

(1873) 02 CAL CK 0004
In the Calcutta High Court
Case No : Special Appeal No. 709 of 1872

Bichook Nath Panday

APPELLANT

Vs

Ram Lochun Singh

RESPONDENT

Date of Decision : 19-02-1873

Acts Referred:

Citation : (1873) 02 CAL CK 0004

Final Decision : Dismissed

Judgement

Pontifex, J.—From this it appears that, if default was not made in payment of the principal and interest, the loan was made at less than the usual rate of interest; but it would also appear from the amount of the sadder jumma that the property hypothecated was an ample security for the loan. Both of the lower Courts have decided that the provision in the bond, which is to take effect in default of punctual payment, must be treated as in the nature of a penalty, and the Judge of Bhaugulpore has accordingly given a judgment to the appellant for the principal amount, but together with interest calculated at 12 per cent. per annum in satisfaction of such penalty.

2. The facts of the case are that default was made in payment of the principal at the expiration of three years from the date of the bond. It does not clearly appear, but I will assume for the purpose of this decision that default was made throughout the three years in payment of the monthly interest. The appellant might have sued on the bond for each monthly installment of interest. This he did not do. But one month and twenty days after the expiration of the period of three years, the appellant instituted the present suit. It would appear that the respondent was at the date of the institution of the suit prepared to pay the principal (with the exception of a trifling sum of Rs. 25 about which there was a dispute, but which the respondent agreed to pay if the appellant would vouch for it having been advanced), but objected to pay interest at the rate of 4 per cent. per mensem according to the default proviso in the bond.

3. The appellant before us insists that, having regard to s. 2, Act XXVIII of 1855,

the Court is bound to decree the interest at 4 per cent. per mensem, and cannot relieve against the proviso as being in the nature of a penalty. The words of that section are:--"In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties." But that section in my opinion does not affect the question of penalty or no penalty. It leaves it still open for the Court to decide whether the 4 per cent. per mensem "was agreed upon by the parties as interest," or whether it was intended as a penalty. Otherwise in no case, however gross and oppressive it might be, if the parties used the word "interest," could the Court interfere. Such argument is met by the numerous cases which decide that the question to be determined of penalty or no penalty is to an instrument cannot change the fact by using a particular name, and whether the sum provided to be paid is to be treated as a penalty or as liquidated damages is a question of law to be decided by the Court upon a consideration of the whole instrument in each case--*Sainter v. Ferguson* 7 C.B., 716, see 727; 18 L.J., C.P., 217. It has been laid down by the Privy Council in the case of *Dimech v. Corlett* 12 Moore's P.C., 199, see 229 that "the law on the question of penalty or liquidated damages may be considered, after a great number of decisions, not perhaps all of them strictly reconcilable with each other, to be at length satisfactorily settled; and the hinge, on which the decision in every particular case turns, is the intention of the parties collected from the language they have used. The mere use of the term "penalty," or the term "liquidated damages" (or in the present case I may add the term "interest") "does not determine that intention; but like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance is, however, of great importance towards arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all or any of them, was intended to be a penalty, and not in the way of liquidated damages." To the principle so laid down by the Privy Council may be added the observations of Tindal, J., in the case of *Kembhy. Farren* 3 M. & P., 425, see 441; S.C., 6 Bing., 141 "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 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."

4. Applying these principles to the case before us, if one day's default was made in payment at the end of any, even the first, month of the three years' term, of the interest at the rate of ? per cent. per mensem, the very large rate of 4 per cent. per mensem would immediately become payable throughout the term; or, in other words, a very large sum would become immediately payable in consequence of the unpunctual payment of a very small sum. Or, again, if

interest at the rate of ? per cent. per mensem had been punctually paid for the first thirty-four months of the term, but one day's default was made in payment of the interest of the thirty-fifth month at that rate, 4 per cent. per mensem would immediately become payable from the very commencement of the term; or, in other words, a very large sum would become immediately payable in consequence of the unpunctual payment of a very small sum, and notwithstanding punctual payment at the lesser rate for thirty-four months. Or, again, if interest at the lesser rate had been punctually paid for thirty-five months, but one day's default was made in payment of the principal sum and the interest for the thirty-sixth month, an increased sum of Rs. 252 would become immediately payable in respect of interest for the higher rate from the commencement of the term; or, in other words, in consequence of one day's default in payment of Rs. 603, the larger sum of Rs. 855 would immediately become payable.

5. The pleader for the appellant has pressed upon us a decision by L.S. Jackson and Paul, JJ., in *Mussamut Sohodea Bebee v. Baboo Dendyal Lall Ante*, p. 138 which has not been reported. The papers in this case have been placed before us, and from them it appears that, for securing a loan of Rs. 8,000 for three months, a bond was given which carried interest at 1-8 per cent. per mensem, but contained a proviso that, in the event of the Rs. 8,000 not being repaid at the end of the three months, an enhanced rate of interest at 5 per cent. per mensem would be levied in lieu of the first-named interest from the date of the execution of the bond to the date of liquidation thereof. The special appeal was by the debtor whose ground of appeal was that the lower Court had been wrong in awarding interest at 5 per cent. per mensem, inasmuch as the condition in the bond was of the nature of a penalty. The only observations by the learned Judges in that case were "the special appeal is dismissed with costs." In that case the period over which an enhanced payment of interest would extend was only three months, and seemingly the proviso only took effect upon default in payment of the principal, nor does it appear that there was any other than personal security for the debt. But however this may have been, I think every case of this nature must depend on its own circumstances, as stated by the late E. Jackson, J., in the case of *Peetambur Chatterjee v. Kaleechurn Roy Ante*, p. 137; and I am of opinion that the present case falls within the principle of the case of *Boley Dobey v. Sideswar Rao Baboo Roy Kur* 4 B.L.R., App., 92 and of *Kemble v. Farren* 3 M. & P., 425; S.C., 6 Bing., 141.

6. It has been argued with some plausibility that, if the bond in this case had contained the stipulation that interest at 4 per cent. per mensem should be paid reducible to ? per cent. on punctual payment, the Court must have decreed interest at the rate of 4 per cent. per mensem, and further that the proviso in the bond should be construed as an alternative stipulation arising on the happening of a particular event, and that as that event has arisen, the proviso is now the only substantive agreement between the parties. But the answer to this argument is that, instead of being an alternative stipulation arising on an

independent event, it is in fact only a proviso to arise on a breach of the original and substantial contract between the parties; and the question is whether such proviso is to be treated as a penalty, or as a stipulation in the nature of liquidated damages for such breach of contract: and with respect to the argument that, if the stipulation had been 4 per cent. per mensem reducible on punctual payment, interest at 4 per cent. per mensem must have been awarded, it may be observed that in that case 4 per cent. per mensem would have been the substantive primary contract between the parties, and not a penal rate to arise on breach of the substantive contract; and that it is improbable that any borrower, having ample security to offer, as was the fact in the present case, would enter into a contract under which he would be primarily liable to pay 48 per cent. per annum for the loan. Under the circumstances of this case, I am therefore of opinion that the decisions of the Court below are correct in treating the proviso in the bond as in the nature of a penalty; and I also think that the lower Appellate Court has done substantial justice between the parties in awarding damages for the breach of contract by decreeing interest at the rate of 1 per cent. per mensem from the date of the bond, and I accordingly think that this special appeal should be dismissed with costs.