1889
JULY 8.

APPEL-
LATE
CIVIL.

14 B. 200.

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APPELLATE CIVIL.

Before Mr. Justice Scott and Mr. Justice Jardine.

DULLABHDAS DEVCHANDSHET (*Original Plaintiff*), *Appellant v.* LAKSHMANDAS SWARUPCHAND (*Original Defendant*), *Respondent.**
[8th July, 1889.]

Interest—Bond—Default in payment on due date—Enhanced interest—Penalty—Contract Act (IX of 1872) s. 74—Breach of contract.

A mortgage-bond provided that interest for the loan should be paid at Rs. 2 *per* month, and that if the loan were not paid off by a certain day, then future interest from the date of default should be paid at Rs. 3 *per* month.

Held, that the higher rate of interest was not a penalty, and might be enforced.

[R., 15 A. 232=13 A. W. N. 130 (F.B); 19 B. 106; 26 C. 300=3 C. W. N. 175; 25 M. 343=11 M.L.J. 421; 36 M. 229=18 Ind. Cas. 417=24 M. L.J. 135—13 M. L.T. 20; D., 14 B. 274.]

[201] THIS was a second appeal from the decision of M. H. Scott, District Judge of Khandesh, in appeal No. 91 of 1887.

The property in dispute was mortgaged by Shambhu valad Kanji Patel and his sons to Harilal Sambhuram by a mortgage-bond dated 15th July 1870.

The material portion of this bond was as follows :—

"We owe you, in all, Rs. 325 of the Bombay Currency. The interest thereon is to be at the rate of Rs. 2 (two) *per cent. per* month, * * * * * We will pay the principal and the interest in full on the 23rd December, 1870, during the harvest season of the current year. Should we fail to pay the amount as agreed upon, we shall pay thereafter interest at the rate of Rs. 3 (three) *per cent. per* month. In security of this, we have given in mortgage one field, as described below."

In taking an account of the debt due under this bond, both the lower Courts held that the stipulation for payment of interest at an enhanced rate was penal, and, therefore, refused to enforce it.

Against this decision the plaintiff appealed to the High Court.

Shantaram Narayan, for appellant :—In this case the higher rate of interest is to be paid only from the date of default. This case is distinguishable from the cases where the higher rate of interest is to be paid from the date of the bond. In those cases the stipulation for increased interest may possibly be regarded as a threat to enforce punctual payment, and a Court of equity may relieve against it. *Pava Nagaji* v. *Govind Ramji* (1) is a case of that kind. But it has no application to the present case. I rely on *Mackintosh* v. *Crow* (2).

Mahadev C. A'pte for respondent, referred to *Motoji Ratnaji* v. *Shekh Husen* (3); *Rasaji Davlaji* v. *Sayana Sagdu* (4); *Pava Nagaji* v. *Govind Ramji* (1); *Vengideshwara Putter* v. *Chatu Achen* (5); *Nanjappa* v. *Nanjappa* (6); *Baij Nath Singh* v. *Shah Ali Hosain* (7).

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* Second Appeal, No. 116 of 1889.

(1) 10 B. H. C. R. 382. (2) 9 C. 689. (3) 6 B. H. C. R. A. C. J. 8.
(4) 6 B. H. C. R. A. C. J. 7. (5) 3 M. 224. (6) 12 M. 161.
(7) 14. C. 148.

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JUDGMENT.

[202] SCOTT, J.—In this case the agreement was to pay interest for the loan at the rate of two *per cent. per mensem*, but if the interest and principal were not paid by the ensuing harvest, then future interest from the date of default was to be paid at the rate of three *per cent. per mensem*. Agreements for an increased rate of interest on default of payment have been held in this Court to be of the nature of a penalty, against which the party may be relieved—*Pava Nagaji* v. *Govind Ramji* (1). But these cases and also the latest case on the subject, *Nanjappa* v. *Nanjappa* (2), only dealt with agreements which, on default in payment of the original rate, imposed the enhanced rate on the defaulting party from the date of the original debt. But they do not touch agreements in which the enhanced rate does not relate back, but is only introduced from the date of the default. The present case is in this latter category. Three *per cent. per* month were to be paid, instead of two, from the date of default. We are not, therefore, bound by the decisions of this Court which were cited to us. Such a contract as the present one is clearly distinguishable, as pointed out by Wilson, J. (*Mackintosh* v. *Crow*(3)), and cannot be held in the nature of a penalty, as there is no fixed sum payable as the consequence of the breach, and the enhanced rate is the sum to be paid for the longer enjoyment of the money. Section 74 of the Contract Act does not appear applicable to the case. But if it is, it must be remembered that the Contract Act was passed after the Bombay decisions, and that, according to s. 74, a penalty can only be treated as the maximum of possible compensation, whilst the test of reasonableness is made the sole guide in fixing the actual sum to be paid (see also *Balkishen Dass* v. *Run Bahadur Singh* (4); *Baij Nath Singh* v. *Shah Ali Hosain* (5).

The question of reasonableness of the bargain is, therefore, alone to be considered, and I think the present agreement is not unreasonable in the sense required to justify interference with an express agreement. It is not necessary to cite cases to show [203] that mere inequality, inadequacy, or excess of advantage in a bargain does not alone constitute a ground on which to avoid a bargain in equity, unless there is some other special ground. (See Story's Equity Jurisprudence, ss. 244—250). Both parties here acted on apparently equal terms, and there is no suggestion of imposition, undue influence, or other improper conduct. The contract agreed upon was a fair one. The original rate was not an unusual one. The enhanced rate was fixed by the parties only in case the lender was kept out of his money beyond a certain date. There is nothing unreasonale in such a contract, and nothing so grossly exaggerated in the agreed enhanced rate as to suggest fraud or undue influence, and, therefore, to call for equitable interference. I think the interest should be calculated at the stipulated rate—three *per cent. per mensem*.

JARDINE, J.—The material part of the bond is as follows :—"The interest thereon is to be at the rate of Rs. 2 (two) *per cent. per* month, making in all Rs. 6½ (six-and-a-half), which we will pay every month. The agreement in respect thereof is as follows :—We will pay the principal and the interest in full on the 1st *Poush Shudh* [23rd December 1870], during the harvest season of the current year. Should we fail to pay the amount as agreed upon, we will pay thereafter interest at the rate

(1) 10 B.H.C.R. 382, and cases there cited. (2) 12 M. 161.
(3) 9 C. 689. (4) 10 C. 305 (314)=10 I.A. 162. (5) 14 C. 248.

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of Rs. 3 (three) *per cent. per* month. In security whereof we have given our fields in mortgage."

I have the same doubts as were expressed by Innes, J., in *Vyathilinga Mudali* v. *Sundarappa* (1) and by Mitter, J. in *Baij Nath Singh* v. *Shah Ali Hosain* (2) as to whether s. 74 of the Indian Contract Act affects the question, as that section seems in its terms to apply only to cases in which "a sum is named in the contract" as the amount to be paid in case of breach. This is not a case in which in the event of default the higher rate of interest was to be paid from the date of the bond. So this case may be distinguished from *Nanjappa* v. *Nanjappa* (3), *Vengideswara Putter* v. *Chatu Achen* (4), *Vyathilinga* v. *Sundarappa* (1), *Bichook Nath Panday* v. *Ram Lochun Singh* (5), *Baij Nath Singh* **[204]** v. *Shah Ali Hosain* (2), *Kharag Singh* v. *Bhola Nath* (6), *Motiji Ratnaji* v. *Shekh Husen* (7) and other cases of which it may be said, as in *Nanjappa* v. *Nanjappa* (3), "that though no sum is named in rupees, the extra sum payable is fixed and ascertainable beforehand, or at any rate at the time that default was made." This and another class of cases, merely, loans for terms certain, are discussed in *Mackintosh* v. *Crow* (8), where it is said that "the element is present in them that by the terms of the contract a sum is made payable by reason of the breach, capable of calculation at the time of the breach, and payable in all events, though in the second class of cases the payment is spread over a term." I do not feel called on by the facts of the present case to lay down any general rule as to the application of the maxim "*id certum est quod certum reddi potest*" to s. 74 of the Contract Act. The subject is not unattended with difficulty, as appears from the discussion in *Juggomohun Ghose* v. *Manickchand*(9) on its application to Act XXXII of 1839 and in *Hill* v. *South Staffordshire Railway Co.* (10) and *Duncombe* v. *Brighton Club Co.* (11), which are decisions on the English Statute on which the Act of 1839 is based. The present case does not resemble those in the Indian Reports to which the maxim has been held to apply. What Wilson, J., said in *Mackintosh* v. *Crow*(8) is applicable to the bond before us. "Where the contract is merely, that if the money is not paid at the due date, it shall *thenceforth* carry interest at an enchanced rate, I do not see how it can be said that there is any sum named as to be paid in case of breach. No one can say at the time of the breach what the sum will be."

The next question is, whether any rule of equity interferes in this case with the rule of law stated in Act XXVIII of 1855. The High Court at Fort William has answered the question in the negative in *Mackintosh* v. *Hunt* (12) and *Mackintosh* v. *Crow*(8) **[205]** So has the High Court of Madras in *Arulu Mastry* v. *Wakuthu Chinayen* (13) and *Nanjappa* v. *Nanjappa*(3). The cases of *Baij Nath Singh* v. *Shah Ali Hosain*(2) and *Basavayya* v. *Subbarazu*(14) go further. The High Court at Allahabad has differed, but the facts of the case of *Bansidhar* v. *Bu Alikhan*(15) are peculiar, as pointed out in *Mackintosh* v. *Crow*.

The subject does not appear to have been dealt with in this Court. *Rasaji Davlaji* v. *Sayana Sagdu*(16) is a case where the higher interest

(1) 6 M. 167. (2) 14 C. 248. (3) 12 M. 161 (157).
(4) 3 M. 224. (5) 11 B.L.R., 135. (6) 4 A. 8
(7) 6 B.H.C. Rep., A.C.J. 8. (8) 9 C. 689 (693). (9) 7 M.I.A. 263.
(10) L.R., 18 Eq., 154. (11) 11 L.R. 10 Q.B., 371. (12) 2 C. 202.
(13) 2 M.H.C.R. 205. (14) 11 M. 294. (15) 3 A. 260.
(16) 6 B.H.C.R. A.C.J. 7.

was to be calculated from the date of the loan. The facts in *Motoji Ratnaji* v. *Shekh Husen* (1) and *Pava Nagaji* v. *Govind Ramji* (2) are not very clear in the report. It may be that the heavy and unconscionable increase of debt which the stipulated rate of interest would cause, induced the Court to regard it as a penalty. At any rate I do not think these decisions preclude us from considering the question of equity by the light of the more recent cases.

The case of *Seton* v. *Slade* (3) is at variance with the view I am disposed to take. But the language used in that judgment is general: and, on the other hand, the language used by their Lordships of the Judicial Committee of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh*(4) although the case before them related to a decree and not a contract, is also somewhat general, and we may, therefore, be guided by it to a certain extent. Their Lordships treat a stipulation increasing the interest from 6 to 12 *per cent.* as not a penalty, nor an unreasonable substitution under the circumstances. I am, therefore, of opinion that in the present case the Courts below were wrong in treating the higher rate of interest as a penalty.

Decree varied.

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14 B. 206.

[206] APPELLATE CIVIL.

Before Mr. Justice Scott and Mr. Justice Jardine.

DINKAR BALLAL CHAKRADEV (*Original Plaintiff*), *Appellant v.* HARI SHRIDHAR APTE (*Original Defendant*), *Respondent.**

[20th August, 1889.]

Res judicata—*Sale of two plots of land by one sale-deed—Validity of deed questioned in dispute as to one of the plots—Order in execution proceedings that deed was valid—Subsequent dispute as to second plot included in deed—Question of validity of deed again raised—Orders in execution proceedings, how far final—Civil Procedure Code (Act XIV of* 1882). *s.* 13 *and* 283.

The plaintiff purchased two distinct plots of land (A and B) from one Gopal by a deed of sale dated 30th December, 1875. In 1884, in execution of a decree against Gopal, plot A was attached and sold as his property, and purchased by the defendant. The plaintiff did not intervene, and at that time took no steps to establish his alleged right to this land. In 1885 the defendant obtained another decree against Gopal, and in execution attached plot B. The plaintiff intervened, and claimed the property attached as his own under the sale-deed of 30th December, 1875. The defendant disputed the sale, but the Court found in favour of the validity of sale-deed, and allowed the plaintiff's claim. The defendant did not file a suit to set aside this order. The plaintiff then filed a suit to establish his title to plot A, relying on his sale-deed of the 30th December, 1875. The defendant again disputed the sale, pleading that it was a colourable and fictitious transaction.

Held, that the order in the execution proceedings did not operate as *res judicata*, and did not stop the defendant from contesting the validity of the sale-deed in the present suit.§

Per JARDINE, J.—If the decision as to the validity of the deed had been a final decision in a suit as distinguished from an execution proceeding, it would have created an estoppel by *res judicata*. Between the parties the orders to which s. 283 of the Civil Procedure Code refers, are subject to the result of a suit, if

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* Second Appeal No. 715 of 1887.

(1) 6 B.H.C.R. A.C.J. 8. (2) 10 B.H.C.R. 382.
(3) 7 Ves. Jun. 265. (4) 10 C. 305 ; 10 I. A. 162.