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"further the objection should have been made on the 5th instant." The same day he decreed the suit in accordance with the terms of the award.

The Lower Appellate Court was of opinion that the rule of 10 days, limitation did not apply to this case and decreed the defendant's appeal holding that the "Munsif was wrong in refusing to hear the objection of the defendant" and remanded the case "for trial of the objection preferred by the defendant."

There is no reported case exactly in point. But by way of analogy I may refer to the case of *Malkarjun* v. *Narhari* (1) in which their Lordships of the Privy Council did not dissent from the principle that, where a judicial sale is null and void *ab initio*, and therefore a nullity in law, the rule of one year's limitation under Art. 12 of the Limitation Act would not apply to a suit [43] brought in order to the setting aside of the sale. The Bombay High Court had held that the particular sale in question was a nullity and that Art. 12 had therefore no application. Their Lordships of the Privy Council reversed that finding on the ground that the sale had been held with jurisdiction and was therefore not a nullity.

In the case under consideration the objection taken was that the award was a forgery. If so, it would be a nullity, and I think the Munsif was bound to enquire into the genuineness of the signatures impugned.

For these reasons I am of opinion that the decision of the Lower Appellate Court is correct, and I would dismiss this second appeal preferred by the plaintiff with costs.

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Before Mr. Justice Rampini and Mr. Justice Gupta.

RAMESWAR PROSAD SINGH *v.* RAI SHAM KISHEN.*

[28th and 29th May, 1901.]

Interests—Enhanced rate of interest on failure to pay on due date—Penalty—Contract Act (IX of 1872), s. 74—Mortgage—Compound interest at a rate higher than that of simple interest—Interest at contract rate up to the date fixed by Court for payment of mortgage money—Subsequent interest at rate to be fixed by Court.

A provision in a bond to the effect that the principal should be repaid with interest on the due date, and that on failure thereof interest should be paid at an increased rate from the date of the bond amounts to a provision for a penalty, and under the terms of s. 74 of the Contract Act, reasonable compensation should be allowed.

***Kalachand Kyal* v. *Shib Chunder Roy* (2) followed; *Chajmal* v. *Brij Bhukan* (3) referred to.**

Stipulation for the payment of compound interest at a rate higher than that of simple interest is a penalty which should not be allowed.

[44] *Baid Nath Das* v. *Shamanand Das* (4) followed.

In a mortgage decree interest at the contract rate should be allowed up to the date fixed by the decree for the repayment of the money due, and after that date at such rate as the Court may fix.

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* Appeal from Original Decree No. 328 of 1900, against the decree of Moulvie Abdool Barry, Subordinate Judge of Patna, dated the 31st of May 1900.

(1) (1900) I. L. R. 25 Bom. 337.
(2) (1892) I. L. R. 19 Cal. 392.
(3) (1895) I. L. R. 17 All. 511.
(4) (1894) I. L. R. 22 Cal. 143.

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Rameswar Koer v. *Mahomed Mehdi Hossein Khan* (1): *Maharaja of Bharatpur* v. *Ram Kanno Dei* (2); *Bakar Sajjad* v. *Udit Narain Singh* (3) referred to.

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APPEAL by the defendant Rameswar Prosad Singh and cross-appeal by the plaintiffs, Rai Sham Kishen and others.

This suit was instituted to recover Rs. 11,23,147, being principal and interest and compound interest due under two mortgage bonds, dated the 19th of June 1888, and the 15th June 1891 respectively. The first bond is for Rs. 4,35,000 and the second bond is for Rs. 1,65,000. The first bond, among other things, stipulates that interest upon the amount borrowed is to be paid at 14 annas per cent. per month with 6 monthly rests, that, if interest be not paid at the end of 6 months, then compound interest upon the interest due will be charged at Rs. 1-8 per cent. per month, that interest is to be calculated according to the Hindi calendar, and that, if interest be not paid for one year, then the bond debt will carry interest at Re. 1 per cent. instead of 14 annas per mensem from the date of the bond. Similar stipulations are also made in the second bond with this modification that the original interest is 12 annas instead of 14 annas.

The defendant pleaded that a single suit upon both the bonds was untenable, that out of the amount covered by the bond of the 19th June 1888, he did not receive Rs. 35,000, and that he also did not receive Rs. 20,000 out of the money secured by the bond of the 15th June 1891, that the amount of interest alleged to have been due under the first bond, was less than what was then incorporated in the second bond, that the stipulation for payment of interest at the increased rate of 1 per cent. per mensem from the date of the bond was in the nature of a penalty, **[45]** that the stipulation about the compound interest and specially at a higher rate was in the nature of a penalty, that after the execution of the bond the plaintiff agreed not to charge compound interest, that the interest was not a charge upon the mortgaged property, that the stipulations in the bond were inserted on account of defendant's confidence in his creditors, the plaintiffs, and under their undue influence, that the plaintiffs were not entitled to get interest and compound interest of intercalary months, and that the amount found due be decreed to be paid in instalments of Rs. 50,000 per year.

The Subordinate Judge held that the defendant was liable for the full amount of the two bonds, excepting two sums of Rs. 8,700 and Rs. 3,300, which according to him was proved to have been appropriated by the plaintiffs at the time of the execution of the bonds and which sums he disallowed. He further held that the stipulation for the payment of the higher rate of interest from the date of the bond was a penalty, but he allowed the plaintiff compensation at the same rate from the date of the bonds. He next found that the agreement to pay compound interest at a rate higher than that of simple interest was not in the nature of penalty. By his decree he allowed interest on the amount of the principal at the contract rate until actual realization, but after the expiration of six months from the date of the decree the amount due for interest and costs was to carry interest at 6 per cent. per annum.

(1) (1898) I. L. R. 26 Cal. 39.
(2) (1901) L. R. 28 I. A. 35.
(3) (1899) I. L. R. 21 All. 361.

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Dr. *Rash Behari Ghose*, Babu *Caruna Sindhu Mookerjee* and Babu *Satish Chunder Ghose* for the appellant.

Moulvie *Mohomed Yusoof*, Dr. *Ashutosh Mukerjee* and Moulvie *Mahomed Mustafa Khan* for the respondent.

JUNE 13. RAMPINI and GUPTA, JJ. The suit out of which this appeal arises is to recover a sum of Rs. 11,23,147, being the principal, interest and compound interest due upon two mortgage bonds executed by the defendant and dated the 19th June 1888 and the 15th June 1891 respectively. The first bond is for Rs. 4,35,000 and the second for Rs. 1,65,000. The conditions of the 1st bond are : (1) that the defendant **[46]** is to pay interest at as. 14 per cent. per month (that is 10½ per cent. per annum) with six-monthly rests ; (2) that on the failure to pay interest at the end of 6 months, then compound interest at the rate of 1-8 per cent. per month (or 18 per cent. per annum) is to be paid ; (3) that interest is to be calculated according to the Hindi calendar, according to which there are 13 months in each year ; and (4) that if interest is not paid for one year, then interest to run on the principal at 1 per cent. per mensem from the date of the bond. The stipulations of the second bond are similar, except that the rate of simple interest is as. 12 per cent. per month instead of as. 14 per cent. per month.

The plaintiff sues to enforce all these stipulations. But he does not claim simple or compound interest on the 1st bond from 1888 up to 15th June 1891, because he alleges there was a settlement of accounts and the simple interest due on the first bond was entered as part of the principal of the 2nd bond, while compound interest up to that date was waived by him.

The defendant, Raja Rameshwar Narain Singh, admits execution of both bonds. He, however, does his best to minimize his liabilities under them. His pleas, so far as it is necessary for the purposes of this appeal to state them, are : (1) that he did not receive Rs. 35,000 out of the alleged consideration of the first bond, or Rs. 20,000 out of the alleged consideration of the 2nd bond ; (2) that the stipulation for the payment of interest at a higher rate from the dates of the bonds in default of payment of interest and the stipulations for the payment of conpound interest at a higher rate than the rate at which simple interest was to run are penalties, which cannot be enforced.

The Sub-Judge found that the defendant had agreed to the payment of commission on the principal sums of the two bonds, that he purchased a carriage for Rs. 5,000, and some *kincob* cloth for Rs. 2,000 from two of the plaintiff's agents, that the amount of Rs. 7,000 was accordingly set off against part of the Rs. 35,000 which the defendant did not receive in cash on the execution of the first bond, and he holds the defendant liable for the full amount of the two bonds, excepting two sums of Rs. 8,700 and **[47]** Rs. 3,300 shown to have been appropriated by the plaintiff at the time of the execution of the bonds, which two sums he disallowed. The Sub-Judge in the second place holds that the stipulations for the payment of the higher rate of interest from the date of the bond is a penalty, but he allows the plaintiff compensation at the same rate from the date of the bonds. The Sub-Judge thirdly finds that compound interest is not a penalty. Finally, he decrees that the principal amounts are to carry interest at the contract rate, until actual realization, but that, after the expiration of 6 months from the date of the decree, interest and costs are to carry interest at the rate of 6 per cent. only.

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The defendant appeals and the plaintiffs cross-appeal.

We will first deal with the defendant's appeal. The grounds of this appeal, as stated by the learned pleader for the appellant, are, (1) that the defendant is not liable for the two sums of Rs. 26,300 and Rs. 16,700 out of the consideration of the two bonds, the receipt of which he does not admit, but for which the Sub-Judge has given the plaintiff a decree; (2) that the Subordinate Judge should not have allowed any compensation to the plaintiffs in lieu of the higher rate of interest, which the defendant agreed to pay on failure to pay interest for a year; (3) that the stipulations for the payment of compound interest at a higher rate than the rate of simple interest is a penalty, which cannot be enforced; (4) that the evidence shows that the plaintiffs gave the defendant to understand that he would not enforce the stipulations for the payment of interest at a higher rate, or, at all events, that they waived their rights to claim compound interest and compensation; (5) that the Subordinate Judge should not have allowed compensation from the date of the bonds; (6) that compound interest and compensation should not have been allowed for the period of the pendency of the suit; and (7) that interest at the contract rate should have been allowed only up to the date fixed for payment, *i.e.*, up to 6 months from the date of the decree.

We think it will be convenient to consider these pleas under 4 heads, *viz.*, (1) the alleged non-receipt of the two sums of Rs. 35,000 and Rs. 20,000; (2) the stipulations for the payment of the increased rate of interest from the dates of the [48] bonds; (3) the stipulations for the payment of compound interest; and (4) the date up to which the contract rate of interest should be allowed.

There cannot, we think, be the slightest doubt on the evidence that the defendant understood perfectly well that the two sums of Rs. 35,000 and Rs. 20,000 out of the consideration of the two bonds were kept back in payment of the carriage and horses, the *kincob* cloth, and "commission" to the plaintiffs, and however reluctant to agree to this being done, yet he did agree to these sums being retained and disposed of in these ways, and did consciously and knowingly admit the receipt of the full consideration of the two bonds. This is apparent from the evidence on both sides. The evidence on this point on the defendant's side is most significant. The witness, Mahomed Kadir, one of his servants, speaks of the price of the carriage and horses and of the *kincob* cloth being deducted from the disputed Rs. 35,000 of the first bond, admits that *nazarana* and *salami* were deducted at the rate of 7½ per cent. and acknowledges receipt of Rs, 1,200 or 1,300 from the plaintiffs' agent, Rai Jaikishen, for his own labour. The witness, Waris Ali, formerly in the defendant's service, also speaks of *nazarana* at 6 or 7½ per cent. being deducted "according to custom," and adds: "*Nazarana* and *salami* means that there is a custom in Gya, Patna and Benares that a *mahajan*, when he lends money, deducts some commission. Those who borrow money know full well that they shall have to pay it. The go-betweens on behalf of the *mahajan* as well as those on behalf of the debtor, share with the creditor in the amount taken for *salami* and *nazarana*. When I gave information to the defendant that money was deducted for *salami* and *nazarana* he said nothing. What else could he do?" He further says:—"The carriage and horses were purchased by the Raja's own choice. The Raja generally purchases *kincob* and shawls. When I first opened negotiations with Rai Jaikishen, I was told that, if

the defendant was to borrow money from the plaintiffs, he shall have to pay *nazarana* and *salami*. I mentioned the matter to the Rajah. At first he did not agree, and then I said the plaintiffs would not advance money, unless *salami* and *nazarana* were paid. The defendant agreed to it." [49] Chatter Lal says: "Although the plaintiff had said that it was the practice of his firm to deduct *nazarana* and *salami*; and I and the Rajah knew of the alleged practice, we did not mention anything about it at the time of the execution of the bond for Rs. 1,65,000. There is thus direct evidence given by the defendant's own witnesses that the defendant knew of the deductions on account of commissions and, however he disliked the arrangement, had to assent to it, as he could have got the loan on no other terms. The terms, however, hard they were, were more favourable than the terms which the Rajah had been getting money on from other money lenders. There is evidence that he had been paying much higher rates of interest to others. The Rajah, it is to be remembered, was a man of mature age at the time of the transaction, and no undue advantage seems to have been taken of him. There is further abundant indirect evidence of the defendant's assent to the retention of the two sums he now complains he did not receive. For in the first place, as pointed out by the Sub-Judge, he never complained in his letters to the plaintiffs of the non-receipt of the Rs. 35,000 of the first bond. Secondly, in the second bond he admits the receipt of Rs. 4,35,000 under the first bond. In that second bond he pays interest on the full amount of the consideration of the first bond. Thirdly, in another bond, *viz.*, on dated 22nd February 1889, printed at page 101 of the Paper Book, he made a similar admission. Fourthly, from the plaintiffs' books, it appears he on two occasions paid interest on the full sum of Rs. 4,35,000. There are, therefore, we think, no grounds, on which he can now, years after the bonds were executed, be allowed to turn round and say he did not receive the full amounts of the consideration for these bonds.

Then with regard to the stipulations for the payment of a higher rate of interest and of compound interest, it has been strenuously contended before us by one of the learned pleaders for the appellant that there is evidence that these stipulations were never intended to be acted on, but were entered in the bonds merely as what is called a *dabao*, that is, an empty threat to frighten the defendant into punctual payment, but never to be enforced. There is, in our opinion, no satisfactory evidence to this effect. The plea is indeed [50] one which, in the circumstances of the case, cannot possibly be entertained. It is evident that no reasonable man could suppose that such stipulations could not be enforced. The defendant must have known, and, in our opinion, did know perfectly well, when he entered into them, that they were enforceable at the plaintiffs' pleasure, though he may have hoped that the plaintiffs would be merciful and not enforce them too strictly. It is evident, however, that he entered into them knowingly and consciously, simply because he was in difficulties and could not get the loans he required on easier terms elsewhere. As for the stipulation to pay higher interest in case of failure to pay interest for one year, this would seem to be clearly a penalty, as held by the Sub-Judge. The case of *Kalachand Kyal* v. *Shib Chunder Roy* (1) is sufficient authority for this view; for the higher rate of interest is payable from the date of the bonds. The learned Sub-Judge was therefore justified by the terms of

(1) (1892) I. L. R. 19 Cal. 392.

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s. 74 of the Contract Act in giving the plaintiffs reasonable compensation. He has given the plaintiffs compensation at the same rate as the defendants agreed to pay an increased interest. The Sub-Judge was justified by the terms of s. 74 of the Contract Act, in allowing such compensation. For, it would seem to be just and equitable to give effect to the stipulations of the parties perfectly understood and freely entered into, so far as they are lawful, and to set them aside only, so far as they are unlawful as being of a penal nature. (See also *Chajmal Das* v. *Brij Bhukan Lall* (1).) But the Subordinate Judge has given the plaintiffs compensation from the date of the bonds. That would seem to be giving them too much. We think the plaintiffs will be sufficiently compensated, if they get compensation at the rate allowed by the Subordinate Judge for default in paying the interest due on the second bond from the date of the default of the second bond, and as there was, at the time of the execution of the second bond, a settlement of accounts with regard to the amount due under the first bond, when the simple interest due on the principal of the 1st bond was calculated and entered as part of the principal of the second bond, and when compound interest was waived, we think the plaintiffs may be regarded as entitled to compensation for the **[51]** default in paying interest on the amount of the first bond only from the date of execution of the second bond. When the plaintiffs accepted simple interest on the principal of the first bond they may be regarded as waiving their claims to the higher rate of interest up to that date, and if they waive their rights, they need receive no compensation for infringement of them.

Then, as to the higher rate at which compound interest was to run. The case of *Baid Nath Das* v. *Shamanand Das* (2) has been cited as authority for the view that compound interest at a higher rate than the rate of simple interest is a penalty, while the decision in *Mangniram Marwari* v. *Rajpati Koeri* (3), has been relied on as an authority for the contrary view. The latter case does not deal specially with the question of compound interest at a higher rate, and it was held for reasons that do not appear to be very clear that it was a case to which the provisions of s. 74 of the Contract Act did not apply. Furthermore, the case of *Mangniram Marwari* v. *Rajpati Koeri* (3) was fully considered in the later case of *Baid Nath Das* v. *Shamanand Das* (2). We therefore prefer to follow this latter ruling, and would accordingly hold on its authority that the stipulations for the payment of compound interest at a higher rate is a penalty, which should not be allowed. The question then arises "are the plaintiffs entitled to compensation in lieu of compound interest at the higher rate stipulated for?" We think they are entitled to compound interest (which is not in itself a penalty, but a perfectly legal provision) at the same rate as that at which simple interest was stipulated for in the bond.

The last question which remains for consideration in this appeal is up to what date interest on the principal is to run. We consider that on the authority of the cases of *Rameswar Koer* v. *Mahomed Mehdi* (4), *Maharajah of Bharatpur* v. *Ram Kanno Dei* (5), and *Bakar Sajad* v. *Udit Narain Singh* (6), the Subordinate Judge was right in allowing the contract rate **[52]** of interest, but that this rate should be allowed only up to the date

(1) (1895) I. L. R. 17 All. 511.
(2) (1894) I. L. R. 22 Cal. 148.
(3) (1890) I. L. R. 20 Cal. 366.
(4) (1898) I. L. R. 26 Cal 39.
(5) (1900) L. R. 28 I A. 35.
(6) (1899) I. L. R. 21 All. 361.

fixed by our decree in this case for the repayment of the bond debts, *i.e.*, up to 3 months from the date of our decree, and that after that date interest should run at the rate of 6 per cent. only. It is to be noted that in both bonds it is most clearly stipulated that the contract rate of interest shall run and all conditions shall continue till the payment of the money covered by the bond, and as said by their Lordships of the Privy Council in the case of *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (1) "the mortgagor cannot complain, if he is made to pay no more than he contracted to pay."

After the date fixed by us for the settlement of accounts between the parties, after which date the defendant will not be entitled to redeem the mortgaged properties, it is sufficient, we think, if the mortgagees get interest on the amount then found to be due to them at 6 per cent. per annum.

We now turn to the plaintiffs' cross appeal. As stated by the learned pleader for the cross appellants the grounds of the plaintiffs' cross appeal are: (1) that all the conditions of the parties contract should be given effect to up to the date of realization; (2) that the increased rate of interest to run from the dates of the bonds is not a penalty; (3) that the Subordinate Judge has made up the accounts between the parties on a wrong principle; and (4) that the Subordinate Judge should not have disallowed the sums of Rs. 8,700 and Rs. 3,300 deducted by the plaintiffs as commission.

The most important of these are the 4th and 1st of these grounds, which will be most conveniently considered in the reverse order to that in which they have been stated. The Subordinate Judge's reason for disallowing the sums of Rs. 8,700 and Rs. 3,300, retained by the plaintiffs as commission is that such commission is bad according to a certain English Act of 1888, which embodies what in his opinion "is an equitable principle of law" against which there is no statutory provision of Indian law. In our opinion, however, no distinction can fairly be made between these two sums and the balances of the sums [53] Rs. 35,000 and Rs. 20,000 which the defendant did not receive. With the exception of the sums appropriated to the payment of the price of the carriage and horses and of the *kincob* cloth there is nothing to show how the rest of these sums was expended. It seems to us to be no good reason to allow them that it is not shown how they were expended and that the plaintiffs' books do not show that they were appropriated by them. But what is a good reason for allowing these balances would seem to us to be that from the evidence it is clear that the defendant was told from the first that he would have to allow certain sums for commission and agreed, though with reluctance, to do so, and that this subsequent conduct as already explained makes it manifest that he knew and never objected to the deductions on this ground from the considerations of the two bonds. But this reason for allowing the sums of Rs. 26,300 and 16,700 is in our opinion an equally good reason for allowing the sums of Rs. 8,700 and 3,300, and we accordingly allow them.

Then, in both bonds it is expressly agreed that all conditions of the bonds, that is, interest at the contract rate on the principal, compound interest on the interest, and interest at the higher rate for default, are to continue till realization. The Subordinate Judge has given no reason for allowing the contract rate only on the principal amount up to date of

(1) (1898) I. L. R. 26 Cal. 39.

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realization and for disallowing compound interest and compensation for default in payment of interest. It appears to us that they should be allowed up to the date on which we allow the contract rate of interest to run on the principals of the bonds. As far as we can see there is no good reason why compound interest at the modified rate we would allow the plaintiffs and compensation for the failure to pay interest should not be allowed up to the date mentioned by us above. We accordingly allow them.

The other grounds of cross appeal are not important. The stipulation for the payment of the higher rate of interest is certainly a penalty, as has been said in dealing with the appeal. In our opinion the Subordinate Judge has made up the accounts between the parties perfectly correctly. He has acted quite fairly in crediting the defendants' payments to interest in the first instance.

[54] We accordingly decree the appeal and cross appeal in the manner indicated above.

A fresh account will now be drawn up of the liabilities of the defendants to the plaintiffs, and a decree prepared according to the provisions of s. 88 of the Transfer of Property Act. The amount mentioned in the decree must be paid within three months from the date of the signing of the decree, failing which the plaintiffs will be at liberty to sell the mortgaged properties in the manner specified in the Subordinate Judge's decree. Each party to get costs in proportion to his success or failure in the appeal and cross appeal.

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29 C. 54.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

KEDAR NATH BANERJEE *v.* ARDHA CHUNDER ROY.* [31st July, 1901.]

Limitation—Bengal Tenancy Act (VIII of 1885) Schedule III, Art. 6—Limitation Act (XV of 1877) Schedule II, Art. 179—Whether an application for execution of a decree for a sum not exceeding Rs. 500, obtained by a co-sharer landlord for his share of the rent, is governed by the special rule of limitation as laid down in Bengal Tenancy Act or by the general law of limitation as laid down in the Limitation Act.

An application for execution of a decree for a sum not exceeding Rs. 500, obtained by a co-sharer landlord for his share of the rent, is governed by Article 179 of the Second Schedule of the Limitation Act (XV of 1877) and not by Article 6 of the Third Schedule of the Bengal Tenancy Act (VIII of 1885).

THE judgment debtor, Kedar Nath Banerjee, appealed to the High Court from the decision of the District Judge.

These appeals arose out of applications for execution of decrees obtained by Ardha Chunder Roy, one of several joint landlords, **[55]** for his share of the rent. The decrees, which were for sums not exceeding Rs. 500, were passed on the 21st December 1893 and were confirmed on appeal by the High Court on the 30th June 1896. On the 5th June 1899 applications for execution of these decrees were made, which did not contain the lists of properties, but the decree-holder produced a list on the 25th July 1899. On the 12th August 1899 these

* Appeal from Order No. 267 of 1900 against the order of F. E. Pargiter, Esq., District Judge of 24-Pergunnahs, dated the 15th of May 1900, affirming the order of Babu Amrito Lal Mookerjee, Munsif of Alipur, dated the 14th of February 1900.