

APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava and Mr.
Justice A. G. P. Pullan.

1930
September,
9.

RAJ INDER BAHADUR SINGH, BABU (DEFENDANT-
APPELLANT) v. BHAGWAN DIN (PLAINTIFF-RESPONDENT.)*

*Indian Contract Act (IX of 1872), section 74, as amended by
the Amending Act (VI of 1899)—Penal interest—Liqui-
dated damages—Mortgage deed containing stipulation for
payment of interest at 4 annas per cent. per mensem—
Interest to be paid at Rs. 2 per cent. per mensem in case
of default for the period of default—Stipulation for pay-
ment of enhanced rate of interest, whether penal.*

Held, that whatever doubts may have existed as regards
penalty and liquidated damages before the amendment made
in section 74 of the Contract Act by the amending Act VI of
1899, it is quite clear now that a stipulation for payment of
interest at a higher rate from the date of default only, is
not necessarily penal. The explanation added to section 74
provides that a stipulation for increased interest from the
date of default may be a stipulation by way of penalty. The
question whether such a stipulation is or is not penal in any
particular case must depend upon the facts and circumstances
of that case. The test is whether the enhanced interest was
intended to be part of the primary contract between the
parties or was introduced only *in terrorem*.

Whether, therefore, the original rate of interest in a
mortgage deed was annas 4 per cent. per mensem and in case
of default in payment of interest, the enhanced rate of in-
terest was made chargeable only in respect of the interest
for the particular year in which default was made and the
parties further stated in the deed, with reference to this
particular clause, that this interest would not be considered
as penal, *held*, that the provision for enhanced interest in
the case was part of the primary contract between the parties
and not a provision by way of penalty.

*First Civil Appeal No. 126 of 1929, against the decree of Pandit
Gulab Singh Joshi, Subordinate Judge of Partabgarh, dated the 31st of
August, 1929, decreeing the plaintiff's claim.

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Mr. *H. D. Chandra*, for the appellant.

Mr. *K. P. Misra*, for the respondent. —

SRIVASTAVA and PULLAN, JJ:—This is the defendant's appeal against the judgment and decree, dated the 31st of August, 1929, passed by the Subordinate Judge of Partabgarh. It arises out of a suit brought by the plaintiff mortgagee on foot of a mortgage deed, dated the 11th of August, 1914, executed by the defendant's father, Babu Ranbir Singh, in favour of the plaintiff for Rs. 18,000. The stipulation as regards interest was that the mortgage money would carry interest at annas 4 per cent. per mensem, that the interest would be paid annually and that if there was default in the payment of interest for any year, then the interest for that year would be paid at the rate of Rs. 2 per cent. per month.

The plaintiff's case was that he had been paid interest regularly for the first eight years of the mortgage but that no payment was made thereafter. He therefore claimed interest at 2 per cent. per mensem since the 11th of August, 1922. The defendant disputed the plaintiff's claim only as regards the enhanced rate of interest. He pleaded that four days before the 11th of August, 1923, he offered to pay the full interest at the rate of annas 4 per cent. per mensem to the plaintiff but the plaintiff did not accept the said interest. He thereupon deposited the amount of Rs. 540 in the Court of the Subordinate Judge of Partabgarh under section 83 of the Transfer of Property Act. Even then the plaintiff refused to accept the payment. The defendant further pleaded that he made similar offers for payment of full interest at the rate of annas 4 per cent. per mensem in August, 1924 and August, 1925, but the plaintiff refused to accept the payments. On these facts the defendant claimed that there had been no default on his part and that he was not liable to interest at the enhanced rate. He further pleaded that in any case interest

at the enhanced rate of 2 per cent. per mensem was penal and that he was entitled to be relieved of it.

The learned Subordinate Judge found the defendant's allegation as regards his having offered to pay the interest due on the 11th of August, 1923, proved. He therefore held that the plaintiff was entitled to interest at annas 4 per cent. per mensem only in respect of the interest for 1923. But in respect of subsequent years his finding was that the defendant had failed to prove that he ever offered interest to the plaintiff. He therefore held the plaintiff entitled to enhanced interest according to the agreement, after 1923. On the question of interest being penal, he expressed the opinion that it was so but did not consider the defendant entitled to any relief on that ground as he held that the rate of interest at 2 per cent. per mensem was quite reasonable.

The learned counsel for the defendant-appellant has repeated before us the two contentions set forth above. As regards the first, namely, the offers in 1924, and 1925, the learned counsel admits that his client has failed to give any evidence to prove the alleged offers. He has, however, argued that the plaintiff's refusal to accept the payment of Rs. 540 offered by the defendant for interest in respect of the year ending the 11th of August, 1923, was sufficient to absolve him from the necessity of making any offers in subsequent years. We find ourselves unable to accede to this argument. The plaintiff's statement as P. W. 1 shows that he had refused to accept the interest for 1923 on the ground that the interest in respect of another debt of Rs. 7,000 was not paid along with it. His statement further shows that he got Rs. 6,000 out of Rs. 7,000 just mentioned, about six years before his examination in Court. This would show that he realized the bulk of this debt shortly after his refusal to accept interest in 1923 in

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respect of the mortgage deed in suit. Under the circumstances there was hardly any justification for the defendant not to have offered payment of interest due for the subsequent years. Further we find from the statement of the plaintiff which is corroborated by the statement of Babu Ram Shankar, pleader, P. W. 2, that subsequent to this refusal the plaintiff served the defendant with a notice through the pleader just mentioned, expressing his willingness to take interest at annas 4 per cent. per mensem if paid annually. The learned Subordinate Judge has believed this evidence and we can see no reason to take a different view of it. We are therefore of opinion that there was no excuse justifying the defendant not paying interest after 1923 and that he has clearly committed default in payment of interest as stipulated in the mortgage deed.

The next question is as regards the enhanced rate of interest being penal. The law as regards penalty and liquidated damages is now fairly well settled. Whatever doubts may have existed on the point before the amendment made in section 74 of the Contract Act by the amending Act VI of 1899, it is quite clear now that a stipulation for payment of interest at a higher rate from the date of default only, is not necessarily penal. The explanation added to section 74 provides that a stipulation for increased interest from the date of default may be a stipulation by way of penalty. The question whether such a stipulation is or is not penal in any particular case must depend upon the facts and circumstances of that case. The test in our opinion is whether the enhanced interest was intended to be part of the primary contract between the parties or was introduced only *in terrorem*. In the present case we notice that the original rate of interest, namely, annas 4 per cent. per mensem simple, was an extraordinarily low rate. Further in case of default in payment of interest, the enhanced rate of

interest was made chargeable only in respect of the interest for the particular year in which default was made. It might as well be mentioned that the parties further stated in the deed, with reference to this particular clause, that this interest would not be considered as penal. Looking to all these circumstances, we are of opinion that the provision for enhanced interest in the present case was part of the primary contract between the parties and not a provision by way of penalty. In this connection we might point out that a provision for compound interest is very common in this part of the country and it is by no means uncommon to come across transactions charging compound interest at 2 per cent. per mensem. It is not therefore possible to say that simple interest at 2 per cent. per mensem was exorbitant much less unconscionable. Further section 74 of the Contract Act provides that in the case of contracts containing stipulations by way of penalty, the court is to award "reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for". So it is open to the Court under this section to award by way of compensation interest at the stipulated rate if it is not unreasonable. We agree with the learned Subordinate Judge that in the circumstances of this case, more particularly in view of the very low original rate of interest, the rate of interest at 2 per cent. per mensem simple is not by any means unreasonable. Thus even if we were inclined to hold that the provision for enhanced interest was penal, we would agree with the learned Subordinate Judge that the defendant was not entitled to any relief under section 74 of the Contract Act.

The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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*Srivastava
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 JJ.*