

1910

WARIS ALI  
KHAN  
v.  
PARSOTAM  
NARAIN.

are understood as defined in the Evidence Act, it necessarily follows that the Court has power to decide upon evidence produced before it the question whether the plaintiff has or has not the title recorded in the revenue papers. The interpretation I would put on section 201 is intelligible in itself and is not repugnant to the context or to common sense. This being the case, a court of law should not in my opinion go further and speculate as to the intention of the Legislature, or seek for another interpretation in the light of administrative expediency. I would therefore concur in the order proposed by the learned Chief Justice.

By THE COURT :—The order of the Court is that the appeal be allowed, the decree of the learned Judge of this Court set aside, and the decree of the lower appellate court restored, with costs in all courts, save and except the costs of this appeal. The parties, in view of the conflict of authority, will abide their own costs of this appeal.

## APPELLATE CIVIL.

1910

February 25.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.  
KUTUB-UD-DIN AHMAD AND ANOTHER (DEFENDANTS) v. BASHIR-UD-DIN  
(PLAINTIFF).\*

Act No. IX of 1872 (Indian Contract Act) section 74—Mortgage—Provision for lower rate of interest in case of punctual payment—Penalty.

If a mortgagee stipulate for a higher rate of interest in default of punctual payment he must reserve the higher rate as payable under the mortgage and provide for its reduction in case of punctual payment, and if he do so he will be entitled to recover the higher rate. But he cannot effect his object by reserving the lower rate and then fixing a higher rate in case of non-payment of the lower rate at the appointed time, such an agreement being considered in the nature of a penalty. *Wallis v. Smith* (1) referred to.

THIS was a suit for sale on a mortgage. The mortgagor covenanted to pay interest at the rate of 2 per cent. per mensem. But the mortgage-deed further provided that if the annual interest was paid punctually at the end of the year the mortgagee would accept it at the rate of Rs. 1-4-0 per cent. per mensem

\* First Appeal No. 181 of 1908 from a decree of Girraj Kishore Datt Subordinate Judge of Bareilly, dated the 2nd of April, 1908.

instead of at the higher rate. Interest had not been paid punctually, and the court of first instance (Subordinate Judge of Bareilly) accordingly gave a decree for the higher rate. The defendant appealed to the High Court, the only plea raised being that the provision as to interest referred to above was in the nature of a penalty and should be disallowed.

Maulvi *Ghulam Mujtaba*, for the appellants.

Maulvi *Muhammad Ishaq*, for the respondent.

STANLEY, C. J.—The only question pressed before us in this appeal is concerned with the rate of interest chargeable to the defendants appellants. The suit was one to raise the amount due on foot of a mortgage of the 14th of August, 1900, by sale, if necessary, of the mortgaged property. In the mortgage the mortgagor admitted that he had borrowed Rs. 3,000 from the plaintiff with interest at the rate of Rs. 2 per cent. per mensem, and he promised to make payment on demand. Then follows a provision that if the annual interest be paid to the mortgagee at the end of the year, the rate of interest will be reduced to Rs. 1-4-0 per cent. per mensem, but that if the mortgagor fail to pay the interest at the end of the year, interest at the rate of Rs. 2 per cent. per mensem will be added to the principal and compound interest be paid at that rate.

The interest not having been punctually paid, the court below gave a decree for the higher rate of interest.

It is contended by the learned vakil for the appellants that the court was wrong in awarding the higher rate of interest inasmuch as it was in the nature of a penalty. It appears to me that this contention is not well founded. According to the English authorities it is well settled that if a mortgagee stipulate for a higher rate of interest in default of punctual payment he must reserve the higher rate as the interest payable under the mortgage and provide for its reduction in case of punctual payment, and if he do so he will be entitled to recover the higher rate. But he cannot effect his object by reserving the lower rate and then fixing a higher rate in case of non-payment of the lower rate at the appointed time, such an agreement being considered in equity as in the nature of a penalty. This rule is not altogether intelligible. JESSEL, M. R., said of

1910

---

KUTUB-UD-  
DIN AHMAD  
v.  
BASHIR-UD-  
DIN.

1910

KUTUB-UD-  
DIN AHMAD  
v.  
BASHIR-UD-  
DIN.

it:—"I am sorry it was so settled, because anything more irrational than the doctrine, I think, can hardly be stated. It entirely depended on form and not on substance." *Wallis v. Smith* (1). Now, however this be, it appears to me that an agreement on the part of a mortgagee to accept on punctual payment interest at a lower rate than the rate agreed to be paid is free from objection. It is an encouragement to punctuality in payment, which is to be commended. It is a premium for punctuality in the fulfilment of a legal obligation. If a mortgagor fail to take advantage of a term of a contract which is beneficial to him, he has himself to blame. In the document before us the provision for payment of interest is free from ambiguity. The agreement was that the mortgagor should pay compound interest at the rate of Rs. 2 per cent. per mensem, but that on punctual payment of interest, interest at the rate of Rs. 1-4-0 per cent. per mensem would be accepted. If undue influence or fraud had been proved, other considerations would arise, but the appellants have not endeavoured to support their allegation of undue influence. I, therefore, think that the decision of the court below is correct and would dismiss the appeal.

BANERJI, J.—I was inclined to hold at the hearing of the appeal that the provision in the mortgage-deed as to interest was an attempt to circumvent the rule of law as to penalties; but in the face of English authorities, and in the absence of any authority in this country to the contrary, I do not think I should be justified in so holding. I therefore agree in dismissing the appeal.

By THE COURT :—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

(1) (1882) L. R., 21 Ch. D., 261.