ORIGINAL CIVIL.

Before Sir R. Garth, Kt., C.J., and Mr. Justice Macpherson.

1877
Jany. 18.

MACKINTOSH *v.* HUNT.

Contract Act (IX of 1872), s. 74—Promissory Note—Stipulation to pay interest at high rate on default in payment of Note—Penalty.

The defendant and one *D*, on the 6th April, 1875, gave to the plaintiff, a money-lender, a promissory note, by which they jointly and severally promised to pay the plaintiff on the 6th September Rs. 400 "for value received in cash in hand paid, on signing and delivering this bond: should we neglect or fail to pay this amount on due date, then only shall it carry interest from and on due date to date of payment at the defaulting rate of 10 per cent. *per mensem*." At the date of the note, the defendant and *D* were in the plaintiff's debt in respect of other promissory notes, and a sum of Rs. 100 was deducted from the amount of the note of the 6th April, in respect of one of these which was given up and in respect of interest on three others. A further sum of Rs. 125 was deducted as interest in advance for the five months previous to the due date of the note, and the balance Rs. 175 was paid by cheque to *D*. *D* died before the note became due. In a suit brought to recover Rs. 400 principal, and Rs. 400 interest, on the promissory note, on default being made in payment—*Held*, this was not a case in which a certain sum was agreed to be paid on a breach of contract, and therefore s. 74 of the Contract Act did not apply. The stipulation to pay interest at the "defaulting rate" was not in the nature of a penalty. *Held*, also, that looking at the nature of the transaction, the note contained a false statement of the consideration, which amounted only to Rs. 275; and there being nothing to show that the defendant understood the real nature of the transaction, the rate of interest being exorbitant, and the consideration inadequate, the transaction was not one which ought to be enforced by a Court of Equity.

REFERENCE to the High Court, by the first Judge of the Calcutta Court of Small Causes, under s. 7 of Act XXVI of 1864.

The following was the order of reference:—

"The plaintiff, who is a well-known money-lender and frequent suitor in this Court, sued the defendant to recover Rs. 400 as principal, and Rs. 400 as interest, alleged to be due on a

promissory note, made by the defendant and one Norman Dutt, of which the following is a copy :

Stamp Paper—Rs. 2.

Calcutta, 6th April, 1875.

Rs. 400.

On the 6th September, 1875, we, jointly and severally as principals, promise to pay to Mr. H. Mackintosh, or order, the sum of Rs. four hundred, for value received in cash in hand, paid on signing and delivering this bond: should we neglect or fail to pay this amount on due date, then only shall it carry interest from and on due date to date of payment at the defaulting rate of 10 *per cent. per mensem.*

(Sd.) NORMAN DUTT.
„ B. HUNT.

"The making of the promissory note was admitted by the defendant; and the plaintiff, on his side, admitted that, at the time of the making of the note, he had deducted in advance Rs. 125, being interest at the rate of 6¼ *per cent. per mensem* for the five months previous to the due date of the note, *viz.*, the 6th September, 1875. Norman Dutt, the other maker of the note, died at the latter end of April, 1875.

"It appeared in evidence that the defendant had never taken the trouble to read the note when he signed it, and that the amount of the note was paid to Norman Dutt, the other maker of the note, on the 7th April, 1875, according to a memorandum signed by him (Norman Dutt) somewhat as follows:—

	Rs.	A.	P.
Discount off (that is to say, the interest paid in advance)	125	0	0
Money payable on one old promissory note, delivered up	76	9	6
Money payable as interest on three other promissory notes	23	6	6
Balance paid by a cheque on the Bank of Bengal	175	0	0
Rs. ...	400	0	0

"It is also in evidence, that Norman Dutt owed the plaintiff money on other promissory notes.

1877

MACKINTOSH v. HUNT.

"The defendant pleaded fraud, not fraud in the sense of undue influence or over-reaching, but fraud in so far as the plaintiff had not paid the full amount of Rs. 400 as promised by him. I was satisfied, however, from the evidence that the plaintiff had, by special arrangement with Norman Dutt, paid the Rs. 400 as above-mentioned, and accordingly overruled the plea of fraud.

"The defendant also pleaded, and it was strongly urged on his behalf, that the defaulting rate of interest payable, *viz.*, 10 *per cent. per mensem*, or 120 *per cent. per annum*, must be considered as a penalty, and that it is consequently one of those cases in which a Court of Justice will give equitable relief.

"In the first place it has been contended, that s. 74 of Act IX of 1872 (Contract Act) is applicable to this case, and that consequently I need only give to the plaintiff reasonable compensation, not exceeding the rate of interest named; but I am of opinion, that s. 74 of that Act only applies to cases where an actual sum is fixed between the parties to be paid as compensation in the event of a breach of the contract; in other words, where the sum so fixed would otherwise be called liquidated damages, and also no doubt to cases where an actual penal sum has been fixed. But, even if the section is applicable, it would still be necessary to decide whether I ought to give the plaintiff the full amount named by the parties themselves, or give him reasonable compensation only, and whether, in so giving him compensation, I ought to take as my guide previous decisions on somewhat similar points. I am inclined to agree with Mr. Macrae, where he says, at page 80 of his Work on the Contract Act, 1872.—'But as the terms of this section leave it open to the Court in all cases to award less than the amount named, the rules on which the English Courts have proceeded in observing the distinction should serve as guides to the Courts here in exercising the discretion conferred upon them by this section;" so that whether the section is applicable or not, I think I ought to be guided by the old law in coming to a conclusion as to the amount to be allowed to the plaintiff on the promissory note.

"In this case the 10 *per cent. per mensem* interest becomes payable if the principal sum of Rs. 400 remains unpaid on the

6th September, and it is payable from that date, and not from the date of the bond, and herein the circumstances of this case differ materially from those of the case of *Bichook Nath Panday* v. *Ram Lochun Sing* (1), where it has been held that the increased rate of interest payable on default of payment of a lower rate from the date of the bond was in the nature of a penalty, and that the plaintiff was only entitled to recover interest at a reasonable rate. Here the high or higher rate of interest becomes payable on the happening of one event only, *viz.*, the failure to pay the Rs. 400 on the 6th September. It is not a promise to pay a very large sum immediately on failure of the payment of a much smaller sum. If the defendant, on the 6th of October, had paid up in full, he would only have paid Rs. 400 *plus* Rs. 48 as interest. I am of opinion, therefore, that the contract to pay the high rate of interest is not in the nature of a penalty, and I am fortified in this opinion by the decision of Lord Romilly in *Herbert* v. *Salisbury and Yeovil Railway Company* (2). There the contract was to pay certain purchase-money with 4 *per cent.* interest on or before the 1st July, 1858, in default of payment of the purchase-money on that date 5 *per cent.*, and again in default of payment of the purchase-money on or before the 1st January 1859, 8 *per cent.* on all moneys remaining unpaid. And His Lordship says :—'Here the parties thought fit to enter into the contract that the rate of interest was to be 4 *per cent.* up to a certain date, 5 *per cent.* for the next half year, and 8 *per cent.* for every subsequent year. I know of nothing to prevent persons entering into a contract of that description. A decision of Holloway, J., *viz.*, *Adanky Rama Chandra Row* v. *Indukuri Appalaraju Garu* (3), in which the whole matter was considered at great length, supports my views, and also to some extent the case of *Omda Khanam* v. *Brojendro Coomar Roy Chowdhry* (4), while I find that there are two contrary decisions of the Bombay High Court—*Motoji Ratnaji* v. *Sheikh Husen* (5) and *Pava Nagaji* v. *Govind Ramji* (6). Those two latter

(1) 11 B. L. R., 135.
(2) L. R., 2 Eq., 221.
(3) 2 Mad. H. C. Rep., 451.
(4) 12 B. L. R., 451.
(5) 6 Bom. H. C. Rep., A. C., 8.
(6) 10 Bom. H. C. Rep., 382.

1877

MACKINTOSH v. HUNT.

decisions are on all fours with the present case, but the former one seems not to have been considered at all, and in the latter the learned Judges, acting upon the rule *stare decisis*, refused to consider the question, whether or no the former one was rightly decided.'

"For the above reasons, I am of opinion that I must follow Act XXVIII of 1855, s. 2, and adjudge to the plaintiff the amount of interest agreed upon between the parties.

"But as the question is one of considerable importance, and one which frequently arises in this Court, I think I ought to refer it to the High Court. I, therefore, refer the following questions: 1*st*, whether or no s. 74 of Act IX of 1872 is applicable to this case; 2*nd*, if such section is not applicable, whether or no the defaulting rate of interest, mentioned in the promissory note, is to be considered in the nature of a penalty, and that it is consequently a case in which the Court ought to decree interest at a reasonable rate only; 3*rd*, if such section is applicable, whether or not the Court ought to allow the full amount of interest agreed upon, or allow only a reasonable rate of interest.

"Contingent on the opinion of the High Court, my judgment will be for the plaintiff for Rs. 800."

The parties were not represented by Counsel in the High Court.

The opinion of the High Court was as follows:—

GARTH, C.J.—We are of opinion that the contract to pay interest at 10 *per cent. per mensem*, if the principal sum of Rs. 400 were not paid on September 6th, the due date of the promissory note, is not in the nature of a penalty. It is true that this rate of interest is in the note called a "defaulting rate;" but, notwithstanding this expression being used, the contract is in fact merely that if the sum of Rs. 400 be not paid on a certain day, it shall from that day bear interest at 10 *per cent. per mensem*, or, in other words, at 120 per cent. per annum. In such a provision there is nothing in the nature of a penalty more than there is in a provision, that the promissory

note shall bear interest from the day of its date. The case seems to us to differ wholly from that class of cases in which a certain sum is agreed to be paid on a breach of contract, and therefore s. 74 of the Contract Act (IX of 1872) does not apply.

But, taking the facts as found by the Judge, the effect of the transaction between the parties is not what the learned Judge supposes it to have been. He is not correct when he says that the plaintiff took interest at the rate of $6\frac{1}{4}$ *per cent. per mensem* only for the five months up to September 6th. What happened (as found by the Judge himself) was this: on the making of the promissory note the plaintiff, the money-lender, paid or gave value to one of the makers to the extent of Rs. 275; and adding to that sum Rs. 125 as discount or interest on Rs. 275 for the five months up to the 6th of September, the note, dated the 6th of April, was given for Rs. 400 payable on September 6th.

It may be true that Rs. 125 as interest for five months on Rs. 400 is interest at the rate of $6\frac{1}{4}$ *per cent. per mensem*; but the sum actually advanced, or for which value was given, was not Rs. 400, but only Rs. 275. And Rs. 125 as interest for five months on Rs. 275 is interest at the rate of nearly 10 *per cent. per mensem*, and is considerably more than 100 *per cent. per annum*.

The plaintiff having thus paid or given value for Rs. 275 only, took a promissory note, payable at the end of five months for that sum, *plus* Rs. 125 as interest, *i.e.*, for Rs. 400; which last-mentioned sum was from the due date of the note to bear interest at 120 *per cent. per annum*. And this being the true nature of the transaction, the promissory note contains a false statement of the consideration, for in it the maker's promise to pay "Rs. 400 for value received in cash in hand paid on signing and delivering this bond."

Considering that the promissory note does not state truly the transaction between the parties; that beyond the fact that he signed the note, there is nothing to show that the defendant understood the real nature of the transaction; that the rate of interest is exorbitant, and the considerations grossly inadequate,

1877

MACKINTOSH v. HUNT.

we think the transaction is not one which ought to be enforced by a Court of Equity. The Calcutta Court of Small Causes is empowered to entertain equitable defences, and ought, as it appears to us, on the facts found, to have given the defendant relief.

The judgment for Rs. 800 is set aside, and judgment will be entered for the plaintiff for Rs. 400 with interest at 12 *per cent. per annum* from September 6th, 1875, to the date of suit, without costs.

APPELLATE CIVIL.

Before Mr. Justice Kemp and Mr. Justice Birch.

1876
June 28.

IN THE MATTER OF THE PETITION OF DESPUTTY SINGH (A MINOR).

BAIJNATH SHAHAI AND OTHERS *v.* DESPUTTY SINGH.*

Creditors of alleged Heir—Application for grant of probate—Succession Act (Act X of 1865), s. 250.

A Hindu testator died, leaving *B*, alleged to be his adopted son, and *C*, who would be his heir in default of adoption. On application made by *B* for probate of the will after the usual notices, the creditor's of *C* came in and opposed the grant of probate.

Held, under the Succession Act, as made applicable by the Hindu Wills Act, that the creditors were not parties having any interest in the estate of the deceased, and therefore were not entitled to oppose the grant of probate.

THE facts of the case appear sufficiently in the judgment.

Mr. *Kennedy* and *Munshi Mohamed Yoosoof* for the appellants.

The *Advocate-General*, offg. (Mr. *Paul*) and Mr. *Woodroffe* for the respondent.

The following cases and authorities were referred to by Counsel on both sides:—

Dabbs v. *Chisman* (1), *Baskcomb* v. *Harrison* (2), *Kipping* v. *Ash* (3), and Coote's Probate Practice, pp. 227, 228, and 231, and cases there cited.

* Miscellaneous Regular Appeal, No. 259 of 1875, against the order of A. V. Palmer, the Officiating Judge of Zilla Shahabad, dated the 9th of August, 1875.

(1) 1 Phill., 155. (2) 2 Rob. Ecc., 118. (3) 1 Rob., 270.