
(1934) 05 CAL CK 0007
In the Calcutta High Court

Bengal Nagpur Ry. Co. Ltd.

APPELLANT

Vs

Ruttanji Ramji and Others

RESPONDENT

Date of Decision : 23-05-1934

Acts Referred:

Contract Act, 1872 — Section 70, 73

Citation : AIR 1935 Cal 347

Hon'ble Judges : Patterson, J; Mitter, J

Bench : Full Bench

Judgement

Mitter, J.—The action which has given rise to this appeal was brought by the plaintiffs, now respondents, to recover Rs. 1,66,493-4-0 from B.N. Ry. Co., on account of price of work done by the plaintiffs as members of a joint Mitakshara family in a certain section of the construction known as the Amda-Jamda Branch. The case stated in the plaint is that the defendants offered to the father of the plaintiffs Ramji Madhoji, who is now dead, contract work in the said construction subject to his signing certain schedules which are usually printed forms of agreement; that the plaintiffs' father signed the schedules for earthwork, bridge work and miscellaneous work and delivered the schedules to the District Engineer of Chaibasa; that after carrying on the works for two or three months plaintiffs and father discovered the work to be unusually difficult and expensive and the scheduled rates to be grossly inadequate and the conditions contained in the schedule were hard and unjust.

2. The contractors expressed their inability to work at the rates agreed upon and pressed for cancellation of the contract; and for settlement of higher rates and better conditions, that this led to a discussion and the result of the discussion was that the defendant company had abandoned the plaintiffs' schedules and had prepared new schedules containing higher rates which however were not accepted by the contractor (plaintiffs) and further that the defendant proposed to leave the question of rates open with a view to ascertain later on an estimate of the contractor's expenses after sufficient progress of the work and that the

defendant company assured the plaintiffs of their well established policy to pay final rates at which contractors can make a profit and that reasonable rates will be paid; that on the faith of these assurances the plaintiffs went on with the work and completed the same; that during the progress of the work the contractor kept the defendant company duly informed of the difficulties and the costs from time to time so that these might be taken into consideration at the final determination of the rates; that although attempts were made by the defendant company as well as by the plaintiffs to settle final rates in advance the attempt failed but the work was not stopped on the mutual understanding that the final rates would be ascertained on the completion of the work; that the work was completed in December 1924 but notwithstanding attempts to settle the rates no agreement was reached; that the Company, while admitting its liability to pay reasonable rates maintained that the rates worked up by the District Engineer in the measurement book were sufficient. In para. 8 of the plaint the plaintiffs state their main objections to the rates worked up by the District Engineer as aforesaid.

3. The plaintiffs admit that in pursuance of an oral arrangement the Contractor was supplied by the defendant with explosives free of charge for blasting purposes and consequently the plaintiffs rates for the cuttings are based on their expenses and do not include the cost of explosives. The plaintiffs further state that in spite of repeated demands the defendant Company failed to pay their dues and as the defendant Company were having the benefit of plaintiffs' money the plaintiffs were entitled to get interest at 1 per cent per month since July 1925. The plaintiffs accordingly prayed for the following reliefs, viz., a decree for (a) Rs. 1,26,863-8-0 or any other amount found due as the value of the work done by plaintiff for defendant. (b) Rs. 40,629-12-0 or any other amount of interest adjudged due. (c) further interest for the period of the suit, until realization on the total claim, (Rs. 1,67,493-4-0). (d) Costs of the suit. (e) Other reliefs.

4. The plaint gives an account of the work done and charges for the same in three schedules. Sch. A is the final bill for the earth work; Sch. B is the final bill for the bridge work and Sch. C is the final bill for miscellaneous work. Sch. D of the plaint after giving the total value of the several kinds of work done and after making deductions on account of previous payments and royalty and after charging interest at 1 per cent per month lays the total claim at Rupees 1,67,493-4-0 only. Several defences to the suit have been taken by the defendant railway company, but we will notice only those around which controversy has centered in the present appeal. Such defences are: (1) that the suit is barred by limitation as the works in respect of which the suit has been instituted were completed more than three years before the institution of the suit; (2) that the schedules of rates for earth work, bridge work and miscellaneous works form the foundations of the contract between the parties and the defendant relies on the schedule of rates and the terms and conditions appearing therein; (3) that the schedules of rates were not liable to variation as

alleged by the plaintiffs; (4) that the plaintiffs pressed for some increases as a matter of favour and pointed out some difficulties in view of which certain increases of rates were sanctioned by the Chief Engineer as a matter of favour and were entered in the schedules; (5) that the defendant did not abandon the contractor's schedules but increased certain rates as permitted by condition No. 15 of the schedules; that as the contractor did not agree to or initial the enhanced rates as entered in the schedules the plaintiffs are bound by the lower rates of the original schedules, that the assistant engineer had no authority to make any new proposal with regard to the rates or give any assurance in respect thereof without the prior sanction of the District and Chief Engineers who alone have the right to alter them; (6) that the defendant never admitted its liability to pay any rates other than those entered in the signed schedules; the defendant states that the rates granted by the defendant are fair and reasonable rates; that without admitting the plaintiff's right to re-open the question of rates the defendant submits with regard to Cls. B, C, D and B, para. 8 of the plaint as follows:

(b) That the defendant railway company submit that the scheduled rates as voluntarily amended by the defendant together with 25 per cent jungle allowance are just and adequate; (c) that over and above the jungle allowance a mileage allowance of annas six per cent per ft. was allowed on earth work on this contractor's length. This was the highest mileage allowance on the District. In the case of bridge work where special rates have not been allowed Rs. 2 profit. special mileage allowance has been included in masonry rate and annas 12 per cent profit. for concrete. That the plaintiffs are not entitled to get what they claim under this head. (d) It is submitted that 25 per cent is a fair allowance and ought not to be increased. (e) That special rates higher than the amended schedules rates with mileage and jungle allowance were approved by the Chief Engineer. These rates are on the average about twice those originally agreed to in the printed schedules. That a special road to the contractor's quarry was constructed by the railway and he was given other advantages. The defendant denies the allegations made in sub-para. (e) of the plaint; (7) that the plaintiffs are not entitled to re-open the question of the said rates and to have fresh rates assessed; that without giving up this position but strongly relying upon it the defendant makes the following submissions with regard to Cls. A, B and C, para. 9, of the plaint:

(a) That the principle of the agreed schedule is that the work should be done for an agreed price and not on an expenditure and commission basis. The contractor cannot claim the latter in view of the agreement signed by him. (b) That the rates paid to this contract are in no way less than those paid to other contractors working near him. (c) That the District Engineer is the sole judge of the classifications. The plaintiffs are not entitled to what they call expert and experienced estimate of rates and expenses; (8) that with regard to the allegations made in para. 16 of the plaint, the defendant submits, that it is not true, that there was any oral agreement between the parties in pursuance of

which the contractor was supplied by the defendant with explosives free of charges for blasting purposes, and that no account of such supply to a particular contractor was kept by the contractor or the defendant; on the contrary it was agreed that the contractor would pay for such explosives and that the cost of explosives would be deducted from the amounts due to the contractor and that in the account of bills for this contractor the cost of explosives was as a matter of fact recovered: the defendant denies that the contractors' rates for the, cuttings are based on their expenses and do not include the cost of explosives; (9) that the plaintiffs are not entitled to any interest as claimed by them and that in any case the interest claimed is excessive.

5. On these pleadings the following issues remain for consideration in the appeal.

(4) Is the suit barred by limitation? This issue was not pressed, eventually and nothing more need be said about it. (6) Are the plaintiffs bound by the signed schedules? Or are they entitled to re-open the question of rates (7) Are the plaintiffs entitled to be paid at the rates and for the quantity claimed by them? (7-a) What are the reasonable rates of price for the work done? (7-b) What is the correct quantity of earth work done in each bank? On whom does the duty of correct measurement lie. (8) Are the plaintiffs liable to pay for the cost of explosives? If so, how much? Is such value included or not in the defendant's or plaintiffs' rates? (13) What amount if any is due to the plaintiffs for the value of the work done? (14) Are the plaintiffs entitled to interest? If so, how much?

6. On 10th January 1929 the plaintiffs put in an application supported by an affidavit for local investigation and on the 12th February they supplemented that petition. On the 16th February the Court allowed the application of the plaintiffs and directed that a commissioner be appointed to assess the fair and reasonable rates for the works done remarking that such an investigation was necessary, it being the plaintiffs' case in the pleadings that the contract known as the schedule of rates was abandoned by the defendant who agreed to pay at reasonable and fair rates and remarking also that expert opinion was necessary for such investigation. The commissioners submitted a very long report covering about 250 pages of Vol. 2 of the paper book. This report was filed on 15th August 1930 On 8th January 1931 both sides filed petitions of objection to the Commissioners' report. The learned Subordinate Judge after taking oral and documentary evidence has granted a partial decree to the plaintiffs for the sum of Rs. 1,51,846 and it is against this decree that the present appeal has been brought by the B.N. Ry. Co. Ltd.

7. In order to understand the points which are involved in this appeal it is necessary to indicate briefly the reasons on which the Subordinate Judge has founded his judgment in favour of the plaintiffs. In the first place the Subordinate Judge has determined on the evidence the labour costs of the contractor. He added to that 10 per cent for supervision of establishment. Over and above that he was allowed 15 percent for profits. In addition to that he has allowed 22? per cent for jungle allowance and 2? per cent for water allowance and he has added

to all this a small mileage allowance as also 5 per cent for tools allowance.

8. The labour costs could be worked out in one of two ways: (1) according to the chowka system or rate and (2) according to the daily output system. The difference between the chowka system and the daily labour system is that in the former the cooly is paid for unit of work whereas in the latter the cooly gets his wages daily. The Subordinate Judge has in ascertaining labour costs proceeded in basing his cooly wages upon the chowka system and this he has done on the report of the commissioner. The Subordinate Judge has also taken an average cooly rate or wage instead of actual wages prevailing from time to time during the period of construction. The defendant Railway Company contended before the Subordinate Judge that in ascertaining cooly wages he should have proceeded on the cooly capacity system which is described fully in the evidence of their witness, one Mr. Austin, as also in the evidence of Mr. Das and Mr. Pearson

9. Mr. Bagram who appears for the defendant-appellant has raised several grounds in support of his appeal. He contends in the first place that the labour costs should have been determined on the cooly capacity system as outlined in the evidence of Mr. Austin and not on the chowka system as adopted by the Subordinate Judge below. In the alternative he has submitted that if the chowka system be held to be the proper system for ascertaining labour costs then all extra additional lead and lift should be disallowed for the simple reason as he puts it, that although in the schedule of rates between the contractor and the Railway Company it is provided that the contractor is to get extra lead and lift there is no corresponding arrangement between the contractor and the coolies where the rate includes all the distance. Mr. Bagram has further complained that instead of taking the wages of men and women cooly according to their variation during the different periods and adding them separately he has taken an average which has operated to the serious disadvantage of the defendant company. Mr. Bagram has next contended that the percentages given by the Subordinate Judge for tools, supervision and establishment, jungle allowance and water allowance are wildly extravagant and he contends that on the evidence no more than a consolidated 15 per cent on the labour costs should have been allowed. He has next contended that the interest allowed by the Judge is excessive both as regards rate and period. One of the submissions on the question of profits is that whatever percentage of profits may be considered necessary to give a contractor who is taking the risk of a loss a considerably lesser percentage should be given to a contractor who is not taking such a risk and as in the present case fair and reasonable rates are being calculated after the work is finished, the question of risk must be eliminated and in this view it is submitted that the percentage of profits given is too high. It is next contended that six annas mileage allowance should be disallowed.

10. Another ground taken is that the Subordinate Judge should have held that the Commissioner was clearly wrong so far as his blasting rates are concerned

and in arriving at a conclusion as to these rates the Commissioner has proceeded on borer's wages at a higher figure than that deposed on behalf of the plaintiff. It is also argued that the Subordinate Judge is in error in his conclusion on the question of lead on cutting spoil. It is also one of the submissions of the appellant that the Subordinate Judge has gone wrong on the question of quantity of earth work done with respect to the banks and it is said that the amount of earth work in banks should have been held to be 59, 26, 135 cubic feet as claimed by the plaintiffs in the letter of their Solicitors Messrs. Pugh & Co. and not 60,46,008 cubic feet as claimed in the plaint. With regard to the costs of rock hard blasting the Commissioner originally put the rate at Rs. 4 per 100 cubic feet. The Subordinate Judge modified the Commissioner's report in this respect and directed him to re-calculate on the footing of taking the rate to be 13/14 of Rs. 4. The Commissioner however notwithstanding this modification arrived at a higher figure than Rs. 4 for 100 cubic feet, viz. Rs. 4-6-9, see Vol. 2, p. 517. It is argued that this is not permissible. The point last taken by Mr. Bagram was that plaintiffs are bound by the scheduled rates, i.e. rates given in the printed schedule of the B.N. Ry. to which the plaintiff Ramji put his signature as on the evidence plaintiff failed to establish the case made in the plaint that there has been abandonment of the scheduled rates and therefore of the original contract. Although this point was taken last logically it comes first in order and has been argued first by the respondent. "We propose therefore to deal with this point first, for if a decision favourable to the Railway Company is arrived at on this head, no further points need be considered.

11. The last ground which we proposed to deal with first has just been indicated. The argument is that there might have been an alteration is one of the essential terms of the contract embodied in the printed forms of the scheduled rates, but there has been no abandonment of the original contract by the defendant Railway Company and that the plaintiffs are bound by the original rates as given in the agreement Ex. P, Vol. 3, p. 201. In order to understand this ground reference should be made to the case made by the plaintiffs in the pleadings. His case in para. 3 of the plaint is that defendant offered Ramji Madhoji who will be called "the contractor" contract work in the construction of the Amda-Jamda branch of the B.N. Ry. between revised miles 9 to 12, chainage 47,000 to 63,500 subject to his signing certain schedules in March 1920. In April 1920 the contractor signed the printed form of schedule then current for earth work, bridge work and miscellaneous work and delivered the same. In May 1920 the contractor found the work difficult and he found the rates grossly inadequate and the contractor began to complain to the higher authorities and the result of this complaint led to a discussion and in August 1920 the Railway Company definitely abandoned the contract. That the schedule rates were definitely abandoned by the Railway Company would appear from the mass of correspondence which have been exhibited in this case and to which we will presently refer. If it be established by that the old rates were abandoned and new rates were not accepted by the contractor and the Railway Company

proceeded to ask the contractor to carry on the work, no rates being settled the contractor would be entitled to claim reasonable rates or market rates. That is the true legal position seems to be established on the authorities to be noticed presently. The first point to be noticed is that it will appear from an examination of the printed schedule that the old rates have been altered in the same schedule in ink either black or red and this fact is admitted by the Railway Company but the assent of the contractor was not taken to it and he did not agree to the revised rates it cannot be said that by agreement new rates were substituted for the old. That the Railway Company abandoned the original rates with mutual consent would appear even from the correspondence. Ex. 78 is a letter of 5th October 1920(nearly six months after work had commenced): see Vol. 3, p. 47. That letter which was written by the Assistant Engineer communicated to the contractor the points which had been conveyed to him by the District Engineer as the result of the inspection of the work. The material portions of the letter are as follows:

1. It is not the policy of the B.N. Ry. to cause loss to their contractors by paying them final rates at which they cannot make a profit. 2. Work has Scarcely been started at present and it is far too early to judge whether a further increase in rates is necessary. The final rates necessary cannot be determined until the work is in full swing. 3. Any representations which you may have to make will be sympathetically considered after a good effort has been put forth (say for six months) which will enable an estimate to be made of the actual expenses incurred.

12. The respondent contends that the letter held out in essence a promise to allow reasonable profit to the contractor. Whether the letter lends itself to that construction or not it is clear that the Railway Company clearly understood that the scheduled (original) rates can no longer regulate the parties and in view of the difficulties they will have to be reconsidered so that a reasonable profit should be left to the contractor. (After examining the evidence His Lordship proceeded). The oral and documentary evidence point in our opinion to the conclusion that there was an abandonment of the original printed rates by mutual consent after the contract. It has been argued for the appellant that under the contract it was permissible to alter the rates after the work has commenced and reference is made to Clause 15 of the general conditions on the back of Ex. P but that clause requires that any alteration in rates after the work has commenced must be noted in the schedule and initialed by the Engineer-in-charge and the contractor. Section 15 really does not assist the defendant for the alterations were not initialed by the contractor.

13. There being the abandonment of the old rates and no settlement of any new rates let us consider what the true legal position is keeping in view the fact that the Railway Company has got the benefit of the work of the Contractor and to the further fact that the contractor did not do the work gratuitously. We are of opinion that in the circumstances any actual transaction between the parties

gave rise to the ordinary legal rights and in the absence of any settlement of any rates the plaintiffs are entitled to get reasonable rates or market rates. Section 70, Contract Act, may be applied to the present case. That section runs as follows:

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

14. Reference may be made in this connexion to *Rose & Frank Co. v. J.R. Crompton* (1925) AC 445, where the facts are stated as follows: By successive arrangements made before 1913 between an American firm and an English Company the American firm were constituted sole agents for the sale in the United States and Canada of tissues for carbonising paper supplied by the English Company. The greater part of these tissues was manufactured for this English Company by another English Company. By an arrangement made between the American Firm and both English companies in 1913 the English companies expressed their willingness that the existing arrangements with the American firm, which were then for one year only, should be continued on the same lines for three years and so on for further periods of three years subject to six months' notice. This document after setting out the understanding between the parties including several modifications of the previous arrangement proceeded as follows:

This arrangement is not entered into nor is this memorandum written, as a formal or legal agreement and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they honourably pledge themselves, with the fullest confidence based on past business with each other that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation. This is referred to as the "honourable pledge" clause.

15. Disputes having arisen between the parties, the English companies determined this arrangement without notice. Before the relations between the parties were broken off the American firm had given and the first mentioned English Company had accepted certain orders for goods. In an action by the American firm for breach of contract and for nondelivery of goods it was held in the above state of facts that the arrangement of 1913 was not a legally binding contract; that at the rate of the arrangement of 1913 was not a legally binding contract; that at the rate of the arrangement of 1913 all previous agreements were determined by mutual consent but that the orders given and accepted constituted enforceable contracts of sale. The following passage in the speech of Lord Phillimore is pertinent to the present controversy:

Any actual transaction between the parties however gave rise to the ordinary

legal rights; for the fact that it was not of obligation to do the transaction did not divest the transaction when done of its ordinary legal significance. This, my Lords, will, I think, be plain if we begin at the latter end of each transaction. Goods were ordered, shipped and received. Was there no legal liability to pay for them? One stage further back. Goods were ordered, shipped and invoiced. Was there no legal liability to take delivery? I apprehend that in each of these cases the American Company would be bound.

16. This case rests on the wide general principle that where one has expressly or impliedly requested another to render him a service without specifying any remuneration, but the circumstances of the request imply that the service is to be paid for, the law will imply a promise to pay quantum meruit, i.e., so much as the party doing the service has deserved, or, as we normally say a reasonable sum. By the letter of 5th October 1920, Ex. 78 the contractor was asked to carry on the work and assurance was given that it was the policy of the railway company to see that the contractors get a certain amount of profit.

17. Mr. Bagram has contended that there has been no abandonment of the original scheduled rates but that there has been merely a variation of the contract in one particular and he has relied on the decision of the House of Lords in the case of *Morris v. Baron* (1918) AC 1 in support of this proposition. Whether there has been a mere variation of terms or abandonment depends upon the facts of each particular case and is of ten not easy to determine, but the following test has been suggested by Lord Dunedin:

In the first case (variation) there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exit; in the second (rescission) you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.

18. (His Lordship then looked into the correspondence and the judgment proceeded.) Applying the test laid down by Lord Dunedin in 1918 A.C. 1 in the passage already quoted it appears that the original contract was gone and as the contractor completed his work he is entitled to reasonable rates. The argument as I understand it, is that under Clause 15 of the general conditions it was permissible to the railway company to vary the rates and the railway company altered it under the condition No. 15 and there was merely variation of a part of the contract and no rescission of the contract. But Clause (11) was altogether disregarded in the correspondence for increase was given in some of the letters without corresponding alteration in the schedule.

19. In this connexion reference is made to a decision of the House of Lords in

Darnley (Earl) v. L.C. & D. Ry. (1867) 2 HLC 43 and reference is made to the following passage occurring in the speech of the Lord Chancellor at p. 60:

When parties who have bound themselves by a written agreement depart from what has been so agreed on in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforce, a substituted verbal agreement, to shew, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding-that both parties were proceeding on a new agreement the terms of which they both understood.

20. There can be no doubt in this case that both parties understood that the old rates as embodied in the printed schedules must be abandoned. Ex. 78 p. 47, Vol. 3, which is described by counsel for appellant as the sheet anchor of the respondent's case supports this view. The letter of the District Engineer dated 20th April 1921, p. 57, Vol. 3, supports the same view. He says:

Your para. 6. You can see and sign the schedule in the Assistant Engineer's Office. Above these rates you will be paid 25 per cent, extra on all items involving labour provided you in return make reasonable arrangement to look after your coolies and make them so contented that they do not bolt.

21. Can there be any doubt on this letter that both parties correctly understood that the scheduled printed rates to which the contractor put his signature can no longer regulate the rights of the parties. The burden of proving that there has been a departure by consent of both parties from the terms of the original contract is on the person asserting it, and in my opinion that burden has been effectually discharged by the conduct of both parties as disclosed in the correspondence just referred to. (After dealing with the argument of the appellant, His Lordship proceeded to consider the cross-objection of the respondent and other questions and then proceeded to consider the question of interest.) The learned Counsel for the appellants has raised a very important question with reference to the interest on the amount claimed. He contends in the first place that no decree for interest should have been allowed as there was no contract express or implied to pay interest and he argues further that in any event interest at the rate of 12 per cent per annum is excessive and his further extreme contention is that interest pendente lite should never be allowed. The amount of interest claimed and due, if interest is payable, is considerable and the case becomes of importance to the parties in consequence of the amount. In support of the contention that no interest should have been allowed up to the date of the suit reliance has been placed on the decision of the Patna High Court in the case of Pattinson v. Bindhya Debi 1933 Pat 196. That decision it is to be noticed is contrary to the view which has been taken consistently in this Court in the cases of Mohamaya v. Ramkhelawan (1912) 15 IC 911 and the case of Khetra Mohan v. Aswini Kumar 1918 Cal 448. The Patna decision seems to be opposed to the decision of their Lordships of the Judicial Committee in the case of Lala Chajmal Das v. Brijbhukhan Lal (1895) 17 All 511, which lays down that

even though the claim of the plaintiffs be or is limited to interest which is not recoverable either under a contract or under the provisions of the Interest Act (Act 32 of 1839) it is open to the Court to make a decree for damages for wrongful detention of their money. In the case before the Judicial Committee where the bonds stipulated for payment of principal in two years from its date with interest at 15 per cent and half yearly rests, but omitted to provide for interest after the expiration of the two years; it was held that interest for the post diem period was nevertheless recoverable as, damages for the non-payment at due date, and that prima facie the rate would be the same as that provided in the bond during the two years; in this case simple interest was ordered at 15 per cent. Wort, J., of the Patna High Court seems to think that this decision of the Judicial Committee cannot be reconciled with a later decision of their Lordships in the case of Kalyan Das v. Makhbul Ahmad 1918 P.C. 53, but if the facts of that case are examined it will be seen that there is no conflict between Lala Chajmal Das v. Brijbhukhan Lal (1895) 17 All 511 and Kalyan Das v. Makhbul Ahmad 1918 P.C. 53 . The facts are: In 1878 the mortgagees under the mortgage of 1863 got Rs. 6,988 on account of a redemption, which is only now taking place; therefore they received it over 30 years too soon; therefore they should not only allow it in account, which they have done, but should allow over 30 years" interest on it too. Alternatively, since 1878 the principal mortgage moneys under the mortgage of 1863 must be deemed to have been paid off in the proportion of Rs. 6,988 to Rs. 15,944 and as the enjoyment of the usufruct by the mortgagees was conceded only in consideration of the continuance of the mortgage loan, the enjoyment should be reduced pro tanto from that date; in strictness on redemption a part of the rents and profits collected should be returned or credited in account to the mortgagors in the above proportion but for simplicity"s sake interest at a sufficient rate will do as well. One cannot however help remembering here that the persons, who are asked to repay these profits are the respondents, whose predecessors never collected them or had anything to do with them, and that the persons to whom they are to be repaid are the successors of Debi Das, who collected and enjoyed them and probably bequeathed them to the appellants, but this inconvenient reminiscence is for present purposes outside the hypothesis. In this state of facts their Lordships of the Judicial Committee said this:

To the first way of putting the matter their Lordships reply, as the High Court replied, that interest depends on contract express or implied or on some rule of law allowing it. Here there is no express contract for interest and none can be implied and no circumstances less capable of justifying the allowance of interest as matter of law can be imagined. The mortgage of 1863 is the answer to the second view. It treats the usufruct as a whole as a remuneration for the loan or any part of it so long as it remains outstanding.

22. The facts of this case are somewhat peculiar and all that was laid down was that a man cannot claim interest for money practically in his own pocket. After the abandonment of the original schedule rates the law implied a promise to pay

at market rates and if there is a breach the Court is entitled to assess damages u/s 73, Contract Act. It appears that the work was completed in December 1924 and on 23rd September 1925 the plaintiff contractor wrote a letter to the Assistant Engineer in charge that he would charge interest on Rs. 65,714 at 15 per cent per annum as the amount though admittedly due was being unlawfully withheld from him. The interest before suit was claimed from 26th July 1925 to 29th November 1927. In this case the interest is really in the nature of damages for detention of the debt. In the case of *Cook v. Fowler* (1874) 7 H.L.C. 27, Lord Cairns refers to the well known principle that any claim in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant and the sum which properly and under all the circumstances should be awarded for damages. No doubt prima facie the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages.

23. And this is what was said by Lord Morris in *Lala Chajmal Das v. Brijbhukhan Lal* (1895) 17 All 511. The appellant has also referred to a decision of this Court in the case of *Prosannamoyee v. Gopal Lal* 1920 Cal 912 where Walmsley, J. held that interest by way of damages is not recoverable for the mere wrongful detention of an ordinary debt. Huda, J., did not agree with him. He held that the plaintiff in that case was clearly not entitled to any interest under the Interest Act. But observed the learned Judge:

That in my opinion does not debar him from claiming interest by way of damages under Section 73, Contract Act.

24. Walmsley's, J. view no doubt supports the appellant but we are not prepared to agree with him in view of the decision of the Judicial Committee and of this Court to which reference has already been made. The ground therefore that no interest should be allowed before suit should fail. The next point taken is that interest pendente lite should not be allowed. There is no authority for this proposition. On the other hand there is authority for the proposition that for the period between the filing of the plaint and the determination of the suit the plaintiffs are entitled to interest: see *Kandappa Mudaliar v. Muthuswami Ayyar* 1927 Mad 99. On the point of interest another ground is taken and it is said that 12 per cent. per annum is excessive. Considering all the circumstances of the case regard being had to the fact that there is no evidence that the contractor sustains actual damage or that he paid 12 per cent on his borrowings, we think that 9 per cent. per annum is the fair rate of interest that the plaintiffs can claim. We accordingly reduce the rate of interest from 12 per cent to 9 per cent and the decree of the Subordinate Judge must be varied in this respect. (The remaining portion of the judgment is not necessary for the purpose of this reporting).

Patterson, J.

25. I agree.