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to the nature of the question, that the defendant may be allowed the benefit of our opinion, but he cannot be allowed the costs of this appeal. The decree will, therefore, be varied by substituting a fifth share instead of a fourth share, and the appellant must bear his own costs in this Court.

Decree varied.

APPELLATE CIVIL.

FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Birdwood, Mr. Justice Jardine and Mr. Justice Farran.

UMARKHA'N MAHAMADKHA'N DESHMUKH, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SA'LEKHA'N AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Interest—Enhanced rate in default of payment—Penalty—Liquidated damages—Contract Act (IX of 1872), Sec. 74.

A proviso for retropective enhancement of interest, in default of payment of the interest at a due date, is generally a penalty which should be relieved against, but a proviso for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties.

THIS was a second appeal from the decision of Ráo Bahádur Ganpat Amrit Mánkar, First Class Subordinate Judge of Thána with appellate powers.

The plaintiff, Umarkhán Mahamadkhán Dêshmukh, sued to recover from the defendants a sum due under a mortgage-bond.

The portion of the mortgage-bond material for the purposes of this report was as follows :—

"* * And as to the assessment and dues due to the Sarkár together with *zamíndár's* cesses which are now payable and which may hereafter, on a survey being made, be decreased or increased, the same are mine. I will be paying the same as I have been paying them up to this time. You have nothing to do with the (payment of the) *dhára* (*i.e.* assessment); should you perchance

* Second Appeal, No. 356 of 1890.

have to pay the assessment, then interest on whatever amount you may have to pay on account of such *dhára* is to be calculated at the rate of one rupee per cent. per month, and should the balance out of the interest in *bhat* (paddy) remain unpaid, the interest in *bhat* is to be calculated at the rate of a quarter as much, that is, 25 per cent., *vádh savái pramáne*. As to these, together with the principal sum, whatever the total amount may be found to be due to you on making the account, I will pay off the same at once. * * * *"

The defendant Sálekhán admitted the execution of the mortgage-bond, but disputed the plaintiff's right to recover the amount claimed.

The High Court remanded the case for the decision on certain issues, including the following:—

"Whether the high rate of interest agreed to be paid on interest not paid in any given year than on the principal, rendered the contract to that extent a penal one."

The above issue was found by the lower Appellate Court in the affirmative, and the plaintiff appealed against the finding.

Mahádeo Chimnáji Apté for the appellant.

Ghanáshám N. Nádkarni for the respondents.

After argument the Appeal Court (Sargent, C. J., and Birdwood, J.) made the following order of reference:—

Having regard to the conflict of decisions between *Pava* v. *Govind*[1] and *Raghunathráv* v. *Yashvant*[2] on the one hand and *Dallabhdas* v. *Lakshmandás*[3] on the other, we think it right to refer it to a Full Bench to decide—

Whether a clause in a bond enhancing the rate of interest on default of payment of the principal debt and interest at the time fixed is to be regarded as a penalty?

The case subsequently came on for argument before a Full Bench consisting of Sargent, C. J., Bayley, Birdwood, Jardine and Farran, JJ.

(1) 10 Bom. H. C. Rep., p. 382 (2) P. J. for 1882, p. 223,
(3) I. L. R., 14 Bom., 200.

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Mahádeo Chimnáji Apté for the appellant:—The stipulation in the document with respect to the payment of interest on interest is not a penalty. The bond itself was passed for the amount due upon a sum under a former bond. The stipulation amounts to an agreement to pay compound interest. It is as damages and not as a penalty that higher interest is claimed on the balance of interest, which was to be paid in kind and not in cash. We admit that, if the enhanced rate be claimed from the date of the bond, it would be a penalty, but it is not so where it is claimed from the date of default. The agreement in question is of the latter kind. There is no conflict in the Bombay decisions so far as the first proposition is concerned; but with respect to the second, there is, we contend, that if a higher rate is to run from a subsequent date, it is not a penalty, having regard to the provisions of the Indian Contract Act (IX of 1872), section 74—*Rasáji* v. *Sáyana*(1) decided before the Indian Contract Act came into force; *Pava* v. *Govind*(2); *Dullabhdás* v. *Lakshmandás*(3); *Raghunáthráo* v. *Yashvant*(4); *Mackintosh* v. *Crow*(5); *Nanjáppa* v. *Nanjáppa*(6). The latter two rulings are expressly dissented from in *Báij Náth* v. *Shák Ali*(7), which lays down that a higher rate of interest is not of the nature of penalty under any circumstances. The same principle is laid down in *Basavayya* v. *Subbarazu*(8); *Rái Balkishen Dáss* v. *Rája Run Bahádursingh*(9); *Appa Rau* v. *Suryanárayana*(10); *Sájaji Panháji* v. *Máruti*(11). *Joshi Kálidás* v. *Koli Dáda Abhesing*(12) is not applicable, because there the agreement was to pay double the amount of the entire debt on default of payment of one instalment, and, therefore, it was held to be in the nature of a penalty—*Arulu* v. *Wakuthu*(13); *Adánky Rámchandra Ráo* v. *Indukuri*(14). In the last case the enhanced rate of interest was 75 per cent., and yet it was held to be not a penalty.

(1) 6 Bom. H. C. Rep., A. C. J., 7.
(2) 10 Bom. H. C. Rep., 382.
(3) I. L. R., 14 Bom., 200.
(4) P. J., 1882, p. 223.
(5) I. L. R., 9 Calc., 689.
(6) I. L. R., 12 Mad., 161.
(7) I. L. R., 14 Calc., 248.
(8) I. L. R., 11 Mad., 294.
(9) L. R., 10 I. A., 162.
(10) I. L. R., 10 Mad., 203.
I. L. R., 14 Bom., 274.
(12) I. L. R., 12 Bom., 555.
(13) 2 Mad. H. C. Rep., 205.
(14) 2 Mad. H. C. Rep., 451.

Ghánashám N. Nádkarni for the respondents:—This is a penalty and not compound interest. The intention to pay compound interest must be clear on the face of the document. A Court of equity will not give effect to the clause in this mortgage—*Peachy* v. *Duke of Somerset*(1). The bond provides that a particular rate of interest shall be paid on the principal, but if the interest is unpaid, a higher rate of interest shall be paid on the balance of interest remaining unpaid. This is not compound interest. The clause in the bond is a threat to the debtor for the purpose of securing regular payments of interest, and ought to be relieved against—*Bansidhar* v. *Bu Alí Khán*(2); *Khurram Singh* v. *Bhaváni Baksh*(3); *Dip Naráin Rái* v. *Dipan Rai*(4); *Rasáji* v. *Sáyana*(5). The parties did not really contemplate that the enhanced rate should be levied. The rule of equity laid down in *Sloman* v. *Walter*(6) should be followed. Section 74 of the Indian Contract Act (IX of 1872) supports our contention.

The earlier cases decided by the Bombay Court make no distinction between a condition to pay enhanced rate from the date of the document and to pay such a rate from a subsequent date —*Páva* v. *Govind*(7); *Raghunáthráv* v. *Yashvant*(8); Coote on Mortgage, p. 957; *Dickson* v. *Longh*(9); *Tikamdás* v. *Ganga*(10). The idea of making a distinction with respect to a clause being penal or otherwise was for the first time started in *Dullabhdás* v. *Lakshmandás*(11). Section 74 of the Indian Contract Act (IX of 1872) does not interfere with the Court's equitable jurisdiction.

The judgment of the Full Bench was delivered by

SARGENT, C. J.:—The question raised by this reference is one on which there has been a great diversity of judicial decision and opinion in the several High Courts of India. As to this Court,

(1) White and Tudor's Leading Cases, Vol. II, p. 1245.
(2) I. L. R., 3 All., 260.
(3) I. L. R., 3 All., p. 440.
(4) I. L. R., 8 All., 185.
(5) 6 Bom. H. C. Rep., A. C. J., 7.
(6) White and Tudor's Leading Cases Vol. II, p. 1257.
(7) 10 Bom. H. C. Rep., p. 382.
(8) P. J., 1882, p. 223.
(9) Irish Reports, Vol. XVIII, p. 518.
(10) 11 Bom. H. C. Rep., p. 203.
(11) I. L. R., 14 Bom., 200.

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however, we cannot doubt that until the Judges who decided the cases of *Dullabhdás* v. *Lakshmandás* (1) and *Sajáji* v. *Máruti*(2) reviewed the decision in *Rasáji* v. *Sayana*(3), *Motoji* v. *Shekh Husen*(4) and *Pava* v. *Govind*(5) by the light of the more recent decisions of the other High Courts, it has been always considered that an enhancement of the rate of interest in default of payment of the principal sum and interest at the day fixed in the bond was in the nature of a penalty whether the enhancement was retrospective taking effect from the date of the loan, or was prospective from the date of default of payment. An examination of the facts in *Motoji* v. *Shekh Husen* and *Pava* v. *Govind* can leave no doubt, we think, that the Court was in both cases dealing with prospective enhancement of interest, and in *Raghunáthráv* v. *Yashwant* (6), where it is plain that the question was as to the enhancement of interest from the day fixed for payment of the instalments, Melvill and West, JJ., treated as well settled by the decisions in *Rasáji* v. *Sáyana*, *Pava* v. *Govind* and *Tikamdás* v. *Ganga* (7) that the agreement to pay such increased interest was a penalty, and ought not to be enforced.

The effect of the recent decisions in *Dullabhdás* v. *Lakshmandás* and *Sajáji* v. *Máruti* is doubtless to distinguish between prospective and retrospective enhancement and to hold that the latter only is in the nature of a penalty,—a distinction apparently suggested to the Court by the judgment of Wilson, J., in *Mackintosh* v. *Crow* (8) disapproving of the decision of Kemp and Pontifex, JJ., in *Bichook Náth* v. *Rám Lochun* (9). That learned Judge treated the question as one to be determined exclusively by section 74 of the Contract Act, and whilst admitting that retrospective enhancement of interest may be a penalty, observed that "where the contract is merely, that if the money is not paid at the due date, it shall *thenceforth* carry interest at an enhanced rate, he did not see how it could be said that there is any sum named as to be paid in case of breach. No one can say

(1) I. L. R., 14 Bom., 200.
(2) I. L. R., 14 Bom., 274.
(3) 6 Bom. H. C. Rep., A. C. J., 7.
(4) 6 Bom. H. C. Rep., A. C. J., 8.
(5) 10 Bom. H. C. Rep., 382.
(6) P. J., 1882, p. 223.
(7) 11 Bom. H. C. Rep., p. 203.
(8) I. L. R., 9 Calc., 689.
(9) 11 Beng. L. R., 135.

at the time of the breach what the sum will be." In *Mackintosh* v. *Hunt*(1) Garth, C. J., and Macpherson, J., had already decided that section 74 of the Contract Act was not applicable to the case of prospective enhancement of interest. In *Báij Náth* v. *Sháh Ali*(2) however, we find Mitter and Macpherson, JJ., holding that the Contract Act is not applicable to either class of cases whether the interest be retrospective from the date of the loan or prospective after default, because they say "in neither case is a sum named in the contract as the amount to be paid in case of breach."

We agree with this view of the above section of the Contract Act, the sole object of which would appear to have been to provide for the class of cases to which *Kemble* v. *Farren* (3) belongs, and in which the distinction between "liquidated damages" and "penalty" has given rise to so much difference of opinion in the English Courts. They are fully discussed by Sir G. Jessel and the rest of the Court in *Wallis* v. *Smith* (4). Assuming, then, that the question under consideration has to be decided, as we think it must, independently of section 74 of the Contract Act, is the Court precluded by section 2, Act XXVIII of 1855, from affording relief in any case? The Calcutta Court in *Báij Náth* v. *Sháh Ali* (5) express the opinion that the only law applicable is section 2 of Act XXVIII of 1855, which says that "in any suit in which interest is recoverable the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties," and that the decision of the Privy Council in *Bálkishen Dáss Rái* v. *Rája Run Bahádhur Singh*(6) supported that view. In that case the question turned upon the construction of a compromise or *solehnamah* embodied in a consent decree, and the Privy Council differing from the High Court (see page 165) expressed an opinion that neither the proviso that an enhanced interest at 12 per cent. instead of 6 per cent. should be paid from the date of the compromise in default of payment of the first instalment of the debt at the due date, nor the proviso for the same enhancement of interest on the en-

(1) I. L. R., 2 Calc., 206.
(2) I. L. R., 14 Calc., 248.
(3) 6 Bing., 141.
(4) 21 Ch. Div., 243.
(5) I. L. R., 14 Calc., at p. 254.
(6) L. R., 10 I. A., 162.

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tire decretal money from the date of default of payment of any instalment other than the first until realization, was a penalty from which the debtor ought to be relieved. But we cannot agree with the Calcutta Court that it supports the view taken by that Court with respect to the application of section 2, Act XXVIII of 1855. The Privy Council do not allude to the Act in their judgment, but they treat the question exclusively as one, whether the proviso for enhancement was a penalty to be relieved against or an alternative stipulation. However, the effect of the above Act was considered by Sir M. Westropp in *Páva* v. *Govind* [1], where he says the equitable jurisdiction to relieve against penalties was not taken away by Act XXVIII of 1855,—a view of the Act which is in accordance with that expressed by Pontifex, J., in *Bichook Náth* v. *Rám Lochun* [2], and which has always been acted on in this Court.

Passing, then, to the consideration of the question whether equitable relief should be afforded by the Court against a proviso for enhancement of interest in default of the payment of the principal sum, we cannot agree with the opinion expressed by the Calcutta Court in *Baij Náth* v. *Sháh Ali*, that the decision of Mr. Justice Wilson and all the other similar cases cited by him in his judgment in *Mackintosh* v. *Crow* [3] must be considered as necessarily overruled. Every case of this nature, as pointed out by Pontifex, J., in *Bichook Náth* v. *Rám Lochun* [4], must depend on its own circumstances. The instrument which their Lordships had to construe in *Bálkishen Dass Rái* v. *Rája Run Bahádur Singh* [5] was of a very special character, and their decision that the provisos providing for an enhanced rate of interest, retrospective and prospective, were not of the character of a penalty, but alternative stipulations, can only be regarded as a decision on the language of that particular instrument. The English cases show that it is regarded as settled law that where an ascertained definite sum of a less amount is to be paid at a certain day, in default of which a large sum is to be paid, the Court will treat the latter as a penalty. It is so stated by the Judges in *Astley*

(1) 10 Bom. H. C. Rep., 382.
(2) I. L. R., 9 Calc., 689.
(3) 11 Beng. L. R., 135.
(4) 11 Beng. L. R., 135.
(5) L. R., 10 I. A., 162.

v. *Weldon*[1]. Sir G. Jessel assumed it to be so settled in *Wallis* v. *Smith*[2], and Lord Justice Lindley in his judgment in that case makes the following remark:—"Whether relief was given on the theory of oppression, or on the theory that the parties could not have meant what they said, or whether by reason of the usury law. But it has long been settled that where a person agrees to pay a larger sum if he does not pay a small one, he does not mean what he says, and the contract is not to have the effect that one would suppose it was intended to have." It is in virtue of this rule that it had been decided in *Holles* v. *Wyse*[3] and *Strode* v. *Parker*[4], that where the interest in a mortgage is fixed at a certain rate to be paid at fixed intervals, a proviso that if the interest is not paid punctually a higher rate shall be charged, is a penal clause, and will not be enforced. However, in *Burton* v. *Slattery*[5], the principal debt was payable by instalments with interest at 5 per cent., with a proviso that if not paid punctually the debtor was to pay 8 per cent., and the House of Lords directed the account to be taken on the basis of 5 per cent. on the instalments up to due date, but 8 per cent. subsequently up to payment. No reasons are given by the House of Lords for their decision, and it cannot, therefore, be said with certainty whether they considered the proviso for prospective enhanced interest to be not in the nature of a penalty, or a reasonable one which should not be relieved against. The decision in *Mackintosh* v. *Crow*[6], where the interest after default in payment at due date was thenceforth to be 10 per cent., may be supported on the latter ground, even if the proviso be regarded as a penalty.

Upon this review of the authorities we think the safer conclusion is that a proviso for retrospective enhancement of interest, in default of payment of the interest at due date, is generally a penalty which should be relieved against, but that a proviso for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the

(1) 2 B. & P., 346.
(2) 21 Ch. Div., at pp. 274-5.
(3) 2 Vern., 289.
(4) 2 Vern., 316.
(5) 5 Brown's Parliamentary Cases, 233.
(6) I. L. R., 9 Calc., 689.

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primary contract between the parties, as may well be deemed to have been the case in *Bichook Náth* v. *Rám Lochun*(1) and *Pava* v. *Govind* (2).

JARDINE, J.:—I concur in the general conclusion at the end of the learned judgment of the Chief Justice as an answer to the question which is propounded in general terms by the Division Bench. As one of the Judges who decided *Dullabhdás* v. *Lakshmandás*(3) and *Sájaji* v. *Maruti*(4) I wish to add that, in my opinion, this conclusion does not conflict with those decisions. In the latter case we observed:—"As laid down by the Privy Council in *Dimech* v. *Corlett*(5), the hinge on which the decision in every particular case turns, is the intention of the parties collected from the language they have used." In dealing with the authorities, the expressions of every Judge must be taken with reference to the case on which he decides—*Richardson* v. *Mellish*(6). I would further add my concurrence in the view expressed that the equitable jurisdiction to relieve against penalties is not taken away by Act XXVIII of 1855—*Pava* v. *Govind*(7), and I think it unnecessary to express a final opinion on the scope of section 74 of the Indian Contract Act, 1872.

Decree confirmed.

(1) 11 Beng. L. R., 135.
(2) 10 Bom. H. C. Rep., 382.
(3) I. L. R., 14 Bom., 200.
(4) I. L. R., 14 Bom., 274.
(5) 12 Moore P. C. C. at p. 229.
(6) 2 Bing., at p. 248.
(7) 10 Bom. H. C. Rep., 382.

APPELLATE CIVIL.

Before Mr Justice Jardine and Mr Justice Telang.

1892. *April* 4.

GOJA'BA'I AND ANOTHER, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHRIMANT SHA'HA'JIRA'O MA'LOJI RA'JE BHOSLE, (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Inheritance—Stridhan—Devolution of stridhan belonging to a childless widow—Grandson—Co-widow—Husband's nephew—Sapindas.

A childless Hindu widow died, possessed of *stridhan* consisting of ornaments given to her on her marriage and of a house purchased by her out of her own separate income. She left her surviving (1) a co-widow; (2) the plaintiff, who was grandson of another co-widow; and (3) a nephew (*i. e.* brother's son) of he husband. She had been married in one of the approved forms.

* Appeal No. 57 1890.