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GAYA DIN v. JHUMMAN LAL.

the terms of the bond immediately on the first default occurring, the mortgagor was clearly liable to pay the whole sum to the mortgagee. In other words the money became due from the mortgagor to the mortgagee on the occurrence of the first default. I fail to see how the last clause which I have mentioned above helps the appellants in any way. It seems to me that this clause was simply put into the document in order to make it quite clear that the interest should continue to run, in spite of no suit being brought, not only up to the expiry of the ten years, but also up to the date of realization. It was simply put in to make it clear that interest would not cease to run after the expiry of ten years. The mortgagee on the occurrence of the first default was fully entitled to demand his money and the mortgagor could not have met him with the plea that this demand was premature. There is no question of "waiver" for no waiver has been alleged, much less proved. Paragraph 3 of the plaint is practically a repudiation of any waiver. In my opinion under the clear terms of this bond the money "became due" in the year 1890, and the present suit was many years beyond time. I would, therefore, dismiss the appeal.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

1915
April 9.

LAHASO KUAR (PLAINTIFF) *v.* MAHABIR TIWARI AND OTHERS. (DEFENDANTS).*

Acquiescence—Possession for many years by co-sharer—Presumption—Consent.

When one co-sharer has been in exclusive possession of a particular plot for a very long time and has made constructions thereon the presumption is that he is in possession with the consent of the other co-sharers. The other co-sharers cannot after lying by for many years come in and ask to have the constructions demolished.

THE facts of this case are fully stated in the judgement of the Court.

Pandit *Shiam Krishna Dar* and Babu *Mangal Prasad Bhargava*, for the appellant.

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* Second Appeal No. 1183 of 1913, from a decree of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 30th July, 1913, reversing a decree of Ganga Nath, Munsif of Ballia, dated the 30th August, 1912.

Mr. *M. L. Agarwala*, and Munshi *Lakshmi Narain* for the respondents.

RICHARDS, C. J., BANERJI and TUDBALL, JJ.—This appeal arises out of a suit in which the plaintiff sought a declaration that the share of the plaintiff and the defendants Nos. 38 and 39 amounts to $\frac{3}{8}$ths in a plot No. 703, and that she might have a decree for joint possession of the plot and for removal of a thatch and for the restoration of a ditch said to have been filled in. Notwithstanding the pleadings it is quite clear that the contesting defendants' contention was not that the plot in question did not form part of the joint property of the co-sharers, but that they for a very long time had been in possession and had sunk a well and made certain constructions. In the lower appellate court the defendants raised no controversy as to the proprietary title of the parties to the plot in question. All that they contended was that having regard to the long time they had been in possession, the plaintiff was not entitled to put them out or to have the constructions demolished. It is perfectly clear that in the event of a partition the plot in question will have to be taken into consideration. The authority making the partition will have regard to the rules that as far as possible parties in possession shall be left in possession and if that is found to be impossible and a certain plot (on which are buildings) in the possession of one party has to be put into the lot of another, rent will be assessed. Where one co-sharer is for many years in exclusive possession of a particular plot and makes constructions thereon, the presumption is that he is so in possession with the consent of the co-sharers. The other co-sharers cannot after lying by for many years come in and ask to have the constructions demolished. We think that the view taken by the court below was correct and ought to be affirmed. There is no question of adverse possession in the case. We dismiss the appeal with costs.

Appeal dismissed.