
(1870) 03 CAL CK 0006

Calcutta High Court

Case No: Regular Appeal No. 248 of 1869

Boley Dobey

APPELLANT

Vs

Sideswar Rao Baboo
Roy Kur and Others

RESPONDENT

Date of Decision: March 28, 1870

Judgement

Kemp, J.

The plaintiff is the appellant. It appears that on the 30th of Jaishta 1270 (12th June 1863) a kistbandi was executed by the defendant, the respondent, to the plaintiff's vendor to the effect that, as there were sums due under four decrees, the amount of which is not specified, and on other accounts also not specified, amounting together to 6,000 rupees it was arranged between the parties that this sum of 1,000 rupees was to be liquidated in 5 years by instalments of 200 rupees per annum payable in the month of Jaishta of each year. The kistbandi then goes on to state that if one or any of the instalments fell due and was not paid, the whole of the instalments were to be considered as lapsed, and the whole amount was to bear interest at the rate of 10 per cent per mensem, and the interest was to be calculated from the date of the kistbandi or from the 30th Jaishta 1270 (12th June 1863). The original obligee sold this kistbandi to the present plaintiff. At the time the kistbandi was sold, according to the plaintiff's calculation rupees 5,499 were due by the defendant, and yet this bond was sold for the sum of rupees 800, which shows clearly the speculative nature of the transaction. In the plaint the cause of action is said to have arisen on the 1st of Asar 1271 (13th June 1863) namely on the date on which the first instalment according to the kistbandi fell due. It is however admitted that the plaintiff's vendor received the instalments for 1271, 1272, and 1273 (1864, 1865, and 1866), and did not enforce the penalty according to the terms of the kistbandi against the debtor. The plaint, therefore, looking to the usurious character, might very properly have been dismissed on the cause of action on which it was based. The Subordinate Judge finds, and this is not objected to, that the kists of 1274 and 1275 (1867 and 1868) are due, namely for the kist of 1274 (1867) rupees 200, and for the kist of 1275 (1868) rupees 200, equal to rupees 400, and he gives the plaintiff a decree for that sum plus 12 per cent

interest from the dates on which the instalments fell due. In appeal it is contended that the Subordinate Judge ought to have awarded interest not at the rate of one per cent per month, but at the rate of 10 per cent per month from the date of the kistbandi. The appellant says that according to this calculation rupees 2,211-9-15-1 are due, instead of rupees 488-6-4 $\frac{3}{4}$ gundas as awarded by the Subordinate Judge. This is a case in which the Court will not be disposed to show any favour to the plaintiff. The terms of the kistbandi, in our opinion, being that interest at the rate of 10 per cent per mensem be paid upon the whole of the principal sum of rupees 1,000 in the event of any instalment falling due, and not being paid, were considered by the parties to be in the nature of a penalty; and looking at the fact that the plaintiff's vendor did waive the penalty on two occasions, namely in the years 1271 and 1272 (1864 and 1865) and also to the fact that on the occurrence of any default in paying an instalment, namely in paying a sum of rupees 200, the penalty, if the bond was strictly enforced, would amount to certainly more than rupees 2,000, we think that on the principle that where a smaller sum is secured by a larger sum, that larger sum may be looked upon as a penalty," the judgment of the Subordinate Judge awarding 12 per cent per annum on the instalments due from the date on which they fell due to the date of payment, is an equitable decision, and one with which we shall not interfere in appeal. The appeal is therefore dismissed with costs.