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Medical School at Patna, which under the rules of the Institution he could not do unless he satisfied the Principal that he had a good knowledge of the English language. With a view of showing that he possessed such knowledge he presented to the Principal a certificate purporting to be signed (but which as a matter of fact he knew was not signed) by the Head Master of the Chapra Academy, which stated that he (the accused) had a good knowledge of the English language. We held that the accused could not be convicted under section 471, Indian Penal Code, as there was no dishonest or fraudulent intent.

We are therefore of opinion that, upon the facts stated, the accused was not guilty of an offence under section 471, Indian Penal Code, inasmuch as his use of the forged document, with the knowledge or belief that it was forged, was not fraudulent or dishonest.

The foregoing observations are equally applicable to the charge of attempting to cheat.

The essence of the offence of cheating is a fraudulent or dishonest intention; and the act done towards the commission of the offence, which is requisite to establish the attempt to cheat, must be done with a fraudulent or dishonest intent. For the reasons given above we are of opinion that the facts of the case do not disclose any such intent on the accused's part.

H. T. H.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Wilson, Mr. Justice Pigot, Mr. Justice Macpherson, and Mr. Justice Banerjee.

1892 *March* 23.

KALACHAND KYAL (DEFENDANT, APPELLANT) *v.* SHIB CHUNDER ROY (PLAINTIFF, RESPONDENT).*

Interest—Bond—Failure to pay on due date—Enhanced rate of interest from date of bond till date of realization—Penalty—Contract Act (IX of 1872), s. 74.

Held by the FULL BENCH (BANERJEE, J., dissenting as to part)—

A provision in a bond to the effect that the principal should be repaid with interest on the due date, and that on failure thereof interest should

* Appeal from Appellate Decree No. 825 of 1890, against the decree of H. Beveridge, Esq., Officiating District Judge of the 24-Parganas, dated the 9th May 1890, affirming the decree of Babu Radha Krishen Sen, Second Subordinate Judge of that district, dated the 23rd January 1890.

be paid at an increased rate from the date of the bond up to the date of realization, amounts to a provision for a penalty, and section 74 of the Contract Act applies to the money claimed at the increased rate of interest from the date of the bond until realization. *Mackintosh* v. *Crow* (1), *Nanjappa* v. *Nanjappa* (2), and *Sajaji Panhaji* v. *Maruti* (3), approved.

Baij Nath Singh v. *Shah Ali Hosain* (4) overruled, so far as it dissents from *Mackintosh* v. *Crow* (1).

Balkishen Das v. *Run Bahadur Singh* (5) distinguished.

BANERJEE, J.—The decision in *Mackintosh* v. *Crow* (1), which regards the interest at the increased rate as a penalty, is correct as to the claim of interest up to the stipulated day of re-payment, and *Baij Nath Singh* v. *Shah Ali Hosain* (4) was wrongly decided as to this point. Section 74 of the Contract Act applies only to that part of the claim for interest which is in respect of the period from the date of the bond to the due date, and has no application to the claim for interest for the period from the due date to the date of realization. This view is in accordance with the decision in *Mackintosh* v. *Crow* (1).

THE order of the referring Judges (PIGOT and BANERJEE, JJ.) was as follows :—

"This is a suit on a money bond in which the plaintiff claims Rs. 1,344-13-5, the principal being Rs. 400 and the sum claimed for interest Rs. 944-13-5.

"The bond is dated 5th Falgun 1289. It was stipulated in it that the money should be repaid with interest at Re. 1-8 per mensem in Bysack 1290, and that on failure thereof interest should be paid at the rate of 2 pice per rupee per mensem from the date of the bond up to date of realization.

"The only question before us in this appeal is whether the increased rate of interest is a penalty or not, and as such comes within section 74 of the Contract Act. In *Mackintosh* v. *Crow* (1) it was held by Garth, C.J., and Wilson, J., that such a provision was a stipulation for payment of a penalty, and came within section 74 of the Indian Contract Act.

"In the case of *Baij Nath Singh* v. *Shah Ali Hosain* (4), Mitter and Macpherson, JJ., dissented from the decision in *Mackintosh* v. *Crow* (1), and held that such a provision did not amount to a penalty.

(1) I. L. R., 9 Calc., 689.
(2) I. L. R., 12 Mad., 161.
(3) I. L. R., 14 Bom., 274.
(4) I. L. R., 14 Calc., 248.
(5) I. L. R., 10 Calc., 305.

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"These decisions are therefore in absolute conflict.

"The case of *Baij Nath Singh* v. *Shah Ali Hosain* (1) is founded upon a construction of the effect of the decision of the Judicial Committee in *Balkishen Das* v. *Run Bahadur Singh* (2), which, in the opinion of Mitter and Macpherson, J.J, was inconsistent with the decision of Garth, C.J., and Wilson, J., in *Mackintosh* v. *Crow* (3).

"In the cases of *Nanjappa* v. *Nanjappa* (4) and *Sajaji Panhaji* v. *Maruti* (5), the High Courts of Madras and Bombay have held that the decision of the Judicial Committee above referred to has not the effect attributed to it in the decision of Mitter and Macpherson, JJ., and that the law is still as laid down in the case before Garth, C.J., and Wilson, J.

"In this view one member of the present Bench concurs. The other dissents from it.

"The questions referred to the Full Bench are :—

"*First.*—Whether the decision in *Mackintosh* v. *Crow* (3) is still the law, or whether that in *Baij Nath Singh* v. *Shah Ali Hosain* (1), dissenting from it, was rightly decided ?

"*Second.*—If the decision in *Mackintosh* v. *Crow* (3) is right, and the provision in the bond in question amounts to a provision for a penalty, then, whether section 74 of the Contract Act applies to the money claimed at the increased rate of interest from the date of the bond until realization, or only to the amount claimed at that rate from the date of the bond until the date of default in payment, that is, until Bysack 1290."

Babu *Nilmadhub Bose* and Babu *Shib Chunder Paulit* appeared for the appellant.

Dr. *Trailokhya Nath Mitter* and Babu *Upendro Chunder Bose* appeared for the respondent.

Babu *Nilmadhub Bose*.—The lower Courts have held upon the authority of *Baij Nath Singh* v. *Shah Ali Hosain* (1), that the stipulation to pay interest at an enhanced rate is not in the nature of a penalty. That case was decided on a misapprehension of the

(1) I. L. R., 14 Calc., 248.
(2) I. L. R., 10 Calc., 305.
(3) I. L. R., 9 Calc., 689.
(4) I. L. R., 12 Mad., 161.
(5) I. L. R., 14 Bom., 274.

Privy Council ruling in *Balkishen Das* v. *Run Bahadur Singh* (1), which was with reference to a decree and not a contract, and which does not appear to have intended to overrule the Indian cases on the point. The cases are collected in the Bombay decision of *Sajaji Panhaji* v. *Maruti* (2), and the law must be taken to be unaltered in the absence of an express decision of the Privy Council. As to the second point referred, I contend that section 74 of the Contract Act applies to the whole amount payable at the increased rate up to realization, the contract being incapable of being divided. [The following cases were also referred to :— *Nanjappa* v. *Nanjappa* (3), *Mussamut Sohodea Bebee* v. *Deendyal Lall* (4), *Shirekuli Timapa Hegda* v. *Mahablya* (5), *Basavayya* v. *Subbarazu* (6), *Mazhar Ali Khan* v. *Sardar Mal* (7), *Bansidhar* v. *Bu Ali Khan* (8), *Bichook Nath Panday* v. *Ram Lochun Singh* (9), *Khurram Singh* v. *Bhawani Bakhsh* (10), *Kharag Singh* v. *Bhola Nath* (11), *Mackintosh* v. *Wingrove* (12), *Muthura Persad Singh* v. *Luggun Kooer* (13), *Sungut Lal* v. *Baijnath Roy* (14), *Arjan Bibi* v. *Asgar Ali Chowdhuri* (15), *Rasaji* v. *Sayana* (16).]

Babu *Upendro Chunder Bose*.—The 'sum named' in section 74, read with the illustration, means an unvarying lump sum, and not merely a sum ascertainable by calculation—*Boolakee Lall* v. *Radha Singh* (17), *Mackintosh* v. *Hunt* (18), *Banwari Das* v. *Muhammad Mashiat* (19). Section 74 does not apply to the present case, but if it applies to the sum named in the contract, the higher rate ought at all events not to be allowed from after default, this amount so payable being only ascertainable by calculation, and therefore not within the section. Then as to the first question the view of the Privy Council ought to prevail. It was not an *obiter dictum*. In that case the provisions for double interest were held to be only a

(1) I. L. R., 10 Calc., 305.
(2) I. L. R., 14 Bom., 274.
(3) I. L. R., 12 Mad., 161.
(4) 11 B. L. R., 138 (note).
(5) I. L. R., 10 Bom., 435.
(6) I. L. R., 11 Mad., 294.
(7) I. L. R., 2 All., 769.
(8) I. L. R., 3 All., 260 (F. B.)
(9) 11 B. L. R., 135.
(10) I. L. R., 3 All., 440.
(11) I. L. R., 4 All., 8.
(12) I. L. R., 4 Calc., 137.
(13) I. L. R., 9 Calc., 615.
(14) I. L. R., 13 Calc., 164.
(15) I. L. R., 13 Calc., 200.
(16) 6 Bom. H. C. (A. C. J.), 7.
(17) 22 W. R., 223.
(18) I. L. R., 2 Calc., 202.
(19) I. L. R., 9 All., 690.

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reasonable substitution of a higher rate of interest for a lower under certain circumstances, which is precisely the present case. Of the same nature is *Basavayya* v. *Subbarazu* (1). The following cases are also in my favour :—*Baij Nath Singh* v. *Shah Ali Hosain* (2), *Arulu Mastry* v. *Wakuthu Chinnayan* (3), *Brojo Kishore Roy* v. *Madhub Pershad Misser* (4), *Mussamut Sohodea Bebee* v. *Deendyal Lall* (5).

Babu *Nilmadhub Bose* in reply.—In the case last cited no reasons are given in the judgment. The case of *Banwari Das* v. *Muhammad Mashiat* (6) contains no reference to the earlier decisions of that Court. The simple question to be decided here is whether the Privy Council case has altered the law.

The opinions of the Full Bench (PETHERAM, C.J., WILSON, PIGOT, MACPHERSON, and BANERJEE, JJ.) were as follows :—

PIGOT, J.—I am of opinion that the judgment in the case of *Mackintosh* v. *Crow* (7) was right in law, and that the case of *Baij Nath Singh* v. *Shah Ali Hosain* (2) was erroneous, so far as it dissented from that judgment.

I do not think that the case before the Privy Council of *Balkishen Das* v. *Run Bahadur Singh* (8) at all affects the decision in *Mackintosh* v. *Crow* (7). It is true that in that case enhanced interest was allowed on the first instalment from the date of the solehnama. But the parties had already, as pointed out in the judgment, voluntarily settled upon the basis of that construction of the part of the 3rd Article which related to this part of the claim. As pointed out in *Nanjappa* v. *Nanjappa* (9), "it was the other stipulation, viz., that for payment of enhanced interest on the whole decretal money that was impugned in the argument, and this stipulation was not open to the objection that it made the higher rate of interest payable from the date of the decree." But further, as pointed out in the decision of the Madras High Court, the case before the Judicial Committee was one in which

(1) I. L. R., 11 Mad., 294.
(2) I. L. R., 14 Calc., 248.
(3) 2 Mad. H. C., 205.
(4) 17 W. R., 373.
(5) 11 B. L. R., 138 (note).
(6) I. L. R., 9 All., 690.
(7) I. L. R., 9 Calc., 689.
(8) I. L. R., 10 Calc., 305.
(9) I. L. R., 12 Mad., 161 (166).

the execution of a subsisting decree was the subject-matter of the appeal.

I think it is enough to express complete concurrence with the opinion expressed by the Courts of Madras and Bombay, that the case of *Balkishen Das* v. *Run Bahadur Singh* (1) did not warrant the dissent from *Mackintosh* v. *Crow* (2) expressed in *Baij Nath Singh* v. *Shah Ali Hosain* (3).

I think that the objection made in the judgment in *Baij Nath Singh* v. *Shah Ali Hosain* (3), that cases such as the present do not come within section 74 of the Contract Act, because no sum is named, is not one to which effect ought to be given. By the fixing of a rate of interest the sum to become payable "at any rate," as the Madras High Court says, "at the time when default is made" (4) is fixed: and this is what the section contemplates.

Upon the second question, I think that when the provision in the contract in question amounts to a provision for a penalty (or, which is the same thing, stipulates for a sum in case of breach within the meaning of section 74), that that goes to the whole sum which may accrue due under the provision, although it may be that by non-payment for an indefinite time the aggregate amount ultimately payable may greatly exceed the amount—the fixed and ascertainable amount—to be due at time of default. I think they cannot be separated, and that section 74 applies to all, that is, that it applies to the money claimed at the increased rate of interest from the date of the bond until realization.

The result will be that the appeal will be allowed, and the case remitted to the original Court to fix a reasonable compensation (not exceeding the amount provided for by the rate of interest specified) for the breach of contract in the non-payment of the principal money due under the bond. All costs to abide the result.

WILSON, J.—I agree.

PETHERAM, C.J.—I agree.

MACPHERSON, J.—I agree. I think I was wrong in considering that the Privy Council case of *Balkishen Das* v. *Run Bahadur Singh* (1) practically overruled *Mackintosh* v. *Crow* (2).

(1) I. L. R., 10 Calc., 305.
(2) I. L. R., 9 Calc., 689.
(3) I. L. R., 14 Calc., 218.
(4) I. L. R., 12 Mad., 167.

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BANERJEE, J.—I regret very much that I am unable to concur fully with my learned colleagues in this case.

It was a suit on a money bond, in which it was stipulated that the money should be repaid with interest at the rate of 1 rupee 8 annas per cent. per mensem in Bysack 1290, and that on failure thereof interest should be paid at the rate of 2 pice per rupee per mensem from the date of the bond up to the date of realization.

The Courts below having allowed interest at the increased rate, the defendant has preferred this appeal, and the only question raised on his behalf is whether the increased rate of interest is not a penalty, and, as such, whether it does not come within section 74 of the Contract Act.

According to the principle laid down in *Muthura Persad Singh* v. *Luggun Kooer* (1) and in *Mackintosh* v. *Crow* (2) such increased rate of interest is a penalty and comes within section 74 of the Contract Act. But in the case of *Baij Nath Singh* v. *Shah Ali Hosain* (3) this view has been dissented from, and the decision of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh* (4) has been referred to as supporting the opposite view that such a provision is not in the nature of a penalty.

As there is thus a clear conflict of decisions in this Court, the following questions have been referred to a Full Bench :—

First.—Whether the decision in *Mackintosh* v. *Crow* (2) is still the law, or whether that in *Baij Nath Singh* v. *Shah Ali Hosain* (3) dissenting from it, was rightly decided ?

Second.—If the decision in *Mackintosh* v. *Crow* (2) is right, and the provision in the bond in question amounts to a provision for a penalty, then whether section 74 of the Contract Act applies to the money claimed at the increased rate of interest from the date of the bond until realization, or only to the amount claimed at that rate from the date of the bond until the date of default in payment, that is, until Bysack 1290 ?

Upon the first question I was at first inclined to think that the decision of the Judicial Committee in the case of *Balkishen Das*

(1) I. L. R., 9 Calc., 615.
(2) I. L. R., 9 Calc., 689.
(3) I. L. R., 14 Calc., 248.
(4) I. L. R., 10 Calc., 305.

v. *Run Bahadur Singh* (1) in effect overruled the decisions of this Court in *Mathura Persad Singh* v. *Luggun Kooer* (2) and *Mackintosh* v. *Crow* (3), that a provision like the one under consideration is a provision for payment of a penalty. On further consideration, however, I am of opinion that the decision of the Judicial Committee has not that effect. There are no doubt passages in the judgment of their Lordships which, taken by themselves, may appear to overrule the two last-mentioned cases, but then what their Lordships were dealing with was not a contract, but a decree based upon a compromise; and, as pointed out by West, J., in the case cited in the note to *Shirekuli Timapa Hegda* v. *Mahablya* (4), "the principles which govern contracts and their modification when justice requires it, do not apply to decrees which, as they are framed, embody and express such justice as the Court is capable of conceiving and administering." It cannot, therefore, be said that the decision in *Balkishen Das* v. *Run Bahadur Singh* (1) in any way touches the present point.

But then there remains the question whether, irrespective of the decision of the Privy Council, the case of *Baij Nath Singh* v. *Shah Ali Hosain* (5), or the earlier case it dissents from, lays down the correct rule of law. Now where, as in the present case, the contract is to repay a loan with interest at a certain rate on a certain day, and there is a further stipulation that in case of default interest is to run at a higher rate from the date of the loan, the additional sum that becomes payable in case of default on account of interest for the period between the date of the loan and the stipulated date of payment, cannot ordinarily be regarded as anything but a penalty which is intended to secure the punctual repayment of the loan—see *Thompson* v. *Hudson* (6), and it comes clearly within section 74 of the Contract Act as a sum named, being exactly ascertainable at the time of the contract by arithmetical calculation. It is no doubt easy to conceive cases in which a provision for an increased rate of interest would not be in the nature of a penalty. Thus when the agreement is to repay a loan with interest at a certain rate on a certain

(1) I. L. R., 10 Calc., 305.
(2) I. L. R., 9 Calc., 615.
(3) I. L. R., 9 Calc., 689.
(4) I. L. R., 10 Bom., 435 (438).
(5) I. L. R., 14 Calc., 248.
(6) L. R. 4 E. & I. Ap. 1 (15).

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date, or to repay it on a certain other and later date with interest at a higher rate from the beginning, there are really two alternative contracts, either of which may be fulfilled by the borrower at his option; and the higher rate of interest payable under the latter contract cannot be regarded as a penalty for the non-performance of the former. That, however, is not the nature of the stipulation in the present case. Here there was only one contract to repay the loan on a certain day with interest at a certain rate, and the provision for the payment of an additional sum as interest for the period between the date of the bond and the stipulated date of repayment was in the nature of a penalty and comes within section 74 of the Contract Act. That being so, the creditor is not entitled to recover such sum as a matter of course; and, in the absence of evidence to the contrary, it must be held that the original rate of interest was a fair rate up to the stipulated date of payment, and so the creditor cannot recover interest for that period at any higher rate merely by reason of the debtor's default in making payment.

My answer to the first question would, therefore, be this, that as regards the claim of interest up to the stipulated date of repayment, the decision in *Mackintosh* v. *Crow* (1), which regards the interest at the increased rate as a penalty, is correct, and the later case of *Baij Nath Singh* v. *Shah Ali Hosain* (2) was not correctly decided.

On the second question, I am of opinion that the amount claimed as interest at the higher rate from the stipulated date of repayment to the date of realization cannot be regarded as a penalty, and does not come within section 74 of the Contract Act. In the first place, there is no contract for the payment of any lesser sum as interest for any period after the due date, for the breach of which the higher rate of interest can be said to be a penalty. The second rate of interest is no doubt a higher or an increased rate in respect of the time between the date of the contract and the due date, but it is the only rate agreed upon in respect of the time following the due date. Then, again, this part of the claim is wanting in another essential peculiarity of a

(1) I. L. R., 9 Calc., 689. (2) I. L. R., 14 Calc., 248.

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penalty, namely, that of being a definite sum which becomes due at once as soon as default is committed. The amount of this part of the claim depends upon, and gradually grows with, the time for which the borrower finds it convenient to retain the use of the principal amount after the due date. It cannot in any sense be regarded as a sum named as the amount to be paid in case of breach of contract within the meaning of section 74 of the Contract Act.

This view is, I think, in accordance with the decision in *Mackintosh* v. *Crow* (1).

My answer to the second question, therefore, is that section 74 of the Contract Act applies only to that part of the claim for interest which is in respect of the period from the date of the bond to the due date, and that it has no application to the claim for interest for the period from the due date to the date of realization.

A. A. C.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1892 *February* 19.

JAMUNA PARSHAD AND ANOTHER (DEFENDANTS, 2ND PARTY), *v.* GANGA PERSHAD SINGH AND OTHERS (PLAINTIFFS),

AND

HARDHANI LAL (DEFENDANT, 1ST PARTY), *v.* GANGA PERSHAD SINGH AND OTHERS (PLAINTIFFS).*

Hindu Law—Joint Family—Mitakshara Law—Mortgage of undivided shares in joint-family property—Consent of co-sharer.

A, *B* and *C* together formed a joint Mitakshara family. On the 27th June 1872, *A* and *B*, without the consent of *C*, for their own benefit and without legal necessity, executed a bond in favour of *J* and *I* (defendants, 2nd party), mortgaging to them certain joint properties. On the 14th August 1882, *J* and *I* obtained an *ex parte* decree on their bond against *A*, *B* and

* Appeals from Original decrees Nos. 104 and 127 of 1891, against the decrees of F. W. Badcock, Esq., Judge of Tirhut, dated the 30th of January 1891.

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