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and Orders, p. 116) it is ruled that "an equitable mortgagee by deposit may have a sale though there is no memorandum of deposit and no agreement to execute a legal mortgage." The case of *Carter* v. *Wake* (1) shows also that an equitable mortgagee by deposit of title-deeds is entitled to the right of foreclosure

If, then, by a deposit of title-deeds a mortgage is effected, which although equitable has the same effect as a legal mortgage and can be enforced by the same remedies, I fail to see how art. 147 can be held to be restricted so as to exclude such mortgages from its operation. It is contended that it applies only to mortgages under which the mortgagee would have the right to institute a suit for foreclosure or for sale under the Transfer of Property Act. Irrespective, however, of the difficulties of construing an Act of 1877 by an Act of 1882 and of applying to the disposal of this case an Act which is not in force in the Bombay Presidency, the contention fails, because the Transfer of Property Act recognizes that the delivery of documents of title does create a mortgage and does not invalidate them (s. 59), and it does not declare that such mortgagees shall not have the right which they have by English law to sue for foreclosure and sale.

Being, then, of opinion that a mortgage by deposit of title-deeds, such as the one in the present case, is a mortgage, and that under it the mortgagee has the right to sue for foreclosure or sale, I hold that art. 147 of the Limitation Act applies, and that the present suit is not time-barred, and I concur in the decree just passed.

Decree reversed.

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[274] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Candy.

SAJAJIPANHAJI (*Original Defendant No. 2*), *Appellant v.* MARUTI (*Original Plaintiff*), *Respondent**.

[30th September, 1889.]

Interest—Penalty—Stipulation in a mortgage-bond for enhanced interest in default of payment on a certain day—Contract Act (*IX* 1872), *s.* 74.

A mortgage-bond provided for repayment of the loan on a certain date with interest at the rate of 8¼ *per cent.* In default of payment on the due date, interest was to be paid at the rate of 37 *per cent.*, to be calculated from the commencement of the loan.

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

[**Appr.**, 19 C. 392 (F.B.); **R.**, 17 B. 106 (110); 30 C. 15=7 C.W.N. 152; 36 M. 229=18 Ind. Cas. 417=24 M.L.J. 155=13 M.L.T. 20.]

SECOND appeal from the decree of W. H. Crowe, District Judge of Poona, in appeal No. 73 of 1886 of the District File.

The plaintiff sued, as assignee of equity of redemption, to redeem certain property which had been mortgaged by the defendant No. 1 to defendant No. 2 by a mortgage-bond for Rs. 1,999, dated 17th February 1868.

* Second Appeal No. 738 of 1887.

(1) L. R. 4 Ch. D. 605.

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The mortgage term was two years. The bond provided for payment of interest at 8¼ *per cent. per annum*, on condition that if the debt were not paid off at the stipulated time, interest at 37 *per cent.*, calculated from the date of the bond, should be paid.

Both the lower Courts held that the stipulation for enhanced interest was of the nature of a penalty, and, therefore, allowed to the mortgagee interest at 8¼ *per cent.* only. A decree was passed awarding to the plaintiff possession of the property mortgaged on payment of Rs. 4,160-14-9 to defendant No. 2 (the mortgagee).

Against this decree this mortgagee appealed to the High Court.

Jardine (with him *Ghanasham Nilkant*), for appellant.

Telang (with him *S. V. Bhandarkar*), for the respondent.

The following authorities were referred to in argument :—[275] *Balkishen Dass* v. *Run Bahadur Singh*(1) ; *Baij Nath Singh* v. *Shah Ali Hosain* (2); *Basavayya* v. *Subbarazu*(3) ; *Rasaji Davlaji* v. *Sayana Sagdu* (4) ; *Mackintosh* v. *Crow*(5) ; *Nanjappa* v. *Nanjappa* (6).

JUDGMENT.

JARDINE, J.—In this appeal a question has been argued which was touched, but not decided, in the judgments in second appeal No. 116 of 1889—*Dullabhdas Devchandshet* v. *Lakshmandas Swarupchand*(7). There it was held that a stipulation for increased interest, in default of payment of the principal, to commence from the due date, was not of the nature of a penalty. We have now to decide whether a stipulation in a mortgage-bond, that in case of default of payment of the principal on a certain date the interest, which was only 3¼ *per cent.* in case of non-default, should be calculated at the rate of 37 *per cent.* from the date of the bond, is a condition of the contract and enforceable under Act XXVIII of 1855, or is to be treated as only accessional and collateral,—that is, as a penalty to secure the fulfilment of the contract,—and to be relieved against under the well-known rule of equity, or under s. 74 of the Indian Contract Act.

It has been argued by the learned counsel for the appellant that the point has been determined by the Judicial Committee of the Privy Council in *Balkishen Dass* v *Run Bahadur Singh* (1). This view of the Privy Council ruling was taken at Calcutta in *Baij Nath Sing* v. *Shah Ali Hosain* (2) and at Madras in *Basavayya* v. *Subbarazu* (3), while in a later case two other Judges of the High Court of Madras took the opposite view—*Nanjappa* v. *Nanjappa* (6). We concur in the reasoning of *Nanjappa* v. *Nanjappa*. The observations of their Lordships of the Judicial Committee have to be taken in connection with the facts of the case and the point to be decided. They related to a decree, not to a bond : and there is nothing in them to show an intention to overrule the decisions of the High Courts in [276] India on the point now before us. They can be given full effect to, in all their generality, as regards decrees, which, as this Court has twice decided, are enforced on principles different to those applied to contracts—*Shirekuli Timapa* v. *Mahablya* (8). For these reasons we are of opinion that we must decide this case without the assistance of the ruling of the Privy Council. It appears, however, to

(1) 10 C. 305=10 I. A. 162. (2) 14 C. 248. (3) 11 M. 294.
(4) 6 B. H. C. R. A. C. J. 7. (5) 9 C. 689. (6) 12 M. 161.
(7) See *ante* 14 B. 200. (8) 10 B. 435.

recognize that once a stipulation is determined to be a penalty, the test of reasonableness is to be applied.

The decisions of the High Courts on the point before us, irrespective of the ruling of the Privy Council, have not been uniform. They are collected under s. 74 of Shephard's Contract Act and at p. 161 of Machperson on Mortgages, (7th ed.). It is important to consider how the Courts dealt with the point before the Indian Contract Act IX of 1872 was passed. In *Rasaji Davlaji* v. *Sayana Sagdu* (1), Couch, C. J., and Newton, J., held that a stipulation increasing the interest from date of the promissory note from two *per cent. per mensem* to one anna per rupee *per mensem* was a penalty which might be relieved from on payment of the lower rate. *Motoji* v. *Shekh Hussen* (2) is based on the same principle, though the facts as reported are not so clear. The fully argued case of *Bichook Nath Panday* v. *Ram Lochun Singh* (3) is also in accordance. It is thus clear that before the passing of the Contract Act the Courts applied equity in relief of the strictness of Act XXVIII of 1855. In the last case and in *Adanky Ramchandra Row* v. *Indukuri Appalraju Garu* (4) the learned Judges refer to *Dimech* v. *Corlett* (5) and *Kemble* v. *Farren* (6). As laid down by the Privy Council in *Dimech* v *Corlett* (5), the hinge, on which the decision in every particular case turns, is the intention of the parties collected from the language they have used."

We have next to consider the question in the light of ss. 73 and 74 of the Contract Act. But here we have no reported decision of this Court to guide us. It has, however, been repeatedly ruled by the High Courts at Calcutta and [277] Madras that a stipulation, like the present, is a penalty to which s. 74 applies in relief. This view might, we think, be taken a *priori*. The Act, according to the preamble, is only "to define and amend certain parts of the law relating to contracts." It "purports to be only a partial measure"—*Kuverji Tulsidas* v. *The Great Indian Peninsula Railway Company* (7). Therefore, we think it ought not to be readily assumed that it was intended by the Legislature materially to restrict any form of equitable relief, unless clear words are used, and on the whole we think the decisions show that this method of interpretation has been applied by the High Courts. The variety of the reliefs afforded by the rule about penalty is seen in the commentary on *Sloman* v. *Walter* in 2 Wh. and T. Equity Cases.

To this it may be objected, as in *Adanky Ramchandra Row* v. *Indukuri Appalaraju Garu* (4), that "Act XXVIII of 1855 is a conclusive proof that the intention of the Legislature is, that parties shall be left to make and be compelled to stand by their own bargains." But this principle is restricted by Bowen, J.'s observation in *Protector Endowment Loan Co.* v. *Grice*: (8) "The rule of equity which prohibits the infliction of penalties, comes down to us from a time when borrowers of money were believed to require special protection against improvident contracts: but whatever the origin of the rule of equity, whatever its economical merits, it exists,—effect must be given to it when a case arises which falls within it." It may also be objected, and is objected in *Baij Nath Singh* v. *Shah Ali Hosein* (9), that it does not fall

(1) 6 B.H.C.R. A.C.J. 7. (2) 6 B.H.C.R.A.C.J. 8. (3) 11 B.L.R. 135.
(4) 2 M.H.C.R. 451. (5) 12 Moore's P.C. 199 (229).
(6) 3 M. & P. 425, (441)=6 Bing. 141. (7) 3 B. 109 (113).
(8) L.R. 5 Q. B. D. 125. (9) 14 C. 248.

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within the rule, because no sum is named in the contract as the amount to be paid in case of breach, and that, therefore, the present case is outside s. 74 of the *Contract Act*. On that assumption, it might perhaps be argued that the Court is at liberty to decide according to the rule of equity, unaffected by the Statute. But we think the proper construction of the words is one which leans to that existing and important rule. The words are not so stringent as the words in Act XXXII of 1839 and 3 and 4 Will. IV. c. 42, s. 28, about interest "sums certain payable at a certain time": see *Juggomohun Ghose* v. [278]*Manikchund* (1) and *Duncombe* v. *Brighton Club Co.* (2): even these latter words have been held to be somewhat governed by the maxim "*Id certum est quod certum reddi potest.*" We are, therefore, on further consideration disposed to agree with the learned Judges of Madras in *Nanjappa* v. *Nanjappo* (3) in in their refutation of the reasoning of Mr. Justice Mitter in *Baij Nath Singh* v. *Shah Ali Hosain* (4) about the scope of the words of s. 74.

There are, of course, many circumstances (see 2 Wh. & T. under *Sloman* v. *Walter*) in which the Courts will refuse to treat an alternative and more onerous stipulation as a penalty, or as any thing but a substantial part of the contract—*Thompson* v. *Hudson* (5); *Rolfe* v. *Peterson* (6); *Ponsonby* v. *Adams* (7). Where the enhanced interest is to begin from the due date, the High Courts, as already noticed, have refused relief. But in testing the present case and determining whether it comes within the relief, we would refer to the reasoning in *Bichook Nath Panday* v. *Ram Lochun Singh* (8) where the following observations of Tindal, C. J., in *Kemble* v. *Farren* are quoted:—"That a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have also, in modern times, endeavoured to relieve, by directing juries to measure and assess the damages actually sustained by the breach of the agreement." The stipulation about enhanced interest would, in the case of a mortgage-bond, be relieved against by the Courts in England—Coote on Mortgage, 5th ed., 957; *Saton* v. *Slade* (9).

Applying the above principles to the present case, we are of opinion that we must assume that the Subordinate Judge was right in treating the greatly enhanced interest as a penalty, and nothing has been pointed out to us showing that the intention [279] of the parties to the contract was otherwise. On the other matters argued by the learned counsel for the appellant we see no reason for interfering with the decree of the District Court, which we now confirm with costs.

Decree confirmed.

(1) 7 M. I. A. 263. (2) L. R. 10 Q. B. 371. (3) 12 M. 161.
(4) 14 C. 248. (5) L. R. 4 H. L. 1. (6) 2 Bro. P. C. 436.
(7) 2 Bro. P. C. 431. (8) 11 B. L. R. 135 (141). (9) 7 Vessy. Jun. 265.