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KHUNNI LAL v. RAGHUNANDAN PRASAD.

In England in cases of municipal elections, a special court is constituted by Statute for the trial of municipal election petitions. It consists of a single commissioner, whose decision is final. He has the power to reserve a question of law as to admissibility of evidence or otherwise for consideration of the High Court, if in his opinion the question requires such consideration. It seems to us that the policy of the law has all along been finality of the decision of the court, commissioner or other special officer empowered to hear election petitions. It seems to us unnecessary to discuss the reasons for such a policy. They appear to us to be obvious. Some awkward and absurd results are mentioned in the ruling mentioned above, to wit, *Sundar Lal* v. *Muhammad Faiq* (1). We agree with this decision in holding that the order passed on an election petition is not a decree and that no provision has been made for appeal from such order. The appeal fails and is dismissed with costs.

Appeal dismissed.

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May, 27.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

AMOLAK CHAND (DEFENDANT) *v.* BAIJNATH (PLAINTIFF) AND BHOLANATH (DEFENDANT.)*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 75—Bond—Option of suing for whole amount due on default of payment of instalments—Limitation.

A bond payable by instalments gave to the creditor the option of suing for the whole amount due on default in payment of any instalment or of suing for the instalments separately. Two instalments were paid; the third was not, and more than six years after default in payment of this instalment, nothing further having been paid on the bond, the creditor sued to recover the whole amount due stating that the cause of action arose on the date when the third instalment became due

Held that the suit was time-barred. *Ajudhia* v. *Kunjal* (2) distinguished.

THE facts of this case were as follows:—

The appellant executed an instalment bond in favour of the plaintiff respondent on the 7th of July, 1904. The sum borrowed was Rs. 600, which, with Rs. 80 as interest, the defendant promised to pay by six-monthly instalments of Rs. 75, in four and a half years.

* First Appeal No. 56 of 1913 from an order of Bans Gopal, Additional Subordinate Judge of Agra, dated the the 18th of January, 1913.

(1) (1912) 16 Oudh Cases, 26. (2) (1908) I. L. R., 30 All., 123.

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The bond provided that in case of default of payment of any instalment, the creditors would be entitled to realize either the whole money with interest at 6 per cent. per annum or those instalments which remained unpaid. The defendant paid the first two instalments on the due dates. The third instalment, which fell due on 7th of January, 1906, was not paid. On the 17th of August, 1912, the plaintiffs brought their suit for the recovery of Rs. 530, principal and Rs. 223-2-0, interest, alleging that the cause of action for the suit accrued on the 7th of January, 1906, the date on which the breach of promise was made and also on the 7th of January, 1909, the date of payment of the last instalment. The defendant admitted the execution of the deed and the receipt of consideration, but pleaded limitation as a bar to the suit. The Munsif dismissed the suit, holding that it was brought beyond the period of limitation allowed by law. On appeal, the Subordinate Judge was of opinion that the suit was not time-barred and remanded the case to the first court for decision of the case on its merits. The defendant appealed.

Pandit *Shiam Krishna Dar*, for the appellant:—

The only question in this case was whether the suit, as brought, was barred by limitation. The bond being an instalment bond with a provision for the bringing of a suit for the whole amount on default of payment of any instalment, article 75, read with article 116, would apply. The first default was made on the 7th of January, 1906, and time began to run from that date for a suit on that bond. It was not open to the creditors to control the accrual of the cause of action which was laid down by the Limitation Act, and the fact that they had an option to sue made no difference so far as the running of time was concerned. The only way in which they could avoid limitation running from the date of default of the first instalment was by proving waiver of the right to sue for the whole amount of the bond. In the present case, the plaintiffs' claim was to enforce the condition which entitled them to recover the whole amount and not to plead waiver. The present suit having been brought on the 17th of August, 1912, that is, more than six years after the accrual of the cause of action, was therefore barred by

time; *Sheo Narain* v. *Ram Din* (1), *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (2), *Rai Shitab Chand Nahar* v. *Hyder Mollah* (3). The case of *Ajudhia* v. *Kunjal* (4) was a case in which the claim was brought to recover the last three instalments that were due on a bond and not the whole amount. In that case it appears to have been assumed that the plaintiffs had waived their right to sue for the whole amount. But in the present case, the plaintiffs took their stand upon the special provision in the bond and sought to enforce that right. In fact, the plaintiffs themselves stated in their plaint that the cause of action to sue arose on the 7th of January, 1906, the date on which the first default was made.

Dr. *Satish Chandra Banerji* (for The Hon'ble Dr. *Tej Bahadur Sapru*), for the respondent:—

The bond gave the creditors an option to sue, but they were not bound to sue. It was open to them to exercise that option or not. Many instalments, due under the bond, were within time. Only a few earlier ones might be said to have been barred. There was no reason why the whole suit should have been dismissed and the plaintiffs not allowed to recover those instalments which were admittedly within time. There was no question of waiver in a case like this. He cited *Ajudhia* v. *Kunjal* (4), *Maharaja of Benares* v. *Nand Ram* (5) and *Shankar Prasad* v. *Jalpa Prasad* (6).

Pandit *Shiam Krishna Dar* was not heard in reply.

TUDBALL and MAHAMMAD RAFIQ JJ.:—This is a defendant's appeal and arises out of a suit on an insalment bond, dated the 7th of July, 1904, for a sum of Rs. 680 as consideration, Rs. 600 being the actual amount of the loan and Rs. 80 being the interest thereon. The whole was repayable in 4½ years in equal instalments of Rs. 75, payable every six months. There was a condition in the bond that if any instalment remained unpaid on the due date, then the creditor would be entitled to recover the whole sum at once with interest or that he might sue for each instalment as it fell due and remained unpaid. The first two instalments were paid on the due dates. The third instalment was due on the 7th of January, 1906. Neither this nor any of the subsequent

(1) (1910) 14 Oudh Cases, 129.
(2) (1904) I. L. R., 31 Calc., 297.
(3) (1896) 1 C. W. N., 229.
(4) (1908) I. L. R., 30 All., 123.
(5) (1907) I. L. R., 29 All., 431.
(6) (1894) I. L. R., 16 All., 371.

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instalments were paid. On the 17th of August, 1912, i.e., six years and seven months after the 7th of January, 1906, the plaintiff brought the present suit. An examination of his plaint would show that he sued to recover the full amount which was due on the 7th of January, 1906, together with interest at the stipulated rate, and which fell due by reason of the default of the 7th of January, 1906, *i.e.*, Rs. 530, principal, *plus* Rs. 223-2, interest. In his plaint he distinctly states that the cause of action for the suit accrued on the 7th of January, 1906. It is to be noted that he does not sue for each of the instalments, which fell due successively every six months together with interest on each instalment from its due date. He is clearly electing to take one of the two options given him by the bond, *viz.*, that one which enabled him to recover the full amount of the debt due by reason of the default in one instalment.

The court of first instance dismissed the suit as time-barred, under articles 75 and 120 of the second schedule of the Limitation Act. The court below, relying mainly on the decision of *Ajudhia* v. *Kunjal* (1), held that the suit was not barred by limitation and remanded it to the court of first instance for decision on the merits. The defendant has come here on second appeal, and it is strongly urged, first, that the ruling referred to does not apply, and secondly, that in view of article 75 of the Limitation Act, the suit is clearly barred. In our opinion, the appeal must succeed. Both under the terms of this bond as well as in law, when the debtor failed to pay the instalment on the 7th of January, 1906, it was open to the creditor either to claim the whole of the debt or two waive that right and take the other option of recovering the instalments. Article 75 distinctly states that the period of limitation begins to run when the default is made, unless where the payee waives his right based on the provision, and then when fresh default is made in respect of which there is no such waiver. It is perfectly clear from the plaint itself that the plaintiffs have not waived that right, which entitled them to recover the whole of the balance due by reason of the default of the 7th of January, 1906. In fact, they take their stand upon that provision and seek to enforce their right. The existence of

(1) (1908) I. L. R., 30 All., 123.

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a waiver is distinctly negatived by the plaint, which states that the right accrued on the 7th of January, 1906. To enforce that right they had six years from that date. The present suit has been brought beyond the period of limitation allowed by law. In regard to the ruling in *Ajudhia* v. *Kunjal* (1), an examination thereof shows clearly that it cannot apply to the facts of the present case. That suit was brought to recover the last three of the instalments that were due under that bond and not the whole amount due by reason of a default in payment of an instalment. It appears to have been proved or assumed that the plaintiffs had forborne to sue, in other words, had waived their rights based on the special provision of the bond and were enforcing their rights in respect of the instalments that were due and had not been paid. In the present case, the facts are directly the contrary. The claim is to enforce the condition which entitled the creditor to recover the whole amount due by reason of the default in payment of one instalment on the 7th of January, 1906. In our opinion, the suit is clearly barred under the provisions of the above-mentioned articles. We allow the appeal, set aside the order of the court below and restore the decree of the court of first instance with costs.

Appeal allowed.

Before Mr. Justice Banerji and Mr. Justice Ryves.

MUHAMMAD ABDUL MAJID KHAN (PLAINTIFF) *v.* AHMAD SAID KHAN AND OTHERS (DEFENDANTS.)*

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Civil Procedure Code (1908), *section* 92—*Waqf—Suit for declaration of plaintiff's right as* mutawalli *and for possession—Jurisdiction.*

Where the plaintiff came into court alleging that he was the rightful *mutawalli* of a certain *waqf*, and that the defendant, on the death of the last incumbent, had wrongfully taken possession of the *waqf* property, and asking to be put into possession thereof as *mutawalli*, it was *held* that this was not a suit which fell within the purview of section 92 of the Code of Civil Procedure and was properly filed in the court of a Subordinate Judge. *Budree Das Mukim* v. *Choonee Lal Johurry* (2) and *Ghelabhai Gavrishankar* v. *Uderam Icharam* (3) referred to. *Muhammad Ibrahim Khan* v. *Ahmad Said Khan* (4) and *Saiyid Ali* v. *Ali Jan*, (5) distinguished.

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* First Appeal No. 107 of 1912 from a decree of Keshab Deb, Subordinate Judge of Moradabad, dated the 18th of December, 1911.

(1) (1908) I. L. R., 30 All., 123. (3) (1911) I. L. R., 36 Bom., 29.
(2) (1906) I. L. R., 33 Calc., 789. (4) (1910) I. L. R., 32 All., 503.
(5) (1912) I. L. R., 35 All., 98.