

## APPELLATE CIVIL.

*Before Mr. Justice Crowe and Mr. Justice Batty.*

1902.

*September 1.*

TRIMBAK TUKARAM NAIK AND OTHERS. (ORIGINAL DEFENDANTS),  
APPELLANTS, v. BHAGCHAND AND ANOTHER (ORIGINAL PLAINTIFFS),  
RESPONDENTS.\*

*Contract Act (IX of 1872), section 74—Bond—Instalments—Failure to pay instalments—Interest at a higher rate from the date of the transaction—Penalty.*

Defendants borrowed a sum of Rs. 200 from the plaintiffs and gave a bond dated the 12th December, 1879, for Rs. 250, repayable by monthly instalments of Rs. 5. The bond provided that, in case of default in payment of any instalment, interest at 24 per cent. per annum should be charged from the date of the bond. The sum of Rs. 203-2-9 was paid by defendants up to the 9th July, 1884, after which date no payments were made. The plaintiffs claimed interest from the defendants at the rate of 24 per cent. calculated from the date of the bond.

*Held*, that the provision in the bond that, on default, interest at 24 per cent. per annum should be charged from the date of the bond was in the nature of a penalty; and that the amount claimed could not be recovered.

APPEAL from the decision of T. D. Fry, District Judge of Násik, confirming the decree passed by Ráo Saheb R. T. Kirtane, Subordinate Judge of Málegaon.

On the 12th December, 1879, the defendants borrowed Rs. 200 from the plaintiffs and gave them a bond for Rs. 250, agreeing to repay the plaintiffs Rs. 250 by instalments of Rs. 5 per month until the whole was paid off.

The bond also provided that, in case of failure to pay any instalment, the defendants should pay interest on the principal sum of Rs. 200 at the rate of 2 per cent. per month from the date of the bond.

The first instalment was paid on the 10th February, 1880, and from that date down to the 9th July, 1884, the defendants paid to plaintiffs Rs. 203-2-9 in instalments of different amounts and at irregular intervals.

On the 1st November, 1898, plaintiffs filed this suit to recover Rs. 400 from the defendants. The claim was made up as follows:

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Principal Rs. 200. Interest at the rate of 2 per cent. per month Rs. 403-2-9: total Rs. 603-2-9. Deducting Rs. 203-2-9 received as interest, the sum remaining due and claimed was Rs. 400.

Defendants 2 and 3 contended that the only balance remaining due was Rs. 46-13-3 and that the covenant in the bond providing for 24 per cent. interest was penal and could not be enforced.

The Subordinate Judge awarded the plaintiffs' claim.

On appeal, this decree was confirmed by the District Judge.

The defendants appealed to the High Court.

*R. R. Desai* for the appellants (defendants).

There was no appearance for the respondents (plaintiffs).

CROWE, J.:—The mortgage-bond on which this suit was brought shows that the sum of Rs. 203-2-9 was paid by the debtor up to 9th July, 1884, as the payments to that amount are endorsed on the bond. It must be held, then, that the plaintiffs have condoned any default made by defendants in payment up to that date.

The balance due on the bond is Rs. 46-13-3. The provision that on default interest at 24 per cent. should be charged from the date of the transaction is clearly of the nature of a penalty. The most the plaintiffs are entitled to is Rs. 46-13-3 plus an equivalent sum according to the principle of *damdupat* by way of interest.

We amend the decree of the lower Appellate Court by ordering that defendants be allowed to redeem the mortgage on payment to plaintiffs of Rs. 93-10-5 within six months from this date. Costs of this appeal on the plaintiffs.

*Decree amended.*