

1902  
APRIL 23,  
23 & MAY 4,  
6.

APPELLATE  
CIVIL.

30 C. 1=  
6 C.W.N. 688.

Commissioner, and we are unable to believe the evidence of plaintiffs' witness, Nandan Singh, that at the time of the sale, Bajrangi Singh, defendant No. 4, one of those co-sharers, told him that he was purposely causing the property to be sold and purchased by Net Loll Sahu.

The case is in our opinion one of undoubted hardship. A valuable estate has been sold at a very inadequate price for an arrear of revenue which, in comparison with the total revenue on the estate, was very trifling. The law, however, does not give to the Civil Courts power to interfere with a sale on the ground of hardship, and the Commissioner of the Division, who alone had power under s. 26 of the Act to move to set aside the sale on such a ground, has not done so. His judgment in appeal has not been laid before us, and we do not know what reasons may have influenced him in his decision.

We feel bound to hold that the plaintiffs have failed to make out a sufficient case for annulling the sale, and we therefore confirm the judgment and decree of the Subordinate Judge and dismiss the appeal with costs.

*Appeal dismissed.*

30 C. 15 (=7 C. W. N. 152).

[15] APPELLATE CIVIL.

ABDUL GANI v. NANDLAL.\* [17th, 18th and 25th June, 1902.]

*Interest—Mortgage bond—Penalty—Increased rate of interest from date of default—Contract Act (IX of 1872) s. 74—Act VI of 1899, s. 4.*

A stipulation in a bond for increased interest from the date of default may be a stipulation by way of penalty, and the Courts in this country are competent to grant equitable relief against such stipulation, independently of section 74 of the Contract Act.

[Ref. 31 Cal. 233; 10 C. W. N. 1020; 11 O. C. 307.]

THE defendant, Abdul Gani, appealed to the High Court.

The defendant executed on the 1st December 1888 a mortgage bond in favour of the plaintiff for Rs. 950, stipulating to pay interest at the rate of  $1\frac{1}{2}$  per cent. per mensem and to repay the amount by the 11th March 1889. It was further provided in the bond that "if the amount be not paid within the stipulated time, the interest on the amount of loan from after the expiration of the fixed time should be charged at the rate of 5 per cent. per mensem up to the date of ultimate recovery."

The plaintiff brought the present suit on the mortgage bond, alleging that the defendant had on different dates paid Rs. 865 only, on account of principal and interest and claiming as balance due Rs. 610-10-6 as principal and Rs. 2,553-10-0 as interest, amounting to Rs. 3,164-4-6 in all.

The defendant denied liability under the bond, alleging non-receipt of consideration and contending that the bond was a *benami* transaction. With regard to the stipulation for increased interest, it was contended that the said clause was inserted in the bond as a penalty clause, at the instance of the gentleman in whose favour the deed was really executed,

\* Appeal from Appellate Decree No. 294 of 1899, against the decree of E. G. Drake, Brockman, Esq., District Judge of Gaya, dated the 3rd of September 1898, modifying the decree of Babu Baroda Prassana Shome, Subordinate Judge of that district, dated the 11th of May 1898.

and that it was not contemplated that the condition would ever be enforced.

[16] The Subordinate Judge overruled all the objections of the defendant, except as regards the increased rate of interest. In regard to this question, he held on the evidence relating to the conduct of the parties in respect of payments actually made after the due date that the real intention of the parties was that so long as the defendant voluntarily made payments in partial satisfaction of the loan, interest would be charged at the lower rate, but that, if the defendant failed to make any payment at all, or discontinued repayment of the loan, interest would be charged at the higher rate. He therefore awarded interest at the lower rate up to the date of the last payment made by the defendant, and at the higher rate on the balance of the principal for the later period. The total amount decreed was Rs. 1,399-6-3.

Both the parties appealed to the District Judge. The appeal preferred by the defendant was dismissed. On the appeal preferred by the plaintiff, which related only to the interest allowed by the Lower Court, the District Judge held that the inference as to the intention of the parties drawn by the Lower Court could not be upheld so as to override the clear terms of the bond. He accordingly decreed the suit in full. Against this decision the defendant appealed to the High Court. The plaintiff also filed a cross appeal, claiming interest at the higher rate up to the date of realization.

Babu Saligram Singh and Maulvi Mustafa Khan for the appellant.  
Babu Mahabir Sahay for the respondent.

*Cur. adv. vult.*

PRATT AND MITRA, JJ :—This is an appeal in an action for recovery of mortgage-money due on a simple mortgage for Rs. 950 dated the 1st December 1888. The money was repayable on or before the 11th March 1889 with interest at 1½ per cent. per mensem. It was, however, stipulated that "if the amount be not repaid within the time fixed, the interest on the amount of loan from after the expiration of the fixed time should be charged at the rate of 5 per cent. per mensem up to the date of ultimate recovery." The defendant paid from time to time [17] Rs. 1,567, and the suit was for Rs. 610-10-6 as principal and Rs. 2,553-10-0 as interest. The Subordinate Judge gave the plaintiff a decree for Rs. 1,399-6-3, overruling all the contentions of the defendant except as to interest after the due date. Both parties appealed, with the result that the plaintiff's claim was decreed in full by the District Judge.

The only point that requires our consideration refers to the rate of interest after the 11th March 1889. The contention of the defendant, as set forth in his written statement and pressed before us, is that the stipulation as to interest at 5 per cent. after the expiry of the due date was a penal provision, not intended to be enforced, and the plaintiff was entitled to have interest at only a reasonable rate.

It has been held in *Mackintosh v. Crow* (1), *Sajaji Panhaji v. Maruti* (2), *Nanjappa v. Nanjappa* (3), *Kala Chand Kyal v. Shib Chunder Roy* (4) and *Rameswar Prosad Singh v. Rai Sham Kishen* (5) that a provision in a bond, for payment of interest at an increased rate, from

(1) (1892) I. L. R. 9 Cal. 689.

(2) (1889) I. L. R. 14 Bom. 274.

(3) (1888) I. L. R. 12 Mad. 161.

(4) (1891) I. L. R. 19 Cal. 392.

(5) (1901) I. L. R. 29 Cal. 43.

1902  
JUNE 17, 18,  
25.

APPELLATE  
CIVIL.

30 C. 15=7  
C. W. N. 152.

the date of the bond, on failure of the debtor to pay the principal with interest on the due date, always amounts to a provision for a penalty, and section 74 of the Contract Act applies to the claim for interest at an increased rate from the date of the bond until realization. If, however, the increased rate of interest is stipulated to have operation only after the date of default, the provision has not generally been regarded as a penalty. We may refer to *Deno Nath Santh v. Nibaran Chandra Chuckerbutty* (1), *Ramendra Roy Chowdhury v. Serajuddin Ahamed* (2) and *Manoo Bepari v. Durga Churn Saha* (3) as illustrating the distinction between the two classes of cases.

In *Umar Khan v. Sale Khan* (4), which came before a Full Bench of the High Court at Bombay, all the previous cases were reviewed, and the Court came to the conclusion that "a proviso for retrospective enhancement of interest is generally a penalty which should be relieved against, but that a proviso for enhanced [18] 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 a part of the primary contract between the parties."

The covenant as to interest in the bond in *Pardhan Bhukhan Lal v. Narsing Dyal* (5) was very similar to that in the present suit, and Rampini, J. in that case observed: "The stipulation for increased rate of interest contained in the bond now sued on may be a penalty, but is not necessarily so merely because the increased rate is an exorbitant one. Whether it is a penalty or not is rather a question of fact than one of law." The case was remanded for the determination of the question, whether, in the circumstances of the case, the stipulation to pay increased rate of interest was not really a penalty against which a Court of Equity ought to grant relief.

In *Deno Nath Santh v. Nibaran Chandra Chuckerbutty* (1) the contract was to pay Rs. 20 annually as interest, and, in default, to pay interest on the consolidated amount of the principal and Rs. 20 as interest, at the rate of Rs. 3-2 per cent. per mensem. It was urged for the debtor that, having regard to the nature of the contract, the Court should hold on equitable principles that it was not enforceable, and that the plaintiff mortgagee was entitled only to reasonable compensation, and *Pardhan Bhukhan Lal v. Narsing Dyal* (5) was relied on. Banerjee, J., in dealing with the question, said: "Although it is in the power of the Court, if a proper case is made out, to refuse to enforce a clause in a contract quite independently of s. 74 of the Contract Act, no such case has been made out." Such a view is opposed to the opinion of the Full Bench of the Bombay High Court in *Umar Khan v. Sale Khan* (4) and of Rampini, J. in *Pardhan Bhukhan Lal v. Narsing Dyal* (5). The Indian Legislature has accepted in Act VI of 1899 the view of the Bombay High Court and that of Rampini, J. The Explanation to s. 74 of the Contract Act, as amended by Act VI of 1899, is "A stipulation for increased interest from the date of default may be a stipulation by way of penalty," and illustration [19] (d) run thus:—"A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per

(1) (1899) I. L. R. 27 Cal. 421.

(2) (1898) 2 C. W. N. 234.

(3) (1898) 2 C. W. N. 333.

(4) (1892) I. L. R. 17 Bom. 106.

(5) (1898) I. L. R. 26 Cal. 300, 310.

cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable." The increase from 12 to 75 per cent. is in itself sufficient, according to the illustration, for a finding that the stipulation is penal within s. 74 of the Act.

1902  
JUNE 17, 19,  
25.  
APPELLATE  
CIVIL.  
30 C. 15=7  
C. W. N. 152.

The present case is not governed by Act VI of 1899, but we are inclined to agree with the views expressed by the Judges of the High Court at Bombay and by Rampini, J. It is not very material, however, whether relief be granted to the debtor on equitable considerations or by the application of s. 74 of the Contract Act. In *Pardhan Bhukhan v. Lal Narsing Dyal* (1), the learned Judges agreed in remanding the case, Ghose, J. directing the Court below to consider the stipulation as to interest from an equitable point of view and Rampini, J. to consider the facts and circumstances of the case, with a view to determine whether the stipulation was penal within the Statute.

In the present case, not only is the increased rate of interest very high, but there is some evidence to show that the stipulation was inserted to ensure prompt payment by the debtor. The Courts below have not considered the case from the point of view that provisions as to increased interest might be penal or that relief might be granted on equitable grounds. If it be not strictly enforceable reasonable compensation should be granted to the plaintiff.

We accordingly remit the case for retrial on the question of interest after due date. As the appellant has been partly unsuccessful, we make no order as to costs.

There is a cross appeal on behalf of the respondent as to interest from the date of the decree. We need only draw the attention of the Courts below to *Rameswar Prosad Singh v. Rai Sham Kishen* (2). Interest should be awarded according to the rule therein laid down.

Case remanded.

30 C. 20 (=7 C. W. N. 314).

[20] APPELLATE CIVIL.

AGIN BINDH UPADHYA v. MOHAN BIKRAM SHAH.\*

[6th, 9th, 10th and 27th June, 1902.]

*Deeds, inspection of—Grant, construction of—Grant by way of lease—"Istemrari mokurari"—Grant for life—Tenure, permanent hereditary—Grant for maintenance—Impartible Raj—Declaratory suit—Bengal Tenancy Act (VIII of 1885), ss. 106, 107, 109—Limitation Act (XV of 1877), Sch. II, Art. 14—Civil Procedure Code (Act XIV of 1892), s. 375—Registration Act (III of 1887) ss. 17, 49.*

A grant was made of certain villages by the proprietor of an impartible Raj to his wife, in *istembrari mokurari*, at a fixed annual rent, the deed containing the following covenant: "I, the declarant, or any representatives, have and shall have no claim, right or dispute thereto, except the aforesaid reserved rent."

*Held*, (1) that the use of the words '*istembrari mokurari*' in the lease was not sufficient to create a permanent and hereditary tenure; and

(2) that the words excluding the claim of, or right of interference by, the

\* Appeal from original Decree No. 464 of 1900, against the decree of Babu H. C. Mitra, Additional Subordinate Judge of Chapra, dated the 17th of September 1900.

(1) (1898) I. L. R. 26 Cal. 300.

(2) (1901) I. L. R. 29 Cal. 43.