

1880
 November 17.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

MARKUNDI KUAR (PLAINTIFF) v. BALKISHEN DAS AND OTHERS
 (DEPENDANTS,)*

Suit for interest—Suit for money payable on demand—Suit for money deposited payable on demand—Act XV of 1877 (Limitation Act), sch. ii, Nos. 59, 60, 63.

The plaintiff in this suit deposited certain money with the defendants, a firm of bankers, on the 30th August, 1863. On the 2nd January, 1867, an account was stated and a balance found to be due to the plaintiff consisting of the original deposit and interest on the same calculated at six per cent. per annum. On the 11th February, 1876, the defendants having proposed to pay the plaintiff such balance, together with interest on the original deposit, from the 2nd January, 1867, to the 15th February, 1876, calculated at four per cent. per annum, the plaintiff demanded that she should be paid such interest at the rate of six per cent. per annum. The defendants refused to accede to this demand on the 14th February, 1876, and on the 17th of the same month they paid the plaintiff such balance with such interest calculated at the rate they proposed, *viz.*, four per cent. On the 11th February, 1879, the plaintiff brought the present suit against the defendants in which she claimed the sum representing the difference between such interest calculated at four per cent. and six per cent.; alleging that her cause of action arose on the 14th February, 1876. *Held* that the defendants were estopped from questioning the plaintiff's demand for such interest calculated at six per cent. *Held* also that the suit could not be regarded as either one for money lent under an agreement that it should be payable on demand, or one for money deposited under an agreement that it should be payable on demand, but must be regarded as one for a balance of money payable for interest for money due, to which cl. ix., s. 1 of Act XIV of 1859, No. 61, sch. ii of Act IX of 1871, and No. 63, sch. ii of Act XV of 1877, had successively applied, and the suit was barred by limitation.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Munshi Kashi Prasad, for the appellant.

The *Senior Government Pleader* (Lala Juala Prasad) and Pandits Ajudhia Nath and Bishambhar Nath, for the respondents.

The High Court (SPANKIE, J., and STRAIGHT, J.,) delivered the following

JUDGMENT.—According to the prayer of the plaint this suit is brought to recover the sum of Rs. 12,150-2-6, alleged balance

* First Appeal, No. 9 of 1880, from a decree of Babu Ram Kali Chaudhri, Ordinate Judge of Benares, dated 6th September, 1879.

1880

 MARUNDI
 KUMAR
 VS.
 BALAKISHOR
 DAS.

of interest, due from the defendants to the plaintiff on an amount of Rs. 61,056, from the 2nd of January, 1867, to the 15th of February, 1876. The circumstances out of which the claim arises appear to be as follows:—The plaintiff is the wife of Rāi Sita Ram, defendant No. 3, who is a member of the same family as the other defendants, and in the year 1873 was a partner with them in a banking firm at Benares, carrying on business under the style of Rai Ram Kishen and Rai Sri Kishen. The plaintiff alleges that, having received a sum of Rs. 50,000, as a gift from her husband, out of his self-acquired funds, on the 27th August, 1863, she on the 30th of the same month paid the money through his hands into the before mentioned firm as a deposit. She further asserts that, according to a long and well established custom of the family, money thus deposited by members of it was entitled to interest at the rate of eight annas per cent. per mensem, and as the accounts were adjusted and the interest credited, the interest was treated as part of the principal and itself carried interest at the above rate. It seems that in 1867 the firm of Rai Ram Kishen and Rai Sri Kishen was dissolved, and subsequently a partition suit was brought by defendant No. 2, Rai Narsingh Das, against Rai Narain Das, defendant No. 1. In execution of the decree obtained by the former person, one Syed Ahmad Khan, C.S.I., was appointed commissioner to effectuate partition and determine the accounts between the parties. From the books of the defendants' firm, it appears that on the 2nd January, 1867, a balance of the plaintiff's account was struck, and a sum of Rs. 61,056 was found to be due to her. This was made up of four entries; the first one for the principal amount of Rs. 50,000, and the remaining three items of interest from Sambat 1921-22-23 at the rate of eight annas per cent. per mensem. It may be observed in passing that this account does not bear out the plaintiff's allegation, that the practice of the firm was to give compound interest; nor, as a fact, does she by her plaint claim it. In the course of carrying out the duties intrusted to him, it became necessary for the commissioner, Syed Ahmad Khan, to ascertain what amount of interest was due from the defendants' firm, between the 2nd of January, 1867, and the 15th February, 1876. This he proceeded to calculate at the rate of Rs. 4 per cent. per annum and declared the amount to be

1880

MAKUNDI
KUAR
v.
BALKISHEN
D&S.

Rs. 22,265. On the 11th of February, 1876, the plaintiff demanded her principal and interest at the rate of Rs. 6 per cent. per annum from the commissioner, but upon the 14th February, 1876, he refused to pay it, and upon that date the plaintiff alleges her cause of action to have arisen. On the 17th February, 1876, the commissioner paid to her, through the hands of her husband, Rs. 83,321-1-6, instead of Rs. 95,471 which she claimed. It is for the difference between these two sums that the present suit was brought on the 11th February, 1879. Rai Sita Ram, defendant No. 3, by his written statement, admitted that the plaintiff was entitled to interest at the rate of eight annas per cent. per mensem, and prayed, as he had not offered any resistance to her claim, that he should be exempted from costs. The remaining defendants pleaded in substance, (i) that the transaction between themselves and the plaintiff was in the nature of a loan, and that therefore the suit was barred by No. 59, sch. ii, Act XV of 1877; (ii) that there is no such custom in the family as that alleged by the plaintiff; (iii) that the Rs. 50,000 was in reality the money of Rai Sita Ram, that he had fictitiously paid it into the firm in the name of his wife, the plaintiff, and that, being his money, it was only entitled to interest at Rs. 4 per cent per annum; (iv) that the higher rate of interest had been entered in the books of the firm of Rai Ram Kishen and Rai Sri Kishen at the instigation of Rai Sita Ram, the husband of the plaintiff, and without the consent of his partners; (v) that in the suit between Rai Narsingh Das and Rai Narain Das for partition, to which Rai Sita Ram was a party, he as the husband of plaintiff and the real owner of the Rs. 50,000 was bound by the decision of this Court as to the rate of interest being Rs. 4 per cent. per annum, and that, having accepted Rs. 83,321-1-6, it is incompetent for the plaintiff, as his wife, to bring the present suit in contravention of the provisions of s. 13, Act X of 1877; (vi) that the suit is a collusive one, and that Rai Sita Ram is the real plaintiff; (vii) that the amount claimed is in excess of the proper sum due by Rs. 1,017-9-9.

The case was heard before the Subordinate Judge of Benares on the 6th September, 1879. With regard to the plea of *res judicata*, he held it inapplicable on the ground that the plaintiff herself was

no party to the suit in the High Court in 1871 ; but, without dealing with the other questions raised, he has decided that the plaintiff's claim is barred both by Act XIV of 1859 and Act XV of 1877. The ground upon which he proceeds is that the transaction between the parties was in the nature of a loan, and that limitation would therefore run from the date when the original loan was made, namely, the 30th August, 1863. A great deal of his judgment is taken up in discussing the circumstances relating to the original deposit of the Rs. 50,000 ; but a close examination of the facts of the case shows that this is only of indirect importance. The principal sum of Rs. 50,000 has admittedly been repaid, together with Rs. 11,056 interest due to the 2nd January, 1867. But, as has already been pointed out, this latter sum is not made up in the manner alleged by the plaintiff in her plaint, namely, by adding each instalment of interest to the principal sum and allowing compound interest. On the contrary, each of the three items is estimated on Rs. 50,000 only. It would therefore seem that the plaintiff has somewhat unnecessarily introduced the question of compound interest, and having accepted payment of the principal sum with interest, she cannot now properly claim it, and indeed, as a matter of fact, she does not do so. Her suit is actually brought for the recovery of nine years one month and twelve days' difference in interest, between Rs. 4 per cent. per annum and Rs. 6, from the 2nd of January, 1867, to the 15th of February, 1876. Now it is to be observed that the Rs. 12,150-2-6, which she claims, is not worked out upon a basis of compound interest on Rs. 50,000 from August, 1863, as might have been expected, but is the difference in simple interest between 4 and 6 rupees per cent. on the Rs. 61,056, balance struck in the defendants' books in her favour on the 2nd of January, 1867 ; nor must the fact be lost sight of that, though items of simple interest only were credited in that account for Sambat 1921-22-23, the interest calculated by the commissioner for the period from 1867 to 1876, at 4 per cent., was in this sense compound, that it was estimated, not on the Rs. 50,000, principal sum, but upon that amount plus the three years' simple interest, in all Rs. 61,056. While therefore, on the one hand, as we have already remarked, the plaintiff could not properly, and does not, claim compound interest ; yet, on the other, it does not lie in the mouths of the defendants to

1850

MAKUNDI
KUAR
v.
BALKISHEN
DAS.

1880

MAKUNDI
KUMAR
v.
BALKISHEN
DAS.

question the demand for 6 per cent, when, apart from the entries in their books, they have by payment of the Rs. 61,056 practically admitted interest at that rate to be due down to 1867. We do not quite follow the remarks of the Subordinate Judge with regard to the period of limitation having commenced to run on the 30th of August, 1863. In reality, no question arises in the suit concerning the principal sum, for that has been admittedly repaid, as also interest on it at 6 per cent. down to 2nd January, 1867; and with reference to the interest now claimed, whether 4 or 6 per cent., no portion of it accrued until the month of January, 1867. Now it must be remembered that at this time the firm of Rai Ram Kishen had ceased to carry on business, and was being wound up by the commissioner, and through the succeeding years, until February, 1876, the plaintiff's Rs. 50,000, with the annual increments of interest, remained in the hands and at the disposal of the defendants, and we think it must be taken that the relations between the parties continued upon the same footing as they had been down to the date of the balance being struck. No doubt there was no formal carrying of interest to the credit of the plaintiff's account in the defendants' books from 1867 to 1876, but that some interest was payable has never been disputed, and the only point now is, at what rate should it be estimated? With regard then to the matter of limitation, in reference to which the Subordinate Judge dismissed the suit, the question arises, in what light is the difference between the 4 per cent, which has been admitted and paid by the defendants, and the 6 per cent., which is disputed by them, in other words, the contested 2 per cent. to be regarded? Is it money lent under an agreement that it should be payable on demand; or is it money deposited under an agreement that it should be payable on demand; or is it money payable for interest upon money due? We do not think that it can be treated as money lent, nor does it appear to us that, under the circumstances of the case, it can be regarded as a deposit. But it seems naturally and reasonably to fall within the description of a balance of money payable for interest upon money due from the defendants to the plaintiff. To hold it a deposit would be to unreasonably strain construction, and to throw it into the category of loan could not improve the plaintiff's position, so far as limitation is concerned. The Subordinate Judge seems to

have lost sight of the circumstances that, even if his view of the law is correct, and the transaction was one of lending and borrowing, each successive instalment of interest, as it fell due and remained in the hands of the defendants, impliedly became a separate and specific loan, and that, so far as the last two years, namely, 1877 and 1878, are concerned, the suit was not barred. Under all the circumstances, we are of opinion that cl. ix, s. 1, Act XIV of 1859, No. 61, sch. ii. of Act IX of 1871, and No. 63, sch. ii. of Act XV of 1877, have successively been applicable to the relations between the parties, and that the plaintiff's claim is barred by limitation. The appeal must therefore be dismissed with costs.

1880

MAHENDRI
KUMAR
?
BAKRISHEN
DAS.

Appeal dismissed.

Before Mr. Justice Spankie and Mr. Justice Straight.

BISRAM MAHTON (DECREE-HOLDER) v. SAHIB-UN-NISSA (AUCTION PURCHASER).*

1880

November

Sale in execution—Holiday—Act X of 1877 (Civil Procedure Code), s. 311—Irregularity in publication or conduct of sale.

The sale of immoveable property by an amín on a close holiday is not illegal, nor is it an irregularity in publishing or conducting the sale.

A certain dwelling-house was sold in execution of a decree on the 24th November, 1879, the sale being conducted by an officer of the Court executing the decree. On the 3rd December, 1879, the decree-holder applied to the Court to set aside the sale on the ground that it had taken place on a public holiday, and in consequence the house, which was worth Rs. 300, had been purchased by the sister of the judgment-debtor for Rs. 17. The auction purchaser of the house opposed this application. The Court disallowed the decree-holder's objection to the sale on the ground that the holding of a sale in execution of a decree on a holiday was not illegal; and made an order confirming the sale. The decree-holder appealed to the High Court.

Munshi *Sukh Ram*, for the appellant.

* First Appeal, No. 120 of 1880, from an order of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 20th May, 1880.