

The appeal must be allowed, and the suit of the plaintiff dismissed with costs.

KEMP, J.—I wish to add that I entirely concur in this judgment. One of the conditions of this bond was that, if the husband, who is a Hindu, married, again, his first marriage would be considered null and void. Now, supposing this lady who now sues to have her marriage cancelled happened to be barren, the husband, if this contract was one which could be enforced, would not, by reason of that contract, be able to marry again without running the risk of having his marriage with the first wife cancelled. I think such a contract quite contrary to the policy and spirit of the Hindu law, and that the suit ought to be dismissed.

1873  
SITARAM, *alias*  
KERRA,  
HEERAH  
v.  
MUSSAMUT  
AHEZREE  
HEERAHNEE.

*Appeal allowed.*

*Before Mr. Justice Kemp and Mr. Justice Pontifex.*

BICHOOK NATH PANDAY (PLAINTIFF) v. RAM LOCHUN SINGH (DEFENDANT).\*

1873  
Feb'y. 19.

*Interest, Rate of—Bond payable by Instalments—Penalty—Liquidated Damages.*

The defendant executed a bond in favor of the plaintiff by which he agreed to pay "interest at 8 annas *per cent.*, month after month, and to repay the principal money within the period of three years." It was further stipulated in the bond that, "should I fail to pay the principal and interest as agreed upon, I shall pay interest at 4 *per cent. per mensem* from the date of this bond to that of liquidation." The defendant made default in payment. *Held* in a suit brought on the bond that the stipulation in the bond for the payment of interest at 4 *per cent. per mensem* was in the nature of a penalty, and the plaintiff was only entitled to recover interest a reasonable rate. In this case 1 *per cent. per mensem.* was given.

See also  
12 B L R 468

THIS was a suit to recover Rs. 1,507-3 as principal and interest due on a bond dated 1st Assin 1275, Fuslee (14th September 1867), executed by the defendant in favor of the plaintiff. The material portion of the bond was as follows:—

"I, Ram Lochun Singh, execute this to the effect following:—

\* Special appeal, N. 709 of 1872, from a decree of the Judge of Bhangulpore, dated the 9th January 1872, modifying a decree of the Subordinate Judge of that district, dated the 2nd December 1870.

1873  
 BICHOOK  
 NATH PANDAY  
 v.  
 RAM LOCHRUN  
 SINGH.

I have borrowed and received the sum of Co.'s Rs. 600 on interest from Bichook Nath Panday, and agreed to pay interest on the said amount at 8 annas *per cent.* month after month, and to repay the principal money within the period of three years. For the said amount, principal and interest, I do hereby mortgage and pledge 1 anna 4 pies out of the entire Mehal Koondcowar, bearing a sudder jumma of Rs. 380; should the mehal in question happen to be sold by auction for arrears of Government revenue, to be attached, or sold, or involved in a suit for debts due to other creditors, this mahajun or creditor shall have authority to realize the money by any means he chooses without waiting for the expiration of the term of this bond. Should I fail to pay the principal and interest as agreed upon, I shall pay interest at 4 *per cent. per mensem* from date of this bond to that of liquidation. On this agreement I have taken the money and given the bond or writing."

The defendant made default in payment, and the plaintiff instituted the present suit on 2nd November 1870. The defendant admitted the execution of the bond, and the plaintiff contended that he was entitled to a decree for the whole amount of principal with interest at 4 *per cent. per mensem*. The Subordinate Judge gave a decree for the principal with interest at 8 annas *per cent. per mensem*.

On appeal, the Judge held that the plaintiff was only entitled to a reasonable rate of interest, and he made a decree for the principal with interest at the rate of 12 *per cent. per annum* from the date of the bond to the date of the decree, and after decree at the rate of 6 *per cent. per annum*.

The plaintiff appealed to the High Court.

Baboos *Romesh Chunder Mitter* and *Kalikishen Sein*, for the appellant, contended that, on non-payment by the defendant, the plaintiff was entitled to interest at the rate stipulated for in the bond on that event occurring, *viz.*, 4 *per cent. per mensem*. By s. 2 of Act XXVIII of 1855, the Court is bound the decree the interest at the rate stipulated for between the parties, If it had been stipulated that interest should be paid at 4 *per cent. per mensem*, but in case of punctual payment at a less rate, the Court would have been bound in case of default to not affected by the phraseology that may be used. The parties

give interest at the larger amount. They cited the cases of *Peetambur Chatterjee v. Kaleechurn Roy* (1), *Raskessur Surmah v.*

1873

BICHOOK  
NATH PANDAY  
v.  
RAM LOCHUN  
SINGH.

(1) *Before Mr. Justice Bayley and Mr.*

*Justice E. Jackson.*

*The 1st December 1870.*

PEETAMBUR CHATTERJEE (PLAINTIFF) v. KALEECHURN ROY AND ANOTHER (DEFENDANTS).\*

*Interest, Rate of—Bond payable by Installments—Penalty.*

Baboo Bamachurn Banerjee for the appellant.

Messrs. G. A. Twidale and H. A. Mendies for the respondents.

THE judgment of the Court was delivered by

JACKSON, J.—This was a suit to recover a sum of Rs. 700 lent upon an agreement to the effect that it should be repaid with interest at 8 annas *per cent. per mensem*, by instalments of Rs. 100 in the month of Falgun (11th February to 12th March) each year from 1268 to 1276 (1862 to 1870); the remainder to be paid in 1277 (1871). There was also a clause in the agreement that, if in four years these instalments were not paid, the interest to be paid on the Rs. 700 would be at the rate of Rs. 1 *per cent. per mensem*. The plaintiff brought this suit demanding interest at the higher rate, on the allegation that for five or six years after the money had been lent, no instalment was paid as agreed upon.

Both the Courts below have dismissed the plaintiff's claim to higher interest than 8 annas *per cent.* Both have come to the conclusion that the stipulation as to the higher percentage was a penalty, and the plaintiff had no sufficient ground to recover at that rate. It is upon this ground that this special appeal has been preferred to this Court, and it is urged that the higher percentage was clearly due under the express terms of the agreement between the parties.

On the part of the respondents, we have been referred to a decision of this Court, in *Boley Dohay v. Sideswar Rao Baboo Roy Kur* (a), in which it was held that where a smaller sum is secured by a larger sum, that larger sum may be looked upon as a penalty. In that case, the money had been lent at the rate of 1 *per cent. per mensem*, and there was a stipulation that, if a certain number of instalments were not paid, the whole amount would be considered to have lapsed, and the loan would bear interest at the rate of 10 *per cent. per mensem*. We think that the facts of that case are very different from those of this, and the question whether the higher rate of percentage should be looked upon as a penalty or not depends upon the circumstances of the case. Ten *per cent. per mensem* is an extraordinary high rate of interest, and the result of that stipulation in the bond was that the recovery of the amount was considered so doubtful, that an interest in the sum of Rs. 5,500 was sold for Rs. 800. This case in no way seems to agree with that case. In this case, the terms granted to the defendants at first were below the ordinary terms on which money is usually lent in this country, and it was almost a favor shown to the defendants that such terms were granted; and the penalty was not that any excessive rate should be paid, but that the ordinary rate at 1 *per cent.* should be paid. There was also in this case other landed security for the payment of the money, and it does seem if the meaning of the parties solely was that, if any delay occurred in the repayment of the money, the lender should receive interest at the ordinary rate of 1 *per cent. per mensem*.

We set aside the decision of the lower

\* Special Appeal, No. 537 of 1870, from decree passed by Subordinate Judge of Beerbhoom, dated the 12th February 1870, modifying a decree of the Sudder Munsiff of that district, dated, the 18th September 1869.