1873.

KHEMKOR *v.* UMIA'SHANKAR.

The question was considered by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J.

WESTROPP, C. J. :—We concur in the opinion of the Judge of the Court of Small Causes at Ahmedabad, that the plaintiff Khemkor, cannot be regarded as the lawful wife of Ranchhor Pánáchand, she having married him in the lifetime of her first husband without the consent of that husband. We reserve our opinion as to whether, even if he had given his consent to her marriage to Ranchhor, such a circumstance would have validated that marriage : see *Reg. v. Karsan Gojá* (*a*).

We also agree with the Judge in thinking that as the mother of the illegitimate children of Ranchhor, *i.e.*, as his concubine, she is entitled to maintenance. (1 Stra. H. L. 174; 1 West and Bühler, pp. 92, 93.)

July 29.

[APPELLATE CIVIL JURISDICTION.]

Referred Case.

PAVA' NA'GA'JI..... *Plaintiff and Appellant.*

GOVIND RA'MJI *et al*.....*Defendants and Respondents.*

Interest—Promissory Note—Penalty—Act XXVIII. of 1855.

Where a promissory note stipulated that, in default of payment of principal within three months after date, interest should run at the rate of 75 per cent. per annum, the increased rate was held to be a penalty and relieved against on payment of interest at 9 per cent. per annum notwithstanding Act XXVIII. of 1855.

Motoji Ratnáji v. *Shekh Husen*, 6 Bom. H. C. Rep., A. C. J. 8., followed; and *Arulu Mastry* v. *Wakuthu*, 2 Mad. H. C. Rep. 205, and *Brojo Kishore Roy* v. *Madhub*, 17 Calc. W. R. Civ. R. 373, dissented from.

THIS was a reference from W. M. P. Coghlan, District Judge of Tanna. The facts fully appear from the following judgment of the District Judge :—

"The issue for decision is whether the plaintiff is entitled to the full amount of interest claimed ?

"My finding on the issue is, the plaintiff is entitled only to interest at 9 per cent. per annum from the date on which interest commences to run under the bond.

(*a*) 2 Bom. H. C. Rep. 124.

"The bond is for Rs. 27, and covenants that three months after date payment shall be made; that in default, interest shall run at the rate of 75 per cent. per annum.

"Rs. 2 according to the plaintiff, and Rs. 3 according to the defendant, were retained as interest at the execution of the bond.

"This case is exactly on all fours with referred case *Motoji Ratnáji* v. *Shekh Husen* (*a*), in which the promissory note, after stipulating for payment without interest by monthly instalments, provided for interest to run at 75 per centum per annum in default of payment of any one instalment. The High Court, on reference of the case, held (following *Rasáji* v. *Sayáná* (*b*) decided on the same day) that the increased rate of interest was a penalty to be relieved against on payment of interest at the rate of 9 per cent. from the time when each instalment became due.

"This doctrine must be followed in this Presidency while the above-mentioned cases are not overruled.

"Both the Madras and Bengal High Courts proceed on a different rule.

"In *Arulu Mastry* v. *Wakuthu* (*c*) it is ruled that in a bond, which stipulated for the payment of principal and interest at a certain rate within six months from the date of the bond, and that in default the rate of interest should be raised to six and a quarter per cent. per mensem, the higher rate of interest was not in the nature of a penalty, and that the plaintiff had a right to enforce payment thereof; for, said the Court (Scotland, C.J., and Phillips, J.), 'There is no ground for treating the higher interest as a penalty, in the legal sense of the term; and in this case considerations as to the probable motives, and calculations, in the contemplation of the parties when the bond was entered into, cannot be allowed to affect in any way the contract right secured to the plaintiff in express terms.'

"Again, the Bengal High Court (of which Court, be it marked, COUCH, C.J., who with NEWTON, J., gave judgment

(*a*) 6 Bom. H. C. Rep. A. C. J. 8. (*b*) *Ibid.* 7.

(*c*) 2 Mad. H. C. Rep. 205.

1873.

PAVA' NA'GA'JI v. GOVIND RA'MJI.

in *Motoji Ratnáji* v. *Shekh Husen,* is now the Chief Justice) has held in *Brojo Kishore Roy* v. *Madhub* (*d*), under date 4th January 1872, that the Court was bound to give effect to the contract entered into between the parties, and that as the parties distinctly stipulated that, in the event of a failure to repay the amount advanced with interest on a particular day, the lender was to be entitled to interest at a different rate, the Court was not authorized to say as a matter of law that such stipulation is to be regarded as a penalty. I am asked to submit this question to the High Court under Sec. 28 of Act XXIII. of 1861. I have doubted the propriety of doing so, on the ground that our present precedent *Motoji* v. *Husen* is itself a decision on a referred case. But, considering the recent Bengal ruling to the contrary, and the great importance of the law being quite clear on this subject, I determined to submit the matter to the High Court. I am encouraged to do so by the fact that Chief Justice Couch presides over the Court from which the recent decision contrary to *Motoji Ratnáji* v. *Shekh Husen* has issued, and that neither of the learned Judges who decided *Motoji Ratnáji* v. *Shekh Husen* is now on the High Court Bench.

"I have found on the issue in conformity with the High Court's ruling in *Motoji Ratnáji* v. *Shekh Husen* ; but my own opinion (which is required by Sec. 28 of Act XXIII. of 1861) is, that a stipulation in a bond for payment of interest from a fixed date, in default of the payment of principal as covenanted, is not of the nature of a penalty from which a defendant may be relieved."

The reference was considered by WESTROPP, C.J., and NA'NA 'BHA'I HARIDA'S, J.

WESTROPP, C.J.:—This Court, acting upon the rule *stare decisis*, abides by the decisions of COUCH, C.J., and NEWTON, J., in *Rasáji* v. *Sayáná* (*e*) and *Motoji Ratnáji* v. *Shekh Husen* (*f*). The latter of those cases is precisely in point in the present case. The case *of Arulu Mastry* v. *Wakuthu* (*g*),

(*d*) 17 Calc. W. Rep. Civ. R. 373. (*e*) 6 Bom. H. C. Rep. A. C. J. 7.
(*f*) *Ibid.* 8. (*g*) 2 Mad. H. C. Rep. 205.

quoted by the District Judge, was decided in 1864. The above decisions of the High Court of Bombay were made in 1869, and were not quoted in the case of *Brojo Kishore Roy* v. *Madhub* (*h*), cited by the District Judge. That case was decided in 1872 by L. JACKSON and MITTER, JJ., who mention a decision in *Boley Dobey* v. *Sideswar* (*i*), which would tend to show that the Judges of the High Court at Calcutta are not unanimous upon the question. The District Judge seems to think that, in some way or another, Sir RICHARD COUCH, who decided the two Bombay cases abovementioned, must be regarded as now holding the opposite doctrine, because he was Chief Justice at Calcutta when the decision in *Brojo Kishore Roy* v. *Madhub* (*supra*) was made. But we fail to see how he can be regarded as in anywise responsible for that decision. There is nothing in the report of it to show that he was consulted about that case by the Judges who made the decision, or that he was in anywise cognizant of it. We see nothing in the cases at Madras and Bengal to lead us to the opinion that it is necessary or desirable that we should depart from the doctrine laid down in this Court by COUCH, C.J., and NEWTON, J. We have not overlooked Act XXVIII. of 1855. We see no reason for believing that the Legislature had any intention of destroying the equitable jurisdiction of our Courts to relieve against a penalty: *Seton* v. *Slade*.(*j*); 2 Wh. and Tud. 384, 785, 787, 1st Ed. The Act (XXVIII. of 1855) was intended to repeal the positive enactments then existing against usury. It has been frequently held in this Court that the Hindú rule of *dámdupat* is not affected by that Act: *Dhondú Jagannáth* v. *Nárayan* (*k*); *Khushálchand Lálchand* v. *Ibráhim Fakír* (*l*); *Hákmá Mánji* v. *Meman Ayab* (*m*); *Náráyan* v. *Satváji* (*n*); and *Pándurang Ganesh* v. *Krishnaráv Anant* there mentioned, page 85. We do not know of any better reason for supposing that the equitable doctrine, under which penalties have been relieved against, has been taken away by that Act, than there was for holding that the Hindú rule of *dámdupat* was thereby extinguished.

(*h*) 17 Calc. W. Rep. Civ. R. 373. (i) 4 Beng. L. R. Apx. 94.
(*j*) 7 Ves. 265, 273. (*k*) 1 Bom. H. C. Rep. 47. (*l*) 3 *Ibid.* A. C. J. 23, 25.
(*m*) 7 *Ibid.* O. C. J. 19. (*n*) 9 *Ibid.* 38.