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extend the time for making the deposit under order XXI, rule 89 with the consent of the parties. For the applicant certain rulings have been cited as showing that the period of limitation prescribed by the Limitation Act cannot be varied by consent of parties. This is no doubt correct as an abstract proposition, but we think that in a case of this sort if a decree-holder consents to accept a deposit made by the judgment-debtor in full satisfaction of his decree, and consents to have the sale set aside on receipt of such deposit, then it is open to the Court to set aside the sale although the deposit was made beyond the period prescribed in the Limitation Act. It would seem futile to confirm the sale if the decree-holder does not wish it to be confirmed.

King, C.J. and Smith, J.

In our opinion this is not a case in which we should interfere in revision with the order of the Court below. The equities are all in favour of the judgment-debtor. He has made a deposit of the full decretal amount, together with the penalty, and the decree-holder has no substantial cause of complaint. If the sale is not set aside it means that the judgment-debtor's property will be sold for a grossly inadequate sum. Even if the view of the Court below is wrong in facts or in law, we think we should not interfere. The application is rejected with costs.

Application rejected.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice H. G. Smith

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SARDAR AMAR SINGH, (DEFENDANT-APPELLANT) *v.* SARDAR PRATAP SINGH AND ANOTHER (PLAINTIFF AND ANOTHER, DEFENDANT (RESPONDENTS)*

Negotiable Instruments Act (XXVI of 1881), section 80—Promissory note—Words "the same" in section 80, meaning of

*First Civil Appeal 102 of 1933, against the decree of Babu Avadh Behari Lal, Subordinate Judge of Rae Bareli, dated the 4th of November, 1933.

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—Date of execution or date of demand, whether the date at which amount of promissory note is payable—Interest pendente lite, *decree of—Costs—Discretion of Court in awarding costs, when can be interfered with in appeal.*

Held, that the words "the same" in section 80 of the Negotiable Instruments Act relate to the amount due on the instrument, and not to the interest on that amount. *Prem Lal Sen* v. *Radhaballav Kankra* (1), dissented from. *Ganpat Tukaram Mali* v. *Sopana Tukaram, Mali* (2), referred to.

Held further, that the date at which the amount of a promissory note "ought to have been paid by the party charged" within the meaning of section 80 of the Negotiable Instruments Act is the date of the note itself. *Ganpat Tukaram Mali* v *Sopana Tukaram Mali* (2), relied on. *Best* v. *Muhammad Sait* (3), and *Prem Lal Sen* v. *Radhaballav Kankra* (1), *dissented* from.

Where interest has been allowed up to the date of the suit and after the date of the decree, *pendente lite* interest should also be allowed unless there is special reason for not allowing it.

The awarding of costs is a matter within the discretion of the Court, and when a Judge does not exercise this discretion arbitrarily but gives reasons in his judgment, it cannot be interfered with in appeal.

Mr. *Hyder Husain,* for the appellant.

Messrs. *Ram Bharose Lal* and *Suraj Sahai,* for the respondents.

SRIVASTAVA and SMITH, JJ.:—This is a first appeal against a decision, dated the 4th of November, 1933, of the learned Subordinate Judge of the Rae Bareli District.

The plaintiffs are the two younger sons of the late Sardar Gurmukh Singh, who died on the 10th of December, 1932,—he was a legal practitioner. The plaintiffs allege that the main defendant, Sardar Amar Singh, defendant No. 1, borrowed Rs.11,000 from their father under three promissory notes, one dated the 29th of March, 1930, for Rs.1,000, another dated the 30th of April, 1930, for Rs.5,000 and another, dated the 25th of

(1) (1930) I.L.R., 58 Cal., 290. (2) (1927) I.L.R., 52 Bom., 88.
(3) (1898) I.L.R., 23 Mad., 18.

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October, 1930, for Rs.5,000. The deeds in question contain no provision for interest, but according to the plaintiffs it was agreed between the parties that interest would be paid at the rate of $7\frac{1}{2}$ per cent. per annum. The other defendant, Sardar Gopal Singh, is the eldest son of Sardar Gurmukh Singh,—the plaintiffs' case was that they alone are entitled under their father's will to realise the sums in dispute but that to avoid future controversy they have made their elder brother also a defendant. The suit was contested by Sardar Amar Singh only. He represented that the sums in question were really deposited with him for safe custody, and that no interest was payable on them. He further pleaded that he had paid Rs.2,000 to Sardar Gurmukh Singh, and not Rs.1,300 only, as was alleged by the plaintiffs. On this latter point the decision of the learned Court below was against the contesting defendant, and that finding has not been attacked before us. As to the nature of the transactions in question, the learned Subordinate Judge was of opinion that they were loans. This finding also has not in itself been attacked before us. The real controversy is as to the liability of Sardar Amar Singh for interest. The learned Subordinate Judge took the view that no oral contract as to interest can be proved by the plaintiffs, but he applied section 80 of the Negotiable Instruments Act (XXVI of 1881) and allowed the plaintiffs interest at 6 per cent. per annum from the date of execution of each of the documents in question up to the date of the suit. He ordered that a deduction should be made of the sum of Rs.1,300 admittedly paid by Sardar Amar Singh. He allowed the plaintiffs half the costs of the suit, and he concluded his judgment by directing that "future interest should run on this aggregate amount at 6 per cent. per annum till realization."

The contention for the appellant. (Sardar Amar Singh), is that no interest ought to have been allowed, and that, in any case, it can only be allowed from the

date when the money was validly demanded. That date, it was suggested by the learned counsel for the plaintiffs-respondents, could not be earlier than the 28th of July, 1933, the date on which the plaintiffs obtained a succession certificate. Their suit had been instituted before that date, that is to say, on the 20th of March, 1933. In that connection, however, the learned counsel for the plaintiffs-respondents has referred us to a passage in the cross-examination of Sardar Amar Singh in which he spoke of Sardar Gurmukh Singh demanding money from him at some time in the month of September, 1932.

The controversy really turns on the interpretation of section 80 of the Negotiable Instruments Act. That section is as follows:

"When no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of 6 per centum per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs."

It may be taken as settled that this section governs alike cases in which no rate of interest is mentioned in an instrument, and those in which interest is not mentioned at all. That was the view taken in a ruling reported in *Best and another* v. *Haji Muhammad Sait and others* (1), and also in a Full Bench ruling reported in *Ganpat Tukaram Mali* v. *Sopana Tukaram Mali* (2). The question is, however, from what date the interest ought to be calculated. In that connection it has been pointed out to us that there is some difference of opinion in the reported decisions as to the meaning of the words "the same" in the clause "from the date at which the

(1) (1898) I.L.R., 23 Mad., 18. (2) (1927) I.L.R., 52 Bom., 88.

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same ought to have been paid by the party charged." In a decision reported in *Premlal Sen* v. *Radhaballav Kankra* (1), it was said at pages 295-296:

"The word 'same' creates the confusion. The noun to which it relates is the word "interest" and not the word "amount". Eliminating unnecessary words, the sentence runs 'interest on the amount due . . . shall . . . be calculated . . . from the date at which the same ought to have been paid . . . until tender or realization of the amount due. . .' If the word "same" is replaced by the word 'interest' the sentence is just as good and as grammatical, but if it is replaced by the words 'amount due', the sentence becomes clumsy and tautologous.

If it had been intended that the word 'same' should relate to the words 'amount due', it is inconceivable that any draftsman would have repeated the words 'amount due' in the line following the word 'same'. He would have repeated the word 'same' or he would have omitted the words of the amount due thereon'.

The latter words have been contrasted by the draftsman with the word 'same', and distinguished therefrom.

By their difference with their juxtaposition, he desired to make clear that they did not refer to the same thing. Instead of which he has succeeded only in making everything as obscure as possible."

On the other hand, in the Bombay ruling to which we have already made reference, although this precise point was not specifically discussed, it was certainly assumed that the words "the same" mean the amount due, and not the interest on that amount. It was said (at page 100): "Turning next to the second point, this is the crux of the case. It depends on the meaning to be given to the words 'be calculated . . from the date at

(1) (1930) I.L.R., 58 Cal., 290.

which the same ought to have been paid by the party charged'. When then is the amount on a promissory note like this due, and when ought it to be paid?"

In our opinion, the view taken by the learned single Judge of the Calcutta High Court who decided the case above mentioned is, if we may respectfully say so, incorrect. In our opinion, the words "the same" mean the amount due on the instrument, and not the interest. If the other view is taken, the provisions of the section would come to this, that interest is to be calculated from the date at which the interest ought to have been paid. Now needless to say interest can only be payable when it has accrued, and to hold that interest is only to be calculated from the date on which a certain amount of interest has already accrued would be to shut out entirely that accrued interest. The section is certainly not happily worded, but we have no doubt in our minds that the words "the same" relate to the amount due on the instrument, and not to the interest on that amount.

The remaining question is on what date the sums in question "ought to have been paid". In the ruling reported in *Best* v. *Haji Muhammad Sait* (1), it was held that in the case of notes payable on demand, as the instruments concerned in the present case admittedly were, the date of the demand, and not that of making the note, is the date from which interest must be taken to run. That view was approved by the learned Judge who decided the case reported in *Prem Lal Sen* v. *Radhaballav Kankra* (2). He said, at page 299, "It is clear from the above cases that interest is only payable as damages, that is, in case of default,—and it follows that where there is no specific agreement to pay interest, it cannot be claimed until after demand, or from the fixed period of payment, as the case might be." On the other hand, in the Full Bench ruling of the Bombay High

(1) (1898) I.L.R., 23 Mad., 18. (2) (1930) I.L.R., 58 Cal., 290.

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Court to which we have made reference, it was said, at pages 109 and 110:

"After careful consideration then of the Act, and of the numerous authorities in India and in England that have been cited to us, we would hold that a promissory note like the one we have here matures and falls due within the meaning of section 22 at the date when it is made. Consequently under section 32 the maker is bound to pay it at that same date, and presentment is unnecessary having regard to section 64. In my judgement therefore the date at which the suit note 'ought to have been paid by the party charged' within the meaning of section 80 is the date of the note itself. In the present case the party charged is the maker. If he had been the indorser, different considerations would arise for under the explanation to section 80, the indorser would be liable to pay interest only from the time that he received notice of dishonour.

In this connection I am not prepared, on the construction of this particular Act, to draw a distinction between the words 'are bound to say' in section 32 and the words 'ought to have been paid' in section 80. I think in this Act they mean substantially the same thing, and that if the maker of a note was 'bound to pay' it at maturity, then he 'ought to have paid' it at maturity.

In the result, therefore, I would hold that in the present case the promissory note became payable immediately on its execution, that that was the date at which it ought to have been paid within the meaning of section 80, and that accordingly as against the maker, the promisee is entitled to interest at 6 per cent. per annum from the date of the note."

This view, in our opinion, is the correct one, and on that view the learned Subordinate Judge was correct in awarding interest at 6 per cent. per annum on the three instruments in question from the date of their execution. In these circumstances, it is not necessary

for us to consider whether any valid demand for the money was ever made, and if so when it was made. The consequence is that the appeal is dismissed, with costs.

We have also before us cross-objections by the plaintiffs-respondents. They contend that "*pendente lite*" interest should have been allowed them at 6 per cent. per annum in addition to interest up to the date of the suit, and interest after the date of the decree. It is conceded by the learned counsel for the defendant-appellant that there is no reason why "*pendente lite*" interest should not have been allowed to the plaintiffs, and we accordingly direct that it be allowed.

Next, it is objected that the plaintiffs should have been allowed the full costs of their suit. This was a matter within the discretion of the learned Subordinate Judge. He did not exercise this discretion arbitrarily, but for reasons he has given in his judgment. We, therefore, see no reason to interfere on that point.

Lastly, it was urged that the decree was not in accordance with the judgment. The contention is that by the words "aggregate amount", at the end of his judgment, the learned Subordinate Judge meant the principal sum, plus interest, plus costs. We cannot positively say whether the learned Subordinate Judge intended to include the costs in the aggregate amount, but we see no sufficient reason for allowing future interest on the costs also, and we accordingly disallow the cross-objections on that point.

The cross-objections have succeeded in part only, and we make no order as to the costs of them.

Appeal dimissed.