

APPELLATE CIVIL.

Before Guha and M. C. Ghose J.J.

PRABHATCHANDRA DEB SARKAR

v.

MAHESHCHANDRA BARMA.*

1930

July 11.

Limitation—Default in instalments of mortgage bond, how the period is to be counted—Limitation Act (IX of 1908), s. 20 ; Sch. I. Art. 75.

In a suit on an instalment mortgage bond, providing that, in default in the payment of two successive instalments, the entire amount would fall due, where the mortgagee accepted payment for three instalments together, waiving his right to sue on the entire amount (the payment not being endorsed at the back of the bond) and subsequently sued for the same after two further successive defaults, held, that the period of limitation should be counted from the latter defaults and not from the former. Article 75 of the Limitation Act applies to the suit and section 20 has no application.

Jawand Lal v. Sharf Din (1) dissented from.*Nand Lal v. Akki* (2) followed.

SECOND APPEAL by Prabhatchandra Deb Sarkar, defendant No. 2.

The material facts appear from the judgment.

Ramaprasad Mukhopadhyaya for the appellant. The first court was right in holding that the suit was barred by limitation. As soon as two successive defaults took place, according to the provisions of the bond, the entire amount became recoverable. This was on the 1st Falgun, 1319. Time began to run against the plaintiff from that date. The suit not having been brought within 12 years from that date the claim was barred. The plaintiff could get an extension of time if the subsequent payment was endorsed in the handwriting of the debtor. The acceptance of the three instalments together might be construed as a waiver

*Appeal from Appellate Decree, No. 547 of 1929, against the decree of S. K. Bhattacharya, Additional Subordinate Judge of Rangpur, dated Oct. 3, 1928, reversing the decree of Satishchandra Banerji, Munsif of Gaibandha, dated Aug. 6, 1926.

(1) (1912) 16 Ind. Cas. 961.

(2) (1925) I. L. R. 6 Lah. 163.

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of his right to sue, but it could not take the case out of the scope of section 20 of the Limitation Act.

Jawand Lal v. Sharf Din (1).

Mohinimohan Bhattacharya for the respondent. Section 20 of the Limitation Act applies to a case where an extension of time is sought for. Here the question is not so much about an extension of time, but from what point of time the period should run. The plaintiff accepts Rs. 150 in full satisfaction of previous instalments. Hence the period commenced from the subsequent defaults. No writing was necessary to constitute waiver. Section 20 has, therefore, no application. When the plaintiff waived his right after the first two defaults, the subsequent defaults gave rise to a fresh cause of action. The case of *Jawand Lal v. Sharf Din* (1) has been dissented from in the case of *Nand Lal v. Akki* (2). Article 132 of the Limitation Act applied. Analogy of Article 75 was also helpful.

GUHA J. This is an appeal by the defendant, in a suit brought upon an instalment mortgage bond, which provided for the payment of the principal sum according to certain instalments and the bond also provided that, in default in the payment of two successive instalments, the entire amount would fall due. The plaintiff stated in the plaint that the mortgagor had paid Rs. 150 in Bhadra, 1321 B.S., on account of the first three *kists* specified in the bond and, as the balance of the instalment mentioned in the bond was not paid, the plaintiff was obliged to bring the present suit. It has been found as a fact that the payment of Rs. 150, though made on one date, was in respect of the three *kists* due at the time when the payment was made. The story of the payment thus made has been accepted by both the courts below, and it has been held that the payment amounted to a part payment of the principal sum. As the payment was not endorsed at the back of the bond in the handwriting of the debtor, as required

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by section 20 of the Indian Limitation Act, the trial court held that the payment could not have the effect of extending the period of limitation; and the plaintiff's suit was, accordingly, dismissed by the court of first instance. On appeal by the plaintiff, the learned Subordinate Judge in court below has reversed the decision arrived at by the court of first instance. On the facts of the case, as stated with sufficient clearness in the judgment of the court of appeal below, and regard being specially had to the fact that the plaintiff in the suit had waived his right to sue on the first default in payment of instalments as mentioned in the bond, it appears to us that the view taken by the learned Subordinate Judge on the question of limitation is correct. Our attention has been drawn by the learned advocate appearing for the appellant to the case of *Jawand Lal v. Sharf Din* (1) decided by the Chief Court of Punjab, where the Chief Court held that the proviso to section 20 of the Indian Limitation Act applied to payments of instalments fixed by and payable under a bond, which provided that, on default in payment of one or more instalments, the whole sum secured would be recoverable, and the fact that any instalments were paid, could not be proved except by the production of entries signed by the debtor and reciting the fact of such payment. The Chief Court further held that the payment of each instalment was a part payment of the principal amount due on the bond. If this position as indicated by the judgment of the Chief Court is acceptable, the defendant appellant before us ought to succeed; but this decision of the Chief Court was subsequently considered by the Lahore High Court in the case of *Nand Lal v. Akki* (2), a case where the plaintiff sued to recover money on a bond payable by instalments with the proviso that default in payment of one or more instalments should render the whole debt due forthwith; the plaint recited the payment of the first two instalments and a default on the third; the suit

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was within time, if the first two instalments had actually been paid. On this state of facts, it was held by the Lahore High Court that section 20 of the Indian Limitation Act had no concern with the suit which was governed by Article 75, according to which the *terminus a quo* was the date of the default, in other words, not the date of payment, but the date of non-payment in accordance with the stipulations of the contract, and that the suit was, therefore, within time. The learned Judges expressly observed that the plaintiff did not invoke the aid of section 20 of the Indian Limitation Act, and he could prove the payment of the earlier instalments by oral evidence. It is to be noticed that the case of *Jawand Lal v. Sharf Din* (1), to which reference has already been made, was not followed by the learned Judges of the Lahore High Court in the case of *Nand Lal v. Akki* (2). On the facts of the case out of which the present appeal has arisen, the view indicated by the Lahore High Court in the case referred to above seems to us to be a correct view of the law. Furthermore, on the facts of the case, regard being had to the definite findings arrived at by the court below, that the mortgagee had accepted overdue instalments and thereby waived the benefit of the provisions which gave him the right to the entire claim as to the first default, section 20 of the Indian Limitation Act would appear to have no application to the present case.

In the above view of the case the appeal fails and must be dismissed with costs.

M. C. GHOSE J. I agree.

Appeal dismissed.

A. C. R. C.

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(2) (1925) I. L. R. 6 Lah. 163.