

by *res judicata* under the provision of section 11, Explanation IV of the Code of Civil Procedure. The circumstances of that case were not very similar to those in the present case, but we quote the case as an authority for a broad construction of the provision in the explanation.

In our opinion, the present suit was barred by the principles of *res judicata*. That being so, the suit must fail and it is unnecessary for us to discuss the merits of the case.

We dismiss this appeal with costs.

---

### APPELLATE CIVIL.

*Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.*

#### ADMINISTRATOR-GENERAL OF BURMA

*v.*

M. E. MOOLLA.\*

*Contract Act (IX of 1892), s. 74—Reduction of interest if paid monthly in advance not a penalty.*

A debtor promised to pay his creditor the principal sum "with interest thereon at one per cent. per mensem, or if paid monthly in advance at 11½ annas for each Rs. 100 per mensem." *Held*, that such an arrangement is valid and not penal.

*Moti Lal Das v. The Eastern Mortgage and Agency Co. Ltd.*, 26 C.W.N. 271. P.C.—*followed*.

*Dantra*—for Appellant.

*Burjorjee*—for Respondent.

RUTLEDGE, C.J., AND BROWN, J.—Mr. Burjorjee raised a preliminary objection on the ground that this was in fact a consent decree and that consequently no appeal lay.

1927  
MAUNG  
BA THEIN  
2.  
MA THAN  
MYINT  
AND TWO.  
RUTLEDGE,  
C.J., AND  
BROWN, J.

1927  
Mar. 29.

---

\* Civil First Appeal No. 11 of 1926.

1927  
 ADMINIS-  
 TRATOR-  
 GENERAL OF  
 BURMA  
 v.  
 M. E.  
 MOOLLA.  
 ———  
 RUTLEDGE,  
 C.J., AND  
 BROWN, J.

We have perused the records in the case and it seems clear to us that while all other points were settled between the parties, the question of the rate of interest was left to the decision of the Court, not, as Mr. Burjorjee would have it, as an arbitrator or *persona designata*, but the Court exercising its ordinary Original Jurisdiction. That being so, an appeal lies in the ordinary way from the Court's decision.

The written statement, we may note, was filed after the parties had entered into their agreement of 21st November 1925. The promissory notes in suit have the following provisions "On demand I, the undersigned, Mahomed Ebrahim Moolla promise to pay Mr. S. T. Andrews or order the sum of Rupees One hundred thousand bearing interest at one per cent. per mensem, or, if paid monthly in advance, at  $11\frac{1}{3}$  annas for each Rs. 100 per mensem."

The learned Judge has held that the higher rate of interest amounts to a penalty within the meaning of section 74 of the Indian Contract Act and relies on a decision of the Calcutta High Court, 22 C.W.N., page 226. It was not pointed out to the learned Judge that that decision had been overruled by their Lordships of the Privy Council very distinctly, in *Moti Lal Das v. The Eastern Mortgage and Agency Co. Ltd.* (1), where Sir John Edge observes at page 271: "The trial Judge rightly held that the  $9\frac{1}{2}$  per cent. interest was not penal interest. The decree of the High Court must be varied in the manner hereafter mentioned." The final decision, therefore, in that case, so far from supporting the learned Judge, was a clear decision to the contrary.

Reliance has been placed on the course of conduct between the parties in that Andrews never charged

(1) (1920) 25 C.W.N. 265.

the higher rate of interest though default had been made in payment and that Andrews by his letter to the respondent dated the 5th May 1920 states: "I will not require you to pay interest at the higher rate if you pay it to my credit to Messrs. Thos. Cook & Sons, Rangoon branch, within five days of the due date of payment at the lower rate." In order, however, to avail himself of this concession by the creditor, respondent would have to show that he had in fact complied with the condition, which he manifestly did not do.

In our opinion, section 74 does not apply to the transaction at all. Respondent promised to pay interest at 12 per cent. on the loan, but he had the option of paying the interest in advance monthly and in such case a lower rate of interest would be charged. We can see nothing in the nature of a penalty in this arrangement and while a creditor like Mr. Andrews can make any concession to his debtor which he may choose, a person in a fiduciary relationship like the Administrator-General has no power to make such concession.

For these reasons, we consider the decision of the trial Court wrong. We accordingly allow the appeal and declare the interest to be 12 per cent. per annum. The appellant is entitled to costs ten gold mohurs.

1927

ADMINIS-  
TRATOR-  
GENERAL OF  
BURMA

v.

M. E.  
MOOLLA.RUTLEDGE,  
C.J., AND  
BROWN, J.