

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

NARAIN BABU (DEFENDANT) v. GOURI PERSAD BIAS (PLAINTIFF).*

Bond—Interest payable Monthly—Specified date for Payment—Limitation Act (IX of 1871), sched. ii, arts. 65, 75.

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The defendant executed a bond, which provided that interest should be payable monthly, and that the principal should become due within six months from the date of execution; the bond contained a clause to the effect that if the interest should not be paid according to the terms of the bond, or if the creditor should feel any doubts as to his being able to realize the principal, he should not be bound to wait until the expiry of the six months in order to bring his suit, but should be at liberty to realize the principal and interest in any manner he might choose,—*held*, that a suit on the bond brought within three years from the date of the day specified therein for payment, was not barred by limitation, as the case fell under art. 65 of sched. ii of Act IX of 1871, and not under art. 75 of sched. ii of that Act.

ON the 28th November 1873, one Narain Babu executed a bond in favor of one Gokul Chund to secure the sum of Rs. 5,000 with interest at 2 per cent. per mensem; the bond contained a clause to the following effect:—"I shall repay the said sum within six months, and the interest I shall pay month by month; but if I should fail to pay the interest in every month, or you shall feel any doubts as to being able to realize the principal amount, you shall not be bound to wait till the expiry of the term mentioned, but shall be at liberty to realize the money, principal with interest, from me, and my heirs and from my moveable and immoveable properties, in whatever way may seem fit; that if within the term of the bond the money shall not be paid, the condition in respect of interest shall stand as it is."

On the 30th May 1876, Gokul Chund sold his right in the bond to the plaintiff, who after demand of payment brought the present suit within three years from the due date of the bond

* Regular Appeal, No. 208 of 1877, against the decree of Babu Gobind Chunder Sandal, Roy Bahadur, Subordinate Judge of Patna, dated the 11th July 1877.

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to recover the amount of principal and interest due under the bond, amounting to Rs. 8,900.

The defendant denied the execution of the bond and the receipt of the money from Gokul Chund.

The Subordinate Judge found that the bond was a valid one, and that it had been executed by the defendant, and the consideration therefore received by him; he therefore gave a decree in favor of the plaintiff with costs.

The defendant appealed to the High Court.

Baboo *Chunder Madhub Ghose* and Baboo *Prannauth Pundit* for the appellant.—The suit is barred by limitation, and although the ground was not taken in the lower Court, or in our grounds of appeal, the Court is bound to notice it. Limitation ran in this case from default in the first payment of interest. The plaintiff was bound to bring his suit on the breach of the first payment of interest, that is to say, one month after the date of the bond, and that being so, the first payment of interest was due in November 1874, and the three years allowed to the plaintiff to bring his suit under cl. 75 of sched. ii of Act IX of 1871 had expired before he brought this suit. The case of *Hurro-nauth Roy v. Maheroollah Moolah* (1) lays down that the period of limitation runs from the first default. [GARTH, C. J.—Here it is not a case where a bond is payable by instalments; it is clearly optional on the part of the obligee to bring his suit at once or not under the terms of the bond. You say that on default in the first payment, the obligee is bound to bring his suit, and so deprive himself of the benefit of the terms of the bond. Unless we are bound by the decision of the Full Bench quoted above, the obligee can bring his suit according to the terms of the bond.] The case of *Hullo-dhur Bangal v. Hogg* (2) lays down that limitation runs from the time of the first default. The case of *Hemp v. Garland* (3) decides that if a plaintiff likes to wait to sue until the last instalment is due, limitation runs from the time from which plaintiff might have brought his action. [GARTH, C. J.—In that case the suit was not a bond, but a warrant of attorney, and it

(1) 7 W. R., 21.

(2) 1 W. R., 189.

(3) 4 Q. B., 519.

was held that the statute ran from the time when the plaintiff's right to sue began. I can see a difference between a case where a bond is payable by instalments, and a case where by nonpayment of interest the whole sum due under the bond becomes payable at once.] In *Mohee Sahao v. A. J. Forbes* (1) it was decided that in a suit for breach of contract, limitation counts from each breach of contract as it arises. The respondent will rely on cl. 65 of sched. ii of Act IX of 1871, which states that limitation runs from the date of the "day specified" for payment in the bond, but those words mean not the specified date of the bond, but the specified date of each consecutive instalment.

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Mr. *Evans* for the respondent.—The appellant says that the first payment of interest became due one month after the date of the execution of the bond, and supposing the cause of suit to have accrued then, we are barred. But where a bond runs in the terms of the bond now in suit, then it is evident that the meaning of the bond points to a possible exercise of a privilege which the obligee might clearly waive unless there is a rule of law preventing him from so doing. The Full Bench case cited, refers to cases of instalment bonds; our case is that of a common bond; and moreover, the Full Bench case is governed by Act XIV of 1859, and ours is governed by Act IX of 1871, which says that limitation "runs from the time of the first default, unless when the payee waives the benefit of the provision, and then from a fresh default;" these words have the effect of upsetting the Full Bench. Supposing the reading of the Court is that "the day specified" is the "date specified" in the bond, we are safe under art. 65; if neither art. 65 or 75 are held to apply, then we come under art. 118, which allows suits which are not mentioned in the schedule to be brought within six years.

[GARTH, C. J.—We are satisfied that the case comes under art. 65, and not under art. 75, and we are ready to hear the appellant on the merits.] (The case was then heard, and a decision on the merits given in favor of the plaintiff, respondent.)

(1) 6 W. R., Act X Rul., 61.