(1916) 05 CAL CK 0043

Calcutta High Court

Case No: L.P. App. No. 40 of 1914

Sanat Kumar Das and Others		APPELLANT
	Vs	
Indra Nath Barman and Others		RESPONDENT

Date of Decision: May 17, 1916

Judgement

Sanderson, C.J.

This case, in my judgment, raises a question of considerable importance, and we are much indebted to the three learned vakils, who have argued the question before us, for their assistance. It appears that so long ago as 1897, the mortgage in question was executed by six individuals, some of whom are Defendants, and the others are now dead and their representatives are the other Defendants in this case.

2. The mortgage was to secure a loan of Rs. 200 and it contained a provision that the loan should be repaid within two months with interest at the rate of one anna in the rupee per mensem, and in case of default the interest was to run at that rate till payment. Each of the six borrowers mortgaged a hal of land to secure the loan. Certain payments were made by some of these six individuals so that the result was that within a little more than six years from the date of the loan, the lender received Rs. 463, that is to say, the whole of his principal Rs. 200 and Rs. 263 by way of interest, which is considerably more than 100 per cent. He postponed bringing his action until 1909, and then the mortgagee sued for Rs. 1,419-8 annas, which he alleged was the amount owing to him upon the mortgage, after deducting the payments which had been admittedly made.

3. The Court of first instance gave the Plaintiff a decree but not for the full amount of his claim, but for Rs. 1,307. Then the Defendants appealed to the District Judge, who dismissed the suit altogether. He came to the conclusion that a collateral verbal agreement had been made between the Plaintiff on the one hand and the Defendants on the other, whereby the Plaintiff gave the Defendants to understand that he would hold each of them liable for his own share only, and that when he accepted the various payments which were made, he verbally agreed to that effect.

The learned Judge after reviewing the evidence carefully came to the conclusion that that agreement had in fact been made, and that consequently the original agreement which was contained in the mortgage bond was varied, and that having regard to that varied agreement the Defendants had individually discharged their liabilities, and that consequently there was nothing owing to the Plaintiff under the mortgage bond, and therefore he dismissed the suit altogether. The Plaintiff appealed to this Court: and Mr. Justice Teunon upon that point held that evidence of the verbal agreement upon which the District Judge had relied was not admissible, having regard to sec. 92 of the Evidence Act: and in my judgment the learned Judge was right in coming to that decision. I think that the District Judge ought not to have admitted evidence of the verbal agreement, because it did in material respects vary the contract which was contained in the mortgage bond and I may point out one respect in which it varied the mortgage bond, that is to say, the mortgage bond by its terms provided that each one of the mortgagees was liable for the whole amount of the mortgage, namely, Rs. 200 and interest; but the alleged verbal agreement provided that each individual who had executed the mortgage bond was liable for one-sixth of the Rs. 200 only: and, therefore, it is obvious that in that material respect namely, in the provision for the repayment of the loan, the contract contained in the mortgage bond was varied by the alleged verbal agreement, and consequently, to my mind, the learned Judge was quite right in saying that evidence ought not to have been admitted to prove the alleged verbal agreement, having regard to sec. 92 of the Evidence Act.

4. It was then argued by the learned vakil for the Appellant that even if the evidence as to the alleged verbal agreement could not be admitted to show the agreement, he could prove that he had made certain payments and those payments had been accepted by the Plaintiff in full satisfaction of the claim. But that argument cannot be maintained, because, when one examines the facts one cannot say that the Plaintiff accepted these payments in full satisfaction of the contract, for he was at the same moment insisting on his right to be paid not only the principal but interest at 75 per cent., and the payments in fact did not cover the principal and the interest at 75 per cent, but only covered the principal and interest at 5 per cent. Therefore, the learned Judge was right in allowing the appeal upon that point.

5. Then comes the important question of the power of the District Judge to interfere with the agreement which was made between the parties as to the rate of interest, namely, 75 per cent.

6. Now, I do not intend to decide in this case that the circumstances amounted to undue influence within the meaning of sec. 16 of the Contract Act. I do not think it is necessary for the purpose of my judgment to come to any conclusion upon that point, and I do not express any opinion upon it. But I do think that this case comes within sec. 74 of the Indian Contract Act, interpreted at it has been by the decision of this High Court, with which decision I have no reason to quarrel. Sec. 74 provides,

"when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or as the case may be, the penalty stipulated for." Now, in this case the contract has been broken. The question is whether it contains any stipulation by way of penalty. If it does, then the party who is entitled to sue for the breach of the contract is entitled to recover nothing more than reasonable compensation; and what is reasonable compensation must be settled by the tribunal before which the case comes. There is a provision in the section that "reasonable compensation must not exceed the amount so named or, as the case may be, the penalty stipulated for." It is obvious to my mind, as I have said, that what is reasonable compensation must be settled by the tribunal trying the case. In arriving at a conclusion as to whether this contract contains a stipulation by way of penalty, I am assisted by the decision in Khagaram Das v. Ram Sankar Das (I.L.R. 42 Cal. 652: s.c. 19 C.W.N. 775; 21 C.L.J. 79 (1914)), in which my learned brother Mr. Justice Mookerjee gave a judgment which was concurred in by my learned brother Mr. Justice Beachcroft: and it is therein stated at page 662, as follows: "It is not of much moment to consider whether the Court can grant such relief in the exercise of its equitable jurisdiction or under sec. 74 of the Indian Contract as amended in 1899. It is sufficient to observe that although the section was originally framed to deal with the doctrine of penalty and liquidated damages as understood in the law of England, it is in its present form comprehensive enough to include the type of case now before us, because it covers all cases where the contract contains ''any stipulation by way of penalty.'' The question consequently reduces in any concrete case to this; does the contract contain a stipulation by way of penalty. In the solution of this question, the observations of Lord Mersey in Webster v. Bosanquet ([1912] A.C. 394) may be usefully borne in mind. The test is, was the agreement to pay the damages for the breach of covenant or contract unconscionable and extravagant, such as no Court ought to allow to be entered into." Now, when one is considering whether the agreement to pay interest at 75 per cent, is a stipulation by way of penalty, one has to take into consideration all the facts of the case. In this case it is found that the loan was intended as a merely temporary loan, intended to be repaid in two months. We know it had to be raised by the Defendants who were men in poor circumstances,--all of them, with one possible exception, were ignorant men--for the purpose of providing begar transport coolies for the Lushai expedition. Rs. 200 was the total amount of loan and a considerable amount of land, according to the finding of the District Judge, was mortgaged to secure this loan. As I read his judgment the land was considerably in excess of the principal sum of Rs. 200 or any possible interest which could become recoverable within the space of two months or within any reasonable time: and, therefore, when I consider all those facts, can I say that the borrowers under those circumstances having agreed to pay interest at

75 per cent, were doing anything but agreeing to pay a penalty. In my opinion, there can only be one answer: The District Judge said, "the Plaintiffs'' claim is certainly one that shocks the conscience:" the learned Judge of the High Court said that in his view the rate of interest was exorbitant, and in that view he did not allow the Plaintiff any costs.

7. In my opinion under the circumstances of this case the agreement to pay interest at 75 per cent, was a stipulation by "way of penalty." But I wish to make it quite clear that I am deciding that this agreement is a stipulation by way of penalty having regard to the circumstances of this case and this case only, because it may well be that in other cases 75 per cent, is a perfectly proper rate, or at any rate, it may not be a stipulation by way of penalty.

8. As I have said, I think under the circumstances of this case the insertion of the provision as to the rate of interest was a stipulation by way of penalty. Therefore, we have to consider what is reasonable compensation within the meaning of sec. 74.

9. I think that the rate of interest which was allowed by the District Judge at 15 per cent, ought not to be disturbed. I should require further information to satisfy me that the decision of the gentleman who was acting as the District Judge sitting in the District and who knew the local conditions and heard all the evidence should be interfered with. I think he was eminently the right person to decide such a question. I therefore confirm his judgment that 15 per cent, would be the reasonable compensation. The result of that will be that a further account will have to be taken, unless the parties can agree, as to the amount, for this reason: As I understand, the learned Judge of the first Appellate Court directed an account to be taken upon the basis that there was a verbal agreement, each individual mortgagor being liable to pay one-sixth of the principal and interest thereon: but I have come to the conclusion that evidence as to that verbal agreement ought not to be admitted and the only contract between the parties is the written mortgage bond and the Defendants are liable to pay the full amount of the principal which is Rs. 200 and interest at the rate of 15 per cent, down to the institution of the suit. It may be that what the parties have already paid covers the amount which they are liable to pay on that basis; on the other hand, it may be that what the parties have already paid does not cover the amount for which they are liable on that basis. It will depend upon the result of the account as to what will be the final form of the decree. The decree will be that the Plaintiff is entitled to recover against the Defendants jointly and severally five-sixths of the principal money, namely, Rs. 200, and interact thereon at the rate of 15 per cent, per annum down to the date of the suit and from the date of the suit at 6 per cent, per annum until realization. The account will have to be taken, and if it turns out that the amount which the Defendants have already paid was sufficient to cover the amount due upon the decree upon that basis, then the suit will be dismissed. On the other hand, if it turns out that the amount already paid is not sufficient, then there will be a decree in favour of the Plaintiff for the

balance. The final decree will be drawn up by the Bench Clerk upon this basis, who, no doubt, will have the assistance of the learned Vakils on both sides.

10. There is just one other matter which I ought to have mentioned. It was argued during the course of the case that inasmuch as the Plaintiff had released one of the mortgagors, and had not at the same time expressly reserved his remedies against the other mortgagors, that in itself would release the other mortgagors. At one time I was impressed by that argument, because it coincided with the view which is held in England with regard to such position as that, and if this matter had to be decided by the law as it stands in England at the present moment, that might have raised considerable difficulty in the way of the Plaintiff; but my attention having been drawn to sec. 44 of the Contract Act which apparently was expressly inserted for the purpose of modifying the law as it stands in England, I do not think that point is a good one.

11. As regards costs, I think that the Appellants in this Court should have the costs of this appeal. With regard to the proceedings before Mr. Justice Teunon, each party will pay his own costs. With regard to the proceedings before the first Appellate Court and the Court of first instance, they will depend upon the result of the account, and the costs will be in proportion to the success of each party, and if the suit on such account being taken be dismissed, it will be dismissed with costs in those Courts.

Liberty to apply.

Mookerjee, J.

12. I agree that the judgment of Mr. Justice Teunon now under appeal cannot be supported.

13. The Plaintiffs-Respondents instituted this suit on the 28th January 1909 to enforce a mortgage granted by six persons in favour of their predecessor on the 21st December 1877, to secure an advance of Rs. 200 on interest at the rate of Rs. 75 per cent, per annum. The plaint stated that Rs. 443 had been paid towards the satisfaction of the debt and that Rs. 1,419-8 was still due. The Plaintiffs, accordingly, prayed that the mortgaged premises might be sold for realization of this sum.

14. The Court of first instance found that the Plaintiffs had released one of the six mortgagors on receipt of a proportionate share of the mortgage money together with interest, but that they had not given full credit for the payments made by the other mortgagors. The result was that a decree was made in favour of the Plaintiffs for Rs. 1,307 to be realised by sale of that portion of the mortgaged premises which had not been released. The Defendants appealed against this decree.

15. The District Judge held, in the first place, that there was evidence to show that the mortgage contract had been split up by agreement of all parties concerned and that the mortgagees had undertaken to receive from each of the mortgagors a

proportionate amount of the mortgage money and to release the corresponding share of the mortgaged properties. He held, in the second place, that interest was not justly recoverable at the rate of 75 per cent, per annum and that, interest should be allowed only at the reduced rate of 15 per cent. per annum. Accounts were then taken on the basis described, and it transpired that the several mortgagors had paid up their respective shares of the mortgage money with interest. Consequently, the ultimate decree of the District Judge was that the suit be dismissed.

16. The Plaintiffs thereupon appealed to this Court and valued their appeal at Rs. 774-13-7, although a decree had been made in their favour by the trial Court for a much larger sum. In support of the appeal, which was heard by Mr. Justice Teunon, the Plaintiffs argued, first, that oral evidence was not admissible, in view of the provisions of sec. 92 of the Indian Evidence Act, to prove that the mortgage contract had been varied in the manner alleged, and secondly, that interest was recoverable at the contract rate of 75 per cent, per annum. Mr. Justice Teunon accepted these contentions and made a decree in favour of the Plaintiffs, limited to the amount claimed in the appeal. He came to the conclusion, however, that the rate of interest specified in the bond was exorbitant and he consequently deprived the successful Plaintiffs of their costs, as also of interest on the decretal sum after the date specified for redemption.

17. On the present appeal, which has been preferred under cl. 15 of the Letters Patent, two objections have been urged on behalf of the Defendants, namely, first, that interest is not payable at the rate specified in the bond, because the stipulation for payment of interest must be deemed a stipulation by way of penalty within the meaning of sec. 74 of the Indian Contract Act, and secondly, that whatever decree, if any, is awarded to the Plaintiffs, it should be a decree, not jointly against the Defendants for the entire sum found due, but severally against each of the mortgagors for a specified proportionate sum.

18. As regards the first contention, I am of opinion that the Appellants have established their position. I base my conclusion on the ground that, in the circumstances of this case, the stipulation for payment of interest at 75 per cent, per annum was a stipulation by way of penalty, within the meaning of sec. 74 of the Indian Contract Act. The District Judge has found, and his finding must be deemed conclusive by this Court, that the borrowers were ignorant Cachari cultivators, that they had been called upon to supply without remuneration transport coolies for the Lushai expedition which they were bound by the Regulation to supply, and that for the wages of the coolies they had to resort to a money-lender. The Plaintiffs advanced the money, and notwithstanding the fact that ample security was furnished by the borrower, they charged interest as the rate of 75 per cent, per annum, although that was the rate of interest usual only in cases of unsecured loans. The District Judge has held, in these circumstances, that the covenant for payment of interest at such a high rate as 75 per cent, per annum was a stipulation

by way of penalty and that award of interest at the rate of 15 per cent, per annum would meet the justice of the case.

19. On behalf of the Plaintiffs-Respondents, the position has been maintained that the stipulation was not by way of penalty, inasmuch as the bond did not contain alternative provisions for payment of interest in different contingencies. The contention of the Respondents in substance is that a stipulation for payment of interest cannot be deemed a stipulation by way of penalty, if the bond provides for payment of interest at one rate only, howsoever high and exorbitant that rate may be, and on this ground the decision in Khagaram Das v. Ram Sankar Das (I.L.R. 42 Cal. 652: s.c. 19 C.W.N. 775; 21 C.L.J. 79 (1914)) has been sought to be distinguished. No doubt, in that case the bond provided for payment of interest at alternative rates in varying circumstances; that, however, was not the reason for the conclusion adopted in that case. Upon a review of the earlier decisions in this Court and in the other High Courts, the principle was adopted that a Court is competent to grant relief whenever the rate of interest appears to the Court to be penal, although the provision for payment of interest mentions one rate only. This doctrine was recently applied in the case of Bouwang Rajachallaphroo v. Banga Behari Sen (20 C.W.N. 408: s.c. 22 C.L.J. 311 (1915)). Reference has been made in the course of the argument to another decision [Abdul Majeed v. Khtrode Chandra Pal (I.L.R. 42 Cal. 690: s.c. 19 C.W.N. 809 (1914))] which also apparently supports the contention of the Appellants. With regard to that decision, however, I wish to guard myself against a possible inference that I accept all the propositions formulated in the judgment in that case; it appears to me that some of the statements therein may be open to just criticism. But I adhere to the view which after much deliberation and with the concurrence of Mr. Justice Beachcroft I took in the case of Khagaram Das v. Ram Sankar Das (I.L.R. 42 Cal. 652: s.c. 19 C.W.N. 775; 21 C.L.J. 79 (1914)) and followed in Bouwang Rajachallaphroo v. Banga Behari Sen (20 C.W.N. 408: s.c. 22 C.L.J. 311 (1915)) with the concurrence of Mr. Justice N.R. Chatterjea and in Gopeswar v. Jadav Chandra (20 C.W.N. 689: s.c. 22 C.L.J. 352 (1915)) with the concurrence of Mr. Justice Newbould, namely, that it is competent to a Court to grant relief whenever the stipulation for payment of interest at a specified rate appears to the Court to be a stipulation by way of penalty.

20. The Respondents have invited the Court to define what may be deemed a stipulation by way of penalty. I do not think we should accede to this request. It would clearly be wrong for the Court to lay down a rigid definition and thereby to crystalise the law, when the legislature, for the best of reasons, has not defined that expression. What constitutes a stipulation by way of penalty must be determined in each individual case upon its own special circumstances; and, in the circumstances of this case, I hold without hesitation that the stipulation for payment of interest at the rate of 75 per cent, per annum was a stipulation by way of penalty. If, consequently, the agreement for payment of interest is not enforcible, as I hold it is not, the Plaintiffs are entirely in the hands of the Court; and I accept the view of the

District Judge that 15 per cent, per annum is the proper rate in this case. The first point must consequently succeed. As regards the second contention, it is clear that, in view of the provisions of sec. 92 of the Indian Evidence Act, oral evidence was not admissible to prove the alleged agreement between the mortgagees and mortgagors, whereby, it is said, the mortgage contract was split up. The essence of the matter is that the entire mortgage contract must, under sec. 59 of the Transfer of Property Act, be comprised in one or more written and registered instruments. We have here a written and registered instrument by which the original security was granted. Under the contract embodied there, the mortgagees are entitled to hold the mortgagors jointly and severally liable for the entire mortgage debt. A variation in that contract to the effect that each mortgagee is liable only in respect of a proportionate share of the debt could be effected only by another written and registered instrument so that the entire mortgage contract would thereafter be found in two instead of in one document (Cf. the decision of the Full Bench in Lalit Mohan Ghose v. Gopali Chack Coal Co. (I.L.R. 39 Cal. 284: s.c. 16 C.W.N. 55; 14 C.LJ. 411 (1911)). If we were to accede to the contention of the Appellants the statutory provisions of sec. 92 of the Indian Evidence Act could be easily evaded and completely nullified. When the difficulty of the situation was realised by the Appellants, the contention was, as a last resort, faintly put forward that the Defendants might invoke the assistance of the doctrine that as one of the mortgagors has been released, the entire mortgage contract has been thereby split up. But it is plain that the Appellants are not entitled to rely on this position, which is inconsistent with their original case. Their primary case was that the mortgage contract had been split up by agreement of all the parties concerned, namely, the mortgagees and the mortgagors. Oral evidence, it has been held, is not admissible in proof of the alleged agreement. The Defendant cannot now turn round and set up the inconsistent case that the mortgage contract has been split up, because one of the mortgagors has been released by the mortgagees without the consent of the other mortgagors. In this view, it is unnecessary to consider the application of the principle enunciated in Hakim Lal v. Ram Lal (6 C.L.J. 46(1907)), and Debendra v. Abdul Samad (10 C.L.J. 150(1909)). Consequently, the decree in this case must be a joint decree in favour of the Plaintiffs, for such sum, if any, as may be found due upon the mortgage accounts against all the Defendants (other than the mortgagor who has been released).