

1881

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

LAGHMAN  
PRASAD  
v  
CHAMMI  
LAL.

STRAIGHT, J.—Looking at the form of the plaint in this case, we think the suit must be regarded as one for money had and received by the defendants for the use of the plaintiff. In other words, the plaintiff's claim is for money which has come into the hands of the defendants under such circumstances that they must be taken to hold it to the use of the plaintiff, and to be under an implied contract to pay it to him. On these grounds, and not those mentioned by the Subordinate Judge, we think that the suit was cognizable by a Court of Small Causes, and therefore no second appeal lies to this Court. The appeal is dismissed with costs.

*Appeal dismissed.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.*

1881  
June 21.

KHARAG SINGH (DEFENDANT) v. BHOLA NATH AND OTHERS (PLAINTIFFS).\*

*Bond—Interest—Penalty—Equitable relief.*

By a registered bond for Rs. 4,500, dated the 4th October, 1875, in which immovable property was hypothecated as collateral security, it was provided that the obligor should pay interest at the rate of R<sup>c</sup>. 1-4-0 per cent. per mensem at the end of every six months, and upon default in the payment of such interest that he should pay interest at the rate of Rs. 2 per cent. per mensem from the date of the bond. The bond also contained a stipulation against alienation and declared that the principal sum was payable on demand. The obligees sued the obligor upon the bond, claiming to recover the principal sum, and interest from the date of the bond for three years eleven months and twenty days, less different sums amounting to Rs. 1,600 paid from time to time on account, at the defaulting rate of Rs. 2 per cent. *Hold* that, having regard to the fact that the security of property was given for the loan, and the obligor contracted not to alienate the property, that the defaulting rate of interest provided by the bond was of a penal character, relating as it did not only to the interest due on and subsequent to the default, but retrospectively to the date of the bond itself, and should not be awarded, but that reasonable compensation only should be awarded for the obligor's breach of contract in respect of interest. Accordingly the Court made a decree giving the obligees interest on the principal sum, from the date of the bond to the date of the decree, at R<sup>c</sup>. 1-4-0 per cent. per mensem, and compound interest, from the date of default in the payment of interest to the date of the decree, at the rate of four annas per cent. per mensem, by way of damages for such default.

\* First Appeal, No. 76 of 1880, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 15th January, 1880.

*Bansidhar v. Bu Ali Khan* (1) followed : *Mackintosh v. Wingrove* (2) dissented from.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

KHARAG  
SINGH  
C.  
BHOJA NATH.

Pandit *Ajudhia Nath* and *Lala Lalta Prasad*, for the appellant.

The *Junior Government Pleader* (*Babu Dwarika Nath Banarji*) and *Munshi Hanuman Prasad*, for the respondents.

The High Court (STUART, C. J., and STRAIGHT, J.,) delivered the following judgments :—

STRAIGHT, J.—On the 4th October, 1875, *Kharag Singh*, defendant-appellant, borrowed from *Har Gopal* and *Dhanraj*, bankers of the town of *Khurja*, now deceased, and represented in this suit by their sons, the plaintiffs-respondents, the sum of Rs. 4,500, hypothecating his share in a certain zamindari as security for the advance. By the bond, which was duly registered, the obligor agreed to pay interest at the rate of Re. 1-4-0 per cent. per mensem at the end of every six months, and upon default in the payment of such interest, it was provided “then, on account of breach of contract, he shall pay interest at the rate of Rs. 2 per cent. per mensem from the date of the execution of the bond.” The instrument also contained a stipulation against alienation, and declared the principal sum to be payable on demand. The plaintiffs-respondents now sue the defendant-appellant to recover the Rs. 4,500 loan, and interest from 4th October, 1875, for three years eleven months and twenty days, less different sums, amounting to Rs. 1,600, paid from time to time on account, at the defaulting rate of Rs. 2 per cent., and the lower Court has decreed the claim in its entirety. The defendant appeals to this Court, and the only contention urged at the hearing on his behalf was, that the provision of the bond as to an increased rate of interest upon default in payment of the ordinary interest is in the nature of a penalty, and should not be enforced. In a Full Bench decision of this Court upon a reference from the Judge of *Ajigarh*—*Bansidhar v. Bu Ali Khan* (1)—to which I was a party, and which has been followed by *Pearson, J.* and myself in Second Appeal No. 771 of 1880 (3), the question of penalty was discussed; and it

(1) I. L. R., 2 All. 260. (2) I. L. R., 1 Cal. 137.

(3) Unreported.

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does not appear to me that any useful purpose can be served by recapitulating at length the opinions therein expressed to which I still adhere. As far as I can ascertain, it has been the uniform practice of this Court, as in numerous instances in the Calcutta and Bombay Courts, to give relief against exorbitant interest as being in the nature of a penalty, and the propriety and necessity for doing so seem to me imperative. The Subordinate Judge refers to a judgment of Garth, C. J., concurred in by Markby, J.,—*Mackintosh v. Wingrove* (1)—as the authority upon which his decision has proceeded. With the greatest respect for those two learned Judges, they seem to me to lay down a principle that, if arbitrarily acted upon, would absolutely put it out of the power of the Courts of this country to grant relief to a multitude of foolish and improvident persons, of whose impecuniosity greedy and unscrupulous money-lenders are always ready to take advantage, in extorting from them promises to pay the most inequitable and extravagant interest. It seems to me that in this appeal we should regard the defendant-appellant as a person who, having broken his contract with the plaintiffs-respondents, is bound to make reasonable compensation to them in respect to such breach. And the question then arises whether the amount provided by the bond is or is not reasonable. In my opinion, having regard to the fact that the security of property was given for the loan, and the borrower contracted not to make any further alienation of it until the whole debt was discharged, the defaulting rate provided by the bond was of a penal character, relating as it did not only to the interest due on and subsequent to the default, but retrospectively to the date of the bond itself. I would accordingly decree the appeal in so far as it relates to the amount of interest allowed by the Judge, and as to the principal sum, would give the plaintiffs-respondents interest from the 4th October, 1875, to the date of our decree at Re. 1-4-0 per cent. per mensem. Upon the amount of interest applicable to the period between the breach of contract and our decree, I would allow as damages for the failure to pay it four annas per cent. per mensem from the date of the actual default. Costs will be given in proportion to the amount decreed.

(1) I. L. R., 4 Calc. 137.

STUART, C. J.—I have read the judgment of Straight, J., in this case, and concur in it and in his proposed order. I cannot too strongly express my dissent from the ruling of the Calcutta Court to which the Subordinate Judge refers, but I would further observe that in this particular case the plaint itself shows that in his own mind the plaintiff regarded the additional interest stipulated for as in itself strictly penal, by the allegation that “in case he (the defendant) should fail to pay six-monthly interest, then on account of breach of contract he shall pay interest at the rate of Rs. 2 per cent. per mensem from the date of the execution of the bond.” Language could not more plainly show that this provision of the contract was and is distinctly intended to be penal.

*Decree modified.*

*Before Mr. Justice Straight and Mr. Justice Duthoit.*

BIRBAL AND ANOTHER (DEFENDANTS) v. TIKA RAM (PLAINTIFF)\*

1881  
June 22.

*Determination of title by Revenue Court—Res judicata—Jurisdiction of Civil Court—Act XVIII of 1873 (North-Western Provinces Rent Act), ss. 36–39.*

The defendants, claiming to be occupancy-tenants of certain land, and alleging that the plaintiff was their sub-tenant, caused a notice of ejection to be served on the plaintiff under ss. 36–38 of Act XVIII of 1873. The plaintiff thereupon, under the provisions of s. 39 of that Act, preferred an application contesting his liability to be ejected, alleging that he had a right of occupancy in such land jointly with the defendants, and was not their sub-tenant. The Assistant Collector trying the case finally decided that the plaintiff was the sub-tenant of the defendants, and the plaintiff was ejected. The plaintiff then sued the defendants in the Civil Court for a declaration of his right as an occupancy-tenant to such land and possession of the same. *Held* that the decision of the Assistant Collector as to the respective rights of the parties could only be regarded as incidental and ancillary to the main point to be determined by him, *viz.*, whether, assuming the relation of landlord and tenant to exist between the parties, the plaintiff was liable to be ejected, and such decision was not a bar to a fresh determination of such rights in the Civil Court.

THE plaintiff in this suit claimed a declaration of his right as an occupancy-tenant to certain land and possession of such land. The suit was instituted in the Court of the Munsif of Etawah. The defendants, claiming to be occupancy-tenants of such land, and alleging that the plaintiff was their sub-tenant, had caused a

\* First Appeal, No. 31 of 1881, from an order of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 7th February, 1881.