

not have the right to dismiss the plaintiff for any other cause than those specified. It merely reminds the plaintiff that he may be dismissed for the misconduct which is there specified; but it in no way affects or alters the right which the defendant company had to dismiss the plaintiff for absolute inability to perform what he had undertaken.

The Judge of the Small Cause Court must, therefore, proceed to deal with the case on the merits. Each party will pay his own costs of this reference.

Attorneys for the plaintiff: Messrs. *Chawntrell, Knowles, and Roberts.*

Attorneys for the defendants: Messrs. *Orr and Harris.*

APPELLATE CIVIL.

Before Mr. Justice Kemp and Mr. Justice Birch.

DEEN DOYAL LALL (PLAINTIFF) v. HET NARAIN SINGH
AND OTHERS (DEFENDANTS).*

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March 20.

Mortgage Bond—Interest after due date, Rate of.

In a suit brought to recover the principal and interest due upon a written security given for the payment of the principal money on a day specified, with interest at a stipulated rate up to such day, the Court may, in its discretion, award interest on the principal sum from due date at such rate as it thinks fit, and is not bound to award such interest at the stipulated rate.

The principle laid down in *Cook v. Fowler* (1) followed.

SUIT on a mortgage bond, dated the 28th of Assin 1269 (Fuslee), corresponding with the 17th October 1861, for payment of the principal sum of Rs. 2,600 and Rs. 5,488-8-6 interest, computed at the rate of 18 per cent. per annum, as specified in the bond, from date of the execution of the bond to the 28th Bysack 1281, corresponding to the 29th April 1874.

The original mortgagors were called as witnesses for the plaintiff, and admitted the execution of the bond and the non-

* Regular Appeal, No. 38 of 1875, against a decree of the Subordinate Judge of Zilla Gya, dated the 19th of September 1874.

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payment of principal and interest due thereon. It was however objected on behalf of the subsequent purchasers of part of the mortgaged property, parties to the suit, that the claim as to interest payable after due date was barred on the ground that such interest was not a charge upon the hypothecated property, but partook more of the nature of damages, and should therefore have been sued for within six years of the date when the bond fell due.

The Court below gave the plaintiff a decree for Rs. 2,875-9-6, refusing to award any interest from the date on which the bond fell due.

The plaintiff appealed to the High Court.

Mr. *C. Gregory* and Baboo *Nil Madhub Sen* for the appellant.

Baboo *Mohesh Chunder Chowdhry* and *Jogesh Chunder Dey* for respondents.

The judgment of the Court was delivered by

KEMP, J.—The plaintiff is the appellant in this case. He sued three sets of defendants to recover a sum of Rs. 8,088-8-6, due under a bond dated the 28th of Assin 1269 Fuslee, corresponding with the 17th of October 1861. The principal amount borrowed was Rs. 2,600, and interest is claimed from the 28th Assin 1269, the date of the bond, to the 28th Bysack 1281, date of suit, being twelve years and seven months, at the rate of Re. 1-8 per mensem. The total amount of interest claimed being Rs. 5,488-8-6. The bond was admitted by the principal defendants, the judgment-debtors. They were examined, and they also stated that, after the bond fell due, they were unable to pay it, and that they agreed to go on paying interest. The first defendants, are the purchasers of a portion of the property which was mortgaged to the plaintiff as security for the sum advanced by him to the principal defendants. The Subordinate Judge has given the plaintiff a modified decree for a sum of Rs. 2,875-9-6

out of Rs. 8,088-8-6 claimed. He has also made the plaintiff pay the costs of the defendants, and the result of the suit is, that although the bond is admitted, and the defendants depose that they were unable to pay, and asked for time, and promised to pay interest, they have to pay only about one-third of the amount claimed, and that the plaintiff has only to receive Rs. 2-5 in the shape of costs from the defendants. No wonder that, under these circumstances, the respondents did not appeal to this Court.

The Subordinate Judge has found that, as there is no stipulation in the bond regarding payment of interest after the appointed period for the discharge of the debt, the plaintiff is not entitled to interest after the lapse of that period.

. . . . The first objection taken before us by the appellant is, that the Court was wrong in not using its discretion, in overlooking the evidence of the debtor-defendants, and in not awarding interest from the date upon which the bond fell due up to the date of suit. The purchaser-defendants raised the following objection, that interest after the due date is not a charge upon the property hypothecated, inasmuch as any interest after that date is in the nature of damages, and more than six years having elapsed from the date on which the principal fell due, namely, in May 1862, the suit is barred.

We think that the Subordinate Judge* is clearly wrong in not awarding interest at all from the date on which the bond fell due. The execution of the bond is admitted, and the bond-debtors admit in their evidence that they were unable to pay the debt on the date it fell due, and that they promised to pay interest from time to time. There is a case before the House of Lords, of *Cook v. Fowler* (1), in which it has been held that there is no rule of law that upon a contract for the payment of money on a day certain with interest at a fixed rate down to that day a further contract for the continuance of the same rate of interest is to be implied. . . . Lord Selborne, in his judgment, which is to be found at page 37, says:—"Although in cases of this class, interest for the delay of payment *post diem*,

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ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted, in an ordinary case of this kind, by a Court or jury, as the proper measure of damages for the subsequent delay; but that is because ordinarily a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to. But in the case before your Lordships, the agreed rate of interest is excessive and extraordinary; and although no question is raised between the present parties as to its fairness and reasonableness so far as it was matter of express contract, it by no means follows that it would have been fair and reasonable, or would have been so regarded by the borrower, if it had been indefinitely extended to every possible delay of payment after the stipulated time."

Now, applying the principle thus laid down to the present case, we do not think we should be justified in giving the plaintiff interest from the date on which the bond fell due at the rate of 18 per cent. per annum, the rate mentioned in the bond; but we think that, acting upon the discretion vested in us, we ought to allow the plaintiff interest at the rate of 6 per cent. per annum, which is the rate usually allowed by this Court, from the date on which the bond fell due. The plaintiff will therefore be entitled to recover Rs. 2,600 principal with interest at the rate of 18 per cent. per annum up to the date on which the bond fell due, and from that date at the rate of 6 per cent. per annum up to date of payment.

We also think that the decision of the Court below with reference to costs must be modified. We therefore modify the decree of the Court below with reference to our remarks made above as to the interest payable to the plaintiff and the period for which that interest is to be paid, and as regards costs, we think that the plaintiff is entitled to his costs in this Court and in the Court below upon the sum now decreed as against both sets of defendants.

Decree modified.