

APPELLATE CIVIL.

Before Newbould and Graham JJ.

BASANTA KUMAR SINGHA

v.

NABIN CHANDRA SHAHA*

1925

May 19.

Limitation—Instalment-bond—Interest—Default in payment of instalment, effect of—Limitation Act (IX of 1908), Sch. 1, Art. 75.

An instalment bond provided that in default of *kists* (instalments), the debtor would pay interest for the sum defaulted till the last day of payment and that, in default of one instalment, the creditor would be at liberty to realise the entire money with interest.

Held, that the provision has the same effect as the stipulation that in such an event the whole sum shall become due.

Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutty (1) and *Hurri Pershad Chowdhry v. Nasib Singh* (2) referred to.

Held, further, that the provision as to payment of interest cannot give the creditor a right to wait to sue until after the expiry of the period of limitation. Limitation commences to run from the default of the first instalment under Article 75 of the First Schedule of the Limitation Act unless there is waiver.

SECOND APPEAL by two of the defendants.

This appeal arose out of a suit for recovery of Rs. 510 alleged to be due on a registered bond. The plaintiff's case was that the defendants had a joint business, in respect of which, on adjustment of accounts, a sum of Rs. 397 odd was found to be due to the plaintiff and that thereupon the first two defendants executed a bond

* Appeal from Appellate Decree, No. 1778 of 1922, against the decree of E. Milsom, District Judge of Noakhali, dated Dec. 21, 1921, modifying the decree of Durga Prasanna Pal, Munsif of Sudharam, dated Jan. 24, 1920.

1) (1904) I. L. R. 31 Calc. 297. (2) (1894) I. L. R. 21 Calc. 542.

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on behalf of all the three defendants for Rs. 300. The plaintiff admitted payment of Rs. 150, but alleged that he had appropriated Rs. 97 out of it in discharge of another debt due to him and the balance in payment of interest due upon the bond in question. The first two defendants filed one written statement and the third defendant another. The third defendant pleaded want of jointness and existence of the business as well as non-liability and limitation. The other two defendants pleaded, *inter alia*, that they had paid Rs. 150 as a part of the principal, that there was no contract for interest and that there had been remission of whatever was due besides what was found as the principal of the instalment-bond in question. They also pleaded limitation.

The primary Court decreed the suit in full. On appeal, the District Judge held that the suit was barred in respect of the first four instalments.

The defendants thereupon preferred this appeal in the High Court.

Babu Jitendra Kumar Sen Gupta, for the appellants. The case is clearly barred by limitation under Article 75 read with Article 116 of the Limitation Act. The lower Appellate Court seems to think that Article 74 applies, on the supposition that there is no provision in the bond that, on default being made in payment of one or more instalments, the whole shall become due. The case thus turns on the construction of the bond. The provision is that, on default of one instalment, the creditor will be at liberty to claim the whole sum. This provision has the same effect as the stipulation that, on default of one instalment, the whole shall become due. *Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutti* (1), *Hurri Pershad*

Chowdhry v. Nasib Singh (1), *Sitab Chandra Nahar v. Hyder Malla* (2).

There can be no question of waiver in this case, as the plaintiff does not allege that he accepted any overdue instalment: *Mohesh Chandra Banerji v. Prosanna Lal Singh* (3), *Girindra Mohan Roy v. Khir Narayan Das* (4), *Abinash Chandra Bose v. Bama Bewa* (5). Waiver is a question of act and as the plaintiff has not pleaded waiver, he cannot be allowed to raise the question.

Babu Bhagirath Chandra Das, for the respondent. Even assuming that the construction put by the appellant on the bond is right, there has been a waiver in this case by the plaintiff of the benefit of the provision by acceptance of Rs. 52 as interest. Besides, there has been payment of interest in this case and the plaintiff is entitled to the benefit of section 20 of the Limitation Act.

Babu Jitendra Kumar Sen Gupta, in reply. The plaintiff is not entitled to have the benefit of section 20 of the Limitation Act, as the defendants did not pay the money as interest. The appropriation by the plaintiff of the money as interest will not make the payment "for interest as such" within the meaning of section 20 of the Limitation Act.

NEWBOULD AND GRAHAM JJ. This is an appeal against a decree in a suit on an instalment bond. The question that has to be decided is whether the suit was barred by limitation. The first Court held that no portion of the claim was barred and decreed the plaintiff's suit in full. On appeal the lower Appellate

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(1) (1894) I. L. R. 21 Calc. 542. (3) (1903) I. L. R. 31 Calc. 183.

(2) (1896) I. L. R. 24 Calc. 281. (4) (1909) I. L. R. 36 Calc. 394.

(5) (1909) 13 C. W. N. 1010.

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Court held that the suit was barred in respect of the first four instalments.

The instalment bond contains the following provisions in case of default :—

“In default of *kists*, we shall pay interest for the sum defaulted, at the rate of Rs. 3-2 per month, without objection, amicably or upon suit, till the last day of payment. If default is made in any one instalment you will be at liberty to realise the entire money with interest amicably or by suit”. The learned District Judge has held that no authority binding in his Court has been produced in support of the view that the stipulation that on default of one *kist* the plaintiffs would be at liberty to claim the whole sum has the same effect as the stipulation that in such an event the whole sum shall become due. Obviously the attention of the learned District Judge was not drawn to the case of *Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutti* (1). There the learned Judges quoted with approval certain remarks in the decision in *Hurri Pershad Chowdhury v. Nasib Singh* (2). In the report at page 300 there is an obvious mistake in the quotation. The passage quoted should be as follows :—“Nor do we think that any distinction can be drawn, as has been attempted to be drawn, between a case in which it is provided that on non-payment of an instalment the whole amount shall become due, and one in which it is provided that on non-payment of an instalment the whole amount may be sued for.”

The learned District Judge has further held that the condition as to payment of interest showed that the defendants had option either to claim at once or to wait on the chance of payment with interest. We

(1) (1904) I. L. R. 31 Calc. 297.

(2) (1894) I. L. R. 21 Calc. 542.

are unable to see why this option to wait on the chance of payment with interest should be held to give the creditor a right to wait until after the period of limitation had expired. On the condition in the bond which gave the plaintiffs the right to sue on the default of one instalment, limitation would commence to run from the first under Article 75 of the first Schedule to the Limitation Act unless there was waiver. In this case there certainly has not been a waiver. Although the defendants in their written statement alleged payment of certain sums towards the principal, the plaintiffs on their own case did not accept these payments on account of the instalments in arrear. They admittedly received these sums amounting to Rs. 150. Of that amount about Rs. 97 was credited to some other debt and Rs. 53 was credited, not in payment of instalments, but in payment of interest.

It is contended on behalf of the respondents that there might be waiver otherwise than by acceptance of payment of overdue instalments. But on the case made by them there is no suggestion how there could have been such a waiver. There is neither evidence nor allegation of express waiver.

We therefore hold that this suit was barred by limitation.

We accordingly decree this appeal and set aside the decrees of the Lower Courts and dismiss the plaintiffs' suit.

The appellants will get their costs in all Courts.

S. M.

Appeal allowed.

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