Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeal and Cross-Appeal of Rani Sundar Koer, widow of Raja Rameswar Pershad Narayan Singh (deceased) v. Rai Sham Krishen and others, and Rai Sham Krishen and others v. Rani Sundar Koer, widow of Raja Rameswar Pershad Narayan Singh (deceased), from the High Court of Judicature at Fort William, in Bengal, delivered the 14th December 1906.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

This case comes before their Lordships on Appeal and Cross-Appeal. The questions between the parties arose in taking the accounts between mortgagor and mortgagee. The Appellant in the principal Appeal is the widow and representative of Raja Rameswar Pershad Narayan Singh, the mortgagor and original Defendant. The mortgagees, who were Plaintiffs in the suit, were the Respondents to the principal Appeal, and the Appellants in the cross-Appeal.

The object of the suit was to enforce payment, by sale of the mortgaged properties, of sums of money owing on two mortgage bonds dated respectively the 19th June 1888 and the 15th June 1891. By the earlier bond the principal sum secured was Rs. 4,35,000, with interest at

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the rate of 14 annas per cent. per mensem, equivalent to 10½ per cent. per annum, and by the first condition of the bond it was agreed that the interest should be paid every six months, and in case of default the mortgagee should pay interest on interest, at the rate of Re. 1-8 annas per cent. per mensem (equivalent to 18 per cent. per annum); and if the amount of interest be not paid within the year, interest on the aforesaid amount of the loan should run at the rate of Re. 1 per cent. per mensem, (equivalent to 12 per cent. per annum), from the date of the execution of the bond till the day of payment.

The principal sum secured by the bond of the 15th June 1891 was Rs. 165,000, made up as follows: (1) Amount due for interest under the first bond; (2) Amount due for principal and interest under an intermediate bond dated the 22nd February 1889; and (3) A further sum stated to have been then advanced. The stipulations as to the interest and compound interest are similar to those in the first bond, except that the rate of interest on the principal money was 12 annas per cent. per mensem instead of 14 annas.

Various points were raised by the mortgagor in his statement of defence and in all sixteen issues were settled. The only points, however, discussed in the argument of the principal Appeal before their Lordships were (1) that both bonds were obtained from the mortgagor by undue influence within the meaning of Section 16 of the Indian Contract Act, 1872, as amended by Act VI. of 1899, Section 2; (2) that a sum of Rs. 8,700 retained by the mortgagees out of the principal sum secured by the first mortgage by way of commission, and a similar sum of Rs. 3,300 retained out of the principal sum secured by the second mortgage ought not

to be allowed to them; (3) that the additional interest charged in both bonds, both by increase of the general rate and by the increased rate of the compound interest on default of payment of interest, was a penalty within the meaning of Section 74 of the Indian Contract Act, as amended by Act VI. of 1899, Section 4, and ought not to be allowed.

There is no evidence of any actual exercise of undue influence by the mortgagees or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money. The learned Counsel for the Appellant argued that the mortgagees were thereby placed in a position "to dominate the will" of the mortgagor, and cited a recent decision of this Board (*Dhanipal Das* v. *Raja Maneshar Bakhsh Singh*, 33 Ind. Ap. 118). In that case, however, the borrower was "a disqualified proprietor" under the Oudh Land Revenue Act, 1876, and his estate was under the management of the Court of Wards, and it was on that ground that their Lordships held that the borrower was under a peculiar disability, and the position of the parties was such that the lender was "in a position to "dominate his will." There is nothing of that kind in the present case, and their Lordships are not prepared to hold that urgent need of money on the part of the borrower will of itself place the parties in that position.

It is not denied that the two sums of Rs. 8,700 and Rs. 3,300 were in fact retained by the mortgagees for commission, and the substantial defence was that it was done with the mortgagor's knowledge and consent at the respective times of the transaction. In the Courts below these sums were treated as items in two larger sums which it was alleged had not come to the Raja's hands and ought not therefore

to be debited to him. The other items in these larger sums appear to have found their way in part to the hands of one Jai Krishen, a relative of the mortgagees, and an old gomashta, Kuerji Dichhit, either directly or as purchase moneys for goods sold by them to the Raja, and as to the rest to the hands of the mortgagor's own servants. The Subordinate Judge held that the Plaintiffs (the mortgagees) had no hand in these transactions and that this extortion could not be laid at their door. And indeed it is hard to see how the mortgagees could be charged with money paid in the nature of douceurs or bribes to persons who (it was said) had great influence over them and had to be propitiated. This part of the case was not pressed upon their Lordships' attention. But the Subordinate Judge held that the mortgagor ought to be credited with the two sums of Rs. 8,700 and Rs. 3,300 retained by the mortgagees as commission, but not with the interest on the Rs. 8,700 which was allowed without objection on the settlement prior to the execution of the second bond.

The learned Judges of the High Court dealt with the whole of the deductions from the principal moneys together. They say:—

"There cannot, we think, be the slightest doubt on the "evidence that the Defendant understood perfectly well that "the two sums of Rs. 35,000 and Rs. 20,000 out of the "considerations of the two bonds were kept back in payment "of the carriage and horses, the kinkhab cloth, and commission "to the Plaintiffs, and however reluctant to agree to this being "done, yet he did agree to these sums being retained and dis-"posed of in these ways, and did consciously and knowingly "admit the receipt of the full consideration of the two bonds."

And after a very full and careful analysis of the evidence, in the course of which they justly observed that the evidence on the Defendant's (the mortgagor's) side was most significant, they summed up their conclusion thus:—

"There are, therefore, we think, no grounds upon which he "can now, years after the bonds were executed, be allowed to

"turn round and say he did not receive the full amounts of "the consideration for these bonds."

Their Lordships have examined the evidence for themselves, but do not find it necessary to say more than that they agree with the statement of the learned Judges as to the effect of it. Not without some reluctance they are constrained also to agree with the conclusion of the High Court on this point.

The "explanation" to Section 74 of the Contract Act as amended says that "a stipulation for "increased interest from the date of default may "be a stipulation by way of penalty." The Indian Courts have invariably held that where (as in the present case) the stipulation is retrospective, and the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered a penalty, because an additional money payment in that case becomes immediately payable by the mortgagor. Their Lordships accept that view of the Statute, and it is unnecessary to discuss under what circumstances increased interest running only from default should or should not be considered a stipulation by way of penalty. The principal Appellant (the mortgagor) argues that the increased interest ought therefore to be disallowed altogether. But this is not what the Statute prescribes. It directs that the party complaining of the breach shall receive from the party who has broken the contract reasonable compensation, not exceeding the amount of the penalty stipulated for. The High Court (agreeing so far with the Subordinate Judge) has given compensation at the same rate as the mortgagor agreed to pay as increased interest, but (differing in this respect from the Subordinate Judge) has not allowed such interest to run from the respective dates of the bonds. The learned Judges observe that at the date of the execution of the second bond there was a

settlement of accounts as regards the interest due on the first bond, and simple interest only was then calculated, and the amount was included in the principal of the second bond. They treat this as a waiver of the compound interest, and any claim for increased interest to that date, and they therefore hold that the increased interest by way of compensation on the first bond should run only from the date of execution of the second bond, and that on the second bond should run only from the date of default of that bond. Their Lordships see no reason to differ from the concurrent Judgment of the Courts below, so far as concerns the rate of the increased interest payable by way of compensation, and they think the High Court has come to a right decision as to the dates from which such increased interest should run.

Their Lordships also agree with the High Court on the question as to the higher rate at which compound interest was to run. Compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty. As, however, the mortgagees have already been at least sufficiently compensated for the default by the increased rate of interest allowed them, their Lordships think that the High Court has taken a reasonable course in allowing compound interest at the same rate only as that at which simple interest was stipulated for on the bond.

The Decree passed by the High Court is dated the 13th June and was signed on the 17th June 1901. It is in the form provided by Sections 86 and 88 of the Transfer of Property Act, 1882, the day fixed for redemption being the 17th September 1901, and in default of payment of the aggregate amount found to be due on that day into Court it provides for payment of simple

interest on such aggregate amount at the rate of six per cent. per annum from the 17th September 1901 until realization.

The point argued on the cross-appeal was that interest ought to have been allowed at the rate stipulated in the bonds with (it is assumed) compound interest from the fixed day until actual realization. The learned Counsel referred to the provisions contained in Sections 86 and 88 of the Transfer of Property Act, and relied in support of his argument on the language used by Lord Hobhouse in delivering the Judgment of this Board in the case of *Rameswar Koer* v. *Syed Nawab Mehdi Hossein Khan*, 25 Ind. Ap. 179.

The Decree is in accordance with the directions contained in Rules of Court made by the Calcutta High Court under the power for that purpose conferred on the Court by Section 104 of the Transfer of Property Act, as well as in rules of an earlier date, and with the uniform practice of that Court. This appears from an instructive note by Mr. Belchambers, the Registrar of the Court, appended to the report of *Achalabala Bose* v. *Surendra Nath Dey*, Ind. L. R., 24 Calc. 766. The same practice has been followed by the Madras High Court (*Subbaraya* v. *Ponnusami Nadar*, Ind. L. R. 21 Mad. 364).

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Their Lordships have carefully examined the case cited by Mr. Cohen, and are satisfied that the question which is now before them was not before the Board or present to the mind of Lord Hobhouse. It was an appeal by the mortgagor from a decree of the High Court of Calcutta, which had directed payment of interest at 12 per cent. per annum (being the mortgage rate) from the date of the institution of the suit to the date fixed by the Subordinate Judge for the repayment of principal

and interest, but contained no direction for payment of interest after that date. And the point argued was that interest from the date of the suit should be at 4 per cent. only, as had been directed by the Subordinate Judge, instead of 12 per cent. allowed by the High Court. The mortgagee did not appeal. The passage in the judgment (at p. 182) which is relied on is as follows:—

"The High Court founded their Order on Sections 86 and "88 of the Transfer of Property Act which indicate clearly "enough that the ordinary decree in a suit of this kind should "direct accounts allowing the rate of interest provided by the "mortgage up to the date of realization."

The expression "up to the date of realization" may have been used per incuriam, or it may have meant "the day fixed for realization," as in fact it seems to have been understood by the reporter of the case in the Indian Law Reports as expressed in his marginal note (26 Calc. 39). Their Lordships cannot have intended to say that Sections 86 and 88 of the Transfer of Property Act indicate that interest at the mortgage rate should be paid up to the time of actual payment of the mortgage money to the mortgagee. These sections contain no direction for interest beyond the day to be fixed by the Court up to which the account is directed to be taken, and in fact the whole difficulty on which there has been so much controversy has arisen from that circumstance. It is enough to say that the question as to the rate of interest (if any) to be allowed after the fixed day until actual realization was not before the Board, and the case is not an authority on that question.

In the subsequent case of *The Maharajah of Bharatpur* v. *Rani Kanno Dei* (28 Ind. Ap. 35) the Appeal was on the construction of an obscurely worded decree, the decision of which was considered to turn on the question whether, according to the true construction of Section 88,

any interest could be allowed by the Court after the fixed day. Their Lordships held that Section 88 did not preclude the payment of such interest, but it was not necessary for them to decide at what rate such interest should be allowed. It may, however, be observed that the rate allowed by the Court below (which their Lordships held on the construction of the decree to be applicable to the period after the fixed day) was 6 per cent. per annum only, and not the mortgage rate, and the decision of their Lordships was based mainly on "the universality of the long "established practice, its continuance for years "after the Transfer Act passed, the manifest "justice of it," and "the lack of any apparent "reason for upsetting it."

In the present case, their Lordships have no hesitation in expressing their concurrence with the High Court of Calcutta, not only in allowing interest after the fixed day, but also in allowing interest at the Court rate and not at the mortgage rate. They think that the scheme and intention of the Transfer of Property Act was that a general account shou'd be taken once for all, and an aggregate amount be stated in the decree for principal, interest, and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree. It will be observed that according to the practice explained by the Registrar, which has been followed in this case, the interest is allowed on the aggregate sum, and not merely on the principal money, and this is right if the mortgagee is treated as a decree holder or judgment creditor, but would be wrong if the right to the interest depended

on the terms of the mortgage bond. After the decision of this Board last cited it is immaterial to inquire into the source of the power in the Court to allow such interest. The words of Section 209 of the Civil Procedure Code are large enough to include the case of a sum of money payable to the Plaintiff out of a fund, and it may be that the Legislature considered that the power of the Court to allow interest after the fixed day was sufficiently provided or preserved by that section, the two Acts being co-temporary. Or it may be said that the provisions of the Transfer of Property Act are not exhaustive and were not intended to overrule the established practice. The directions for payment to the parties contained in Section 88 cannot be read literally because Section 94 contemplates a final adjustment and provides for payment of subsequent costs, and there is nothing in the Act which precludes the subsequent interest also being taken into account as decided in the *Maharajah of Bharatpur's* case. From the form in which that case came before the Board it was unnecessary to decide at what rate subsequent interest should be allowed, but the reasons given in the Judgment in that case appear to their Lordships to be equally cogent for the interest being at the Court rate.

Their Lordships will therefore humbly advise His Majesty that the Appeal and Cross-appeal be both dismissed. It is impossible, in a case like this, to adjust the payment of costs with mathematical accuracy, but as the greater part of the expenses have been incurred on the principal Appeal, their Lordships think that justice will be done by directing the principal Appellant to pay to the Cross-Appellants one-half of their costs of the consolidated Appeals, and making no further order as to costs.