examination or do more than have him present in Court for the accused to call him or not as they may think fit.

H. T. H.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

1886 *December* 11.

BAIJ NATH SINGH (PLAINTIFF) *v.* SHAH ALI HOSAIN (DEFENDANT.)*

Interest—Penal Clause in Contract—Enhanced rate of interest on default of payment of principal on due date—Penalty—Contract Act (IX of 1872) *s. 74—Act XXVIII of* 1855, *s.* 2.

In a suit on a bond, wherein it was stipulated that the loan was to be repaid on a certain date and to bear interest at the rate of 2 per cent. *per mensem*, but that if the loan were not repaid on the date named the principal was to bear interest at the rate of 4 per cent. *per mensem* from the date of the loan:

* Appeal from Appellate Decree No. 1101 of 1886, against the decree of T. M. Kirkwood, Esq, Judge of Patna, dated the 20th of February, 1886, modifying the decree of Moulvi Mahomed Nural Hosain, Khan Bahadur, Subordinate Judge of that District, dated the 27th of June, 1884.

Held, on the authority of the decision in *Balkishen Das* v. *Run Bahadur Singh* (1), that the stipulation as to the payment of interest at the higher rate was not in the nature of a penalty, and that the plaintiff was entitled to a decree for the amount due on the bond with interest at the increased rate from the date of the bond, and that, whether the interest at the increased rate, in case of non-payment on the date fixed in the contract, was payable from the commencement of the loan or from the date fixed for the repayment of the loan, s. 74 of the Contract Act was not applicable. *Mackintosh* v. *Crow* (2) upon this point dissented from.

The decision in the case of *Balkishen Das* v. *Run Bahadur Singh* (1) overrules the decision in the case of *Muthura Persad Singh* v. *Luggun Kooer* (3), and all similar cases cited in *Mackintosh* v. *Crow* (2), which held that the stipulation for the payment of a higher rate of interest in the event of the non-payment of the debt on the date fixed in the contract, from the commencement of the loan, is in the nature of a penalty.

THE plaintiff brought this suit to recover Rs. 1,000 as principal and Rs. 1,149-5-5 as interest due under a bond executed by the defendant in favor of his ancestor on the 14th December, 1881, the interest being calculated upon the principal from that date to the date of suit at the rate of 4 per cent. per mensem. The bond stipulated that the money was to be repaid on the 14th of December, 1883, and it was not disputed that payment was not made in accordance with that stipulation. The suit was brought on the 6th of May, 1884. The agreement as to the interest in the bond was that the loan was to bear interest at the rate of two per cent. per mensem. It then went on to provide that, if the money were not repaid on the date mentioned above, that is, on the 14th of December, 1883, the principal should bear interest at the rate of 4 per cent. per mensem from the date of the loan, namely, the 14th December, 1881. The defendant, amongst other pleas taken in defence, contended that the stipulation, regarding the payment of interest at the higher rate, was in the nature of a penalty, and that he was entitled to be relieved from its full operation being enforced against him. The Subordinate Judge overruled that plea, and held that he was bound by the contract. He accordingly decreed the suit for the full amount claimed in the plaint. On appeal by the defendant the District Judge, relying upon the decision in the case of

(1) I. L. R., 10 Calc., 305. (2) I. L. R., 9 Calc., 689.
(3) I. L. R., 9 Calc., 615.

1886

BAIJ NATH SINGH v. SHAH ALI HOSAIN.

Muthura Persad Singh v. *Luggun Kooer* (1), and referring to other rulings by the Allahabad High Court to the same effect, held that the stipulation for the payment of interest at the rate of 4 per cent. per mensem should be treated as being in the nature of a penalty so far as the period, which elapsed from the date of the bond to the date fixed for repayment, was concerned. He accordingly modified the decree of the lower Court, and allowed the plaintiff interest at the rate of 2 per cent. per mensem for that period, and at the rate of 4 per cent per mensem for the remaining period.

Against that decree the plaintiff now preferred this second appeal to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Nilkant Sahoy* for the appellant.

Moulvie *Mahomed Yusoof* for the respondent.

Baboo *Mohesh Chunder Chowdhry* contended that the decision of the lower Court was wrong, and that the provision as to the payment of the increased rate of interest in the event of the non-payment of the amount on the due date was not in the nature of a penalty, and therefore governed by s. 74 of the Contract Act, but was a perfectly valid agreement which fell within the provisions of s. 2, Act XXVIII of 1855. He also contended that the present case was governed by the decision of the Privy Council in the case of *Balkishen Das* v. *Run Bahadur Singh* (2).

Moulvie *Mahomed Yusoof* for the respondent contended that the case was governed by s. 74 of the Contract Act, inasmuch as the sum payable under the bond, in the event of a breach, was easily ascertainable by a mere mathematical calculation, and was therefore a sum "named" and in the nature of a penalty; and that the lower Court should have gone further than it had done, and held that the stipulation as to the increased rate of interest was of a penal nature even after the due date of the bond. He also contended that the case of *Balkishen Das* v. *Run Bahadur Singh* (2) was not in point, because there the solehnama was the basis of a decree, and the rule with reference

(1) I. L. R., 9 Calc., 615. (2) I. L. R., 10 Calc., 305.

to penalties does not apply to the directions contained in decrees. He also cited and relied on the following cases: *Mazhar Ali Khan* v. *Sardar Mal* (1); *Bansidhar* v. *Bu Ali Khan* (2); *Behary Loll Doss* v. *Tej Narain* (3); and *Sungut Lal* v. *Baijnath Roy* (4).

The following judgments were delivered by the Court (MITTER and MACPHERSON, JJ.):—

MITTER, J. (after stating the facts set out above continued).—The plaintiff has preferred this second appeal, and it is contended before us that the decision of the lower Appellate Court is contrary to law. The decision upon which the lower Appellate Court specially relies is that in the case of *Muthura Persad Singh* v. *Luggun Koer* (5). There the stipulation in the bond was that, in case of default of payment of the principal sum with interest at the rate of one per cent. per mensem on a certain date, interest should be paid at the rate of two per cent. per mensem from the date of the bond. Mr. Justice Wilson, in delivering the judgment of the Court, refers to certain cases, apparently taking a contrary view, but he distinguished them from the case before him in the following way: "The former of these cases probably dealt with a document executed before the Contract Act, but however that may be, such cases differ materially from the present. In them the agreement to pay an increased rate of interest from a future day may well be regarded as a substantive part of the contract, not as a penalty for its breach; but where, as here, an increased rate of interest from the date of the bond is made payable on default, we cannot regard it in any other light than as a sum named in the contract to be paid in case of breach within the meaning of s. 74 of the Contract Act." He has more fully explained this view in a later case, namely, *Mackintosh* v. *Crow* (6). He says in the decision in that case: "Two rules of law are established by the Legislature of this country:

"*First*, that a man is free to contract to pay any rate of interest that he chooses upon money borrowed, and the Courts must enforce it against him (Act XXVIII of 1855, s. 2), and

(1) I. L. R., 2 All., 769.
(2) I. L. R., 3 All., 260.
(3) I. L. R., 10 Calc., 764.
(4) I. L. R., 13 Calc., 164.
(5) I. L. R., 9 Calc., 615.
(6) I. L. R., 9 Calc., 689.

1886

BAIJ NATH SINGH v. SHAH ALI HOSAIN.

there is nothing to hinder his agreeing with regard to the future as well as the present. He may contract to pay no interest at present, but interest hereafter; or to pay one rate of interest now and a higher or lower rate hereafter."

"*Secondly.*—By s. 74 of the Contract Act, 'when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of such breach is entitled, whether or not actual damage is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named.'

"This section, it will be observed, does away with the distinction between a penalty and liquidated damages; and this must be borne in mind in dealing with cases decided before the Contract Act, many of which turned upon this distinction. Under this section, whether a sum would formerly have been held a penalty or liquidated damages, if it be named in the contract as the amount to be paid in case of breach, it is to be treated, much as a penalty was before, as the maximum limit of damages."

Then he considers the question as to whether the particular case before him fell within the first or the second of the above mentioned two rules. In the case before him the stipulation as to the payment of interest was that, in case of default, the higher rate of interest would be paid from the date of the default and not from the date of the bond. He comes to the conclusion that, where the higher rate is stipulated to be paid from date of default as in the case before him, the provisions of s. 2, Act XXVIII of 1855 would apply, but where the higher rate is, under the terms of the contract, payable from the commencement of the loan in the event of the principal being not paid on the date agreed upon, the provisions of s. 74 of the Contract Act would apply. Referring to a variety of cases, all set out in his judgment, he says that: "In all such cases this element is present, that by the terms of the contract a sum is made payable by reason of the breach, capable of calculation at the time of the breach, and payable in all events, though in the second class of cases the payment is spread over a term. But where, as here, the contract is merely that if the

money is not paid at the due date it shall *thenceforth* carry interest at an enhanced rate, I do not see how it can be said that there is any sum named as to be paid in case of breach. No one can say at the time of the breach what the sum will be. It depends entirely on the time for which the borrower finds it convenient to retain the use of the money. It is a fresh sum becoming due month by month, or, as the case may be, for a new consideration. And, in my opinion, the case falls under the first rule of law above mentioned, not under the second. This view of the law was acted upon by this Court in *Mackintosh* v. *Hunt* (1)."

It seems to me, with deference to his opinion, that whether the interest in the case of non-payment of the principal on the date fixed in the contract is payable from the commencement of the loan, or from the date fixed for the repayment of the loan, s. 74 of the Contract Act has no application. That section says: "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named." In either of the cases mentioned above no amount is *named* in the contract as the amount to be paid in case of breach. It is true that on the date when the breach took place, the amount that under the contract would be due on that date to the creditor could be ascertained by arithmetical calculation, but that is not a case where it can be said that that amount is named in the contract as the amount to be paid in case of a breach. Then, again, the amount which may be ascertained by such calculations is not the whole amount which is named in the contract as the amount to be paid in case of a breach, even if it be conceded that the use of the word "*named*" does not make any difference. The whole amount which, in consequence of the breach, would be payable to the creditor cannot be precisely ascertained on the date of the breach even by arithmetical calculation, because the breach continues so long as the money

(1) I. L. R., 2 Calc., 2.

1886

BAIJ NATH SINGH v. SHAH ALI HOSAIN.

is not repaid after due date, and, therefore, to use the language used in the judgment of Mr. Justice Wilson, "no one can say at the time of the breach what the sum will be." One or two illustrations will help to throw considerable light on the question, whether a case of this description falls under s. 74 of the Contract Act. Suppose a loan is advanced on the condition that it is to be repaid on demand; that interest at a *certain* rate is to be paid upon the amount borrowed if it be paid within a certain time; but if not paid within that time but paid within another fixed time, interest is to be paid at a certain other rate, and that, if again the money borrowed with interest be not repaid within the last mentioned time, the principal should carry interest at a certain other rate; suppose no demand is made for the payment of the money till all these dates expire, certainly it could not be said that a case of this description would fall under s. 74, because no amount would be named here as payable in case of *a breach*, as the higher rate of interest became payable before the demand and therefore before the date of breach. Suppose, again, as it was the case in *Arjan Bibi* v. *Asgar Ali Chowdhuri* (1), no interest is chargeable under the contract for a certain time, and that if the money be not paid within that time interest would be payable at a certain stipulated rate from the commencement of the loan. Here also the case cannot fall under s. 74 of the Contract Act. It seems to me, therefore, that in both classes of cases mentioned in the judgment of Wilson, J., s. 74 of the Contract Act is not applicable. The law that is applicable is contained in s. 2, Act XXVIII of 1855, which says: "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." In the case before us the rate agreed upon by the parties is 24 per cent. under one set of circumstances, and double that rate under another set of circumstances. It is not a case of any sum being payable in case of a breach of the contract, but the stipulation amounts to this that two different rates of interest are payable for the loan under two different sets of circumstances. The decision of the Judicial Committee of the Privy Council in the case of *Balkishen Das*

(1) I. L. R., 13 Calc., 200.

v. *Run Bahadur Singh* (1) fully supports the view we take. In that case the defendant executed in favor of the plaintiff a solehnama, upon the basis of which a decree was passed. The solehnama stipulated for the payment of a debt due from the defendant to the plaintiff by instalments, and it provided that the plaintiff should get interest on the decretal money at the rate of 6 per cent. per mensem from the defendant. Then it further provided 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. The date of the solehnama was the 29th March 1873, corresponding with the month of Choitro 1280. Therefore it is clear that the stipulation in the solehnama was that, in case of non-payment of the first instalment on the due date, that is, on the 30th Bhadon 1281 Fusli, interest at the rate of 12 per cent. per annum was to be paid from the date of the solehnama, that is from Choitro 1280. The rate otherwise agreed upon to be paid was 6 per cent. per annum. The High Court had held, with reference to this provision, that the double rate of interest was in the nature of a penalty. Their Lordships of the Judicial Committee, with reference to this decision, say: "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." Then further on they say: "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 stipulation of interest at 12 instead of 6 per cent. per annum in a given state of circumstances." It seems, therefore, that the case cited by the lower

(1) I. L. R., 10 Calc., 305.

1886

BAIJ NATH SINGH v. SHAH ALI HOSAIN.

Appellate Court and all the other similar cases cited in the judgment of Mr. Justice Wilson, in the case of *Mackintosh* v. *Crow* (1), ruling that the stipulation for the payment of a higher rate of interest in the event of the non-payment of the debt on the date fixed in the contract, from the commencement of the loan is in the nature of a penalty, have been overruled by their Lordships of the Judicial Committee in the case cited above.

The decree of the lower Appellate Court will, therefore, be reversed, and that of the Court of first instance restored with costs in all the Courts.

MACPHERSON, J.—I think we are bound to follow the view taken by the Privy Council in the case referred to, and which practically overrules the decision of this Court to which reference is made. I concur, therefore, in reversing the decree of the lower Appellate Court.

H. T. H. *Appeal allowed.*

ORIGINAL CIVIL.

Before Mr. Justice Mitter and Mr. Justice Trevelyan.

1886 *September* 8.

DOYA NARAIN TEWARY (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

Jurisdiction—Letters Patent, 1865, *s.* 12—*Carrying on business and personally working for gain—Secretary of State—Cause of Action—Limitation—Acknowledgment—Statute* 21 *and* 22 *Vic.*, *c.* 106, *s.* 65—*Limitation Act* (*XV of* 1877), *ss.* 19, 20.

Section 65 of 21 & 22 Vic., c. 106, does not constitute the Secretary of State a body corporate, but simply lays down that that officer and department are to be sued *as* a body corporate. A suit, therefore, brought against the Secretary of State is not one against any person or any real body corporate, but is one brought against a nominal defendant, such nominal defendant being put upon the record merely to enable the plaintiff to obtain the remedy secured to him by s. 65.

The words "cause of action" in s. 12 of the Letters Patent, 1865, mean all those things necessary to give a right of action; and in a suit for breach of contract, where leave has not been obtained to sue under that section, it must be established that the contract as well as the breach have taken place within the local limits of the Court.

* Original Civil Suit No. 211 of 1884.

(1) I. L. R., 9 Calc., 689.