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realization" we have an indication that the legislature contemplated that the assets referred to should be assets held in the process of execution. If we were to hold that money paid into Court under Order XXI, Rule 55, was assets held by the Court within the meaning of section 73, we should be only nullifying the provisions of Rule 55; for, there would be no inducement to any judgment-debtor to procure a payment into Court of the amount of the claim of his attaching creditor if the money could at once be absorbed by rateable distribution amongst a number of other creditors.

For these reasons, we reverse the order of the lower appellate Court, set aside the sale, and remand the dakhast to the lower Court for disposal according to law.

The appellant will have his costs in this Court and the two lower Courts.

Order reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

VELCHAND CHHAGANLAL (ORIGINAL PLAINTIFF), APPELLANT, v.

A. FLAGG AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Contract Act (IX of 1872), section 74—Loan—Default in payment—Enhanced interest—Interest calculated in anticipation added to principal—Penalty—Relief against penalty.

The defendant received Rs. 2,440 on a bond which he executed for Rs. 5,500 in the plaintiff's favour. The balance of the amount of the bond was made up of interest calculated upon the sum of Rs. 6,000 for 39 months at the rate of 1½ per cent. per mensem added in advance. The amount was made re-payable in monthly instalments of Rs. 50 for the first 12 months and after that of Rs. 100 for another 26 months and the balance at the end of the 39th month. In case of default in payment of any instalment, the whole amount of the bond became due at once; but if the plaintiff waited longer the defendant agreed to pay interest at 5 per cent. per month till payment. There was default in payment; and the plaintiff sued to recover the amount of the bond together with interest at 5 per cent. per month. The Sub-

* First Appeal No. 187 of 1910.

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ordinate Judge held that the stipulation for addition of interest in anticipation in the amount of the bond as also the stipulation for enhanced interest at the rate of 5 per cent. per month on default were unenforceable at law and awarded the plaintiff's claim for Rs. 2,440 with interest at the rate of $1\frac{1}{2}$ per cent. per month.

Held, that both the stipulations were penal and therefore not enforceable in full by reason of the provisions of section 74 of the Indian Contract Act, 1872.

FIRST appeal from the decision of G. V. Saraya, First Class Subordinate Judge at Ahmedabad.

Suit to recover money on a bond.

The bond in question was executed by Lieut. A. Flagg for Rs. 5,500 on the 29th September 1908 to Velchand Chhaganlal. It was signed by Lieut. G. W. Atkins as surety. It ran as follows :—

“Borrowed and received from Chaganlal Panachand, bankers, Nasirabad, the sum of Rs. fifty-five hundred only (Rs. 5,500), which sum we jointly or severally agree to repay the firm or their manager Velchand in Ahmedabad or at their option at Nasirabad or elsewhere in monthly instalments of Rs. 50 for the first 12 months and after that of Rs. 100 for another 26 months and the balance at the end of the 39th month. Instalments to be given from the 5th November 1908.

If we fail to pay any one instalment on due date as agreed above we jointly or severally promise to pay the whole amount of the bond at once on demand.

But if the firm wait any longer we agree to pay interest at 5 per cent. per month till payment in full.”

Under the bond Lieut. A. Flagg received Rs. 2,440 in cash; Rs. 50, the first instalment which had become due then, was treated as paid; and Rs. 3,520 were added as interest calculated on Rs. 6,000 at the rate of $1\frac{1}{2}$ per cent. per month. The amount of the bond was at first fixed at Rs. 6,000; but it was reduced to Rs. 5,500 on the defendant's pledging his life policy with the plaintiff.

The first instalment which became due in November 1908 was taken as paid. There was default in payment of the December instalment. The defendant did not pay any of the remaining instalments in time, though he paid Rs. 886 to the plaintiff in small sums.

The plaintiff filed this suit on the 1st April 1910, to recover the unpaid balance of Rs. 5,500 and claimed interest over it from December 1908 to the date of the suit at the rate of 5 per cent. per mensem.

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The Subordinate Judge found that the amount actually advanced under the bond was Rs. 2,440, which he decreed in plaintiff's favour, with interest at the rate of $1\frac{1}{2}$ per cent. per month. He held that both the stipulation for addition of interest in the amount of the bond, and the stipulation to pay further interest at the rate of 5 per cent. per month were unenforceable at law.

The plaintiff appealed to the High Court.

Coyaji, with *Ratanlal Ranchhoddas*, for the appellant.

The respondents did not appear.

The following cases were referred to in the course of argument:—*Velchand v. Manners*⁽¹⁾; *Hari v. Ramji*⁽²⁾; *Prayag Kapri v. Shyam Lal*⁽³⁾; *Rai Balkishen Dass v. Raja Run Bahadoor Singh*⁽⁴⁾; and *Kirti Chunder Chatterjee v. J. J. Atkinson*⁽⁵⁾.

SCOTT, C. J.:—The appellants are a firm of money-lenders who through the agency of a firm of commission agents in Bombay advanced to the first respondent a sum of Rs. 2,440 on or about the 14th of October 1908. Prior to that payment an agreement upon a stamped paper of Rs. 30 was signed by the first respondent for whose benefit the payment was made. By that agreement he stated that he had received from the appellants Rs. 5,500 which he and the second defendant, who was then intended to sign as a surety, agreed to repay in Ahmedabad or at the option of the appellants in Nasirabad or elsewhere in monthly instalment of Rs. 50 for the first 12 months and after that of Rs. 100 for another 26 months and the balance at the end of the 39th month, the instalments to begin from 5th November 1908. And it was stipulated in two subsequent clauses as follows:—"If we fail to pay any one instalment on due date as agreed above we jointly or severally promise to pay the whole amount of the bond at once on demand. But if the firm waits longer we agree to pay interest at 5 per cent. per month till payment in full."

(1) (1909) 25 T. L. R. 329.

(2) (1903) 31 Cal. 133.

(3) (1904) 28 Bom. 371.

(4) (1883) L. R. 10 L. A. 162.

(5) (1906) 10 C. W. N. 640.

The second respondent signed the agreement as surety on the 14th of October 1908, the date upon which the payment of Rs. 2,440 was made.

It is noted by the learned Subordinate Judge that the balance of Rs. 5,500 is made up of interest calculated upon the sum of Rs. 6,000 for 39 months at the rate of $1\frac{1}{2}$ per cent. per mensem added in advance. That would make a rate of interest exceeding 3 per cent. per mensem upon the original advance. At the time of the suit the 39 months' period had not expired, for the suit was filed upon the 13th of April 1910. But the plaintiffs alleged a cause of action by reason of the failure of the respondents to pay due instalments after demand made. That cause of action arises under the first stipulation which we have referred to. The plaintiffs base a claim for interest at 5 per cent. per month upon the second of the stipulations referred to.

The learned Subordinate Judge has come to the conclusion that both these stipulations upon which the claim in the suit is based are penal and therefore not enforceable in full by reason of the provisions of section 74 of the Indian Contract Act, and he refers to illustration (g) to that section as showing that this is a case to which section 74 is directly applicable. That illustration runs as follows:—"A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty." Again, the stipulation whereby interest at 5 per cent. per month is payable upon the sum due is a stipulation for increased interest from the date of default which, as the explanation of the section shows, may be a stipulation by way of penalty. In the present case it is a stipulation to pay 60 per cent. interest upon a sum which is originally made up very largely of interest at an exorbitant rate. We have, therefore, no hesitation in holding that the second stipulation also is one by way of penalty.

Various money-lenders' cases have been cited to us decided by the Indian Courts and one decided by Mr. Justice Darling in

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the King's Bench Division in England. The English case appears of considerable similarity to the present one and the plaintiffs were the same in both cases suing upon agreements in very much the same form. It is to be observed, however, that the provisions of section 74 and its illustration (g) were not brought to the notice of the learned Judge. Similarly in the Indian cases section 74, as amended by Act VI of 1899, does not seem to have been brought to the notice of the Court in argument.

We are of opinion that the learned Subordinate Judge has rightly decided this case. He has allowed one-and-a-half per cent. per mensem, that is, interest at 18 per cent. upon the amount actually due in respect of sums advanced. This we have no doubt is reasonable compensation.

We affirm the decree and dismiss the appeal.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

ABDUL REHMAN BAPUSAHEB AND OTHERS (PLAINTIFFS) v.
CASSUM EBRAHIM AND OTHERS (DEFENDANTS).*

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*Civil Procedure Code (Act V of 1908), section 92—Sanction of Advocate-General—
Plaint amended—New defendant and prayers added—No sanction of Advocate-
General to amendments.*

Two plaintiffs as relators, having previously obtained the sanction of the Advocate-General under section 92 of the Civil Procedure Code, filed a suit against three defendants in respect of certain charitable properties. When the suit was called on for hearing two of the defendants were struck off and the plaintiffs asked for and obtained leave to add another person as defendant and they amended the plaint and prayed for certain reliefs against the added defendant. No sanction

* Suit No. 450 of 1909.