Before Mr. Justice Tudball and Mr. Justice Sulaiman.

1921
April, 12.

PANCHAM AND OTHERS (PLAINTIFFS) *v.* ANSAR HUSAIN AND OTHERS (DEFENDANTS.)*

Act No. IX of 1908 *(Indian Limitation Act), Schedule I, article* 132—*Mortgage—Bond payable by instalments—Total amount due exigible on default of payment of any instalment—Limitation—Terminus a quo.*

In a mortgage bond, dated the 21st of February, 1893, it was stipulated that the mortgage debt would be payable at the end of twelve years. It was further stipulated that the mortgagors would pay Rs. 500 annually, in payment mostly of interest, and that if default was made in such annual payment, the mortgagees were to have power, without waiting for the expiry of the stipulated period, to set aside all the stipulations embodied in the document and to bring a suit in court to realize the entire principal together with interest and costs from the persons of the mortgagors and from the hypothecated property. No annual instalment was ever paid. The mortgagees brought a suit on their bond on the 21st of February, 1917, that is to say, on the last day of a period of twelve years from the time that the mortgage money was expressed to be payable.

Held that article 132 of the first schedule to the Indian Limitation Act, 1908, applied, and the suit was barred. *Gaya Din* v. *Jhumman Lal* (1) followed.

THE facts of this case are fully set forth in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellants.

Maulvi *Rafi-ud-din Hasan*, Pandit *Radha Kant Malaviya*, Maulvi *Haidar Mehdi* and Maulvi *Majid Ali*, for the respondents.

TUDBALL and SULAIMAN, JJ.:—This is a plaintiff's appeal arising out of a suit for sale brought on the basis of a mortgage deed, dated the 21st of February, 1893, purporting to have been executed by two persons, Zauwar Husain and his mother Musammat Sadar-un-nissa, in favour of the plaintiff appellant, Pancham. According to the document Rs. 4,000 was the loan and it was secured on two classes of property. Firstly, pure zamindari in mauza Deoria and Chak Muhammad Panah, pargana Jhusi of the Allahabad district, and 13 items of property which the mortgagors held as mortgagees from other persons. Among these 13 items were two mortgages of property in mauza Chintemanpur and Sidhaura. Out of the sum of Rs. 4,000,

*First Appeal No. 420 of 1918 from a decree of Partap Singh, Subordinate Judge of Allahabad, dated the 21st of May, 1918.

(1) (1915) I. L. R., 37 All., 400.

Rs. 1,400 purported to have been paid in cash prior to the registration and Rs. 2,600 purported to have been left with the creditor for payment of certain debts due from the mortgagors to other persons. They were as follows:—

Rs. 1,000 due to Nawaz Khan on account of his decree.

Rs. 700 due to Ilahi Bakhsh of Utraon.

Rs. 400 due to Mir Zahid Husain who held a mortgage of *sir* land in mauza Deoria; and

Rs. 500 to Lala Janki Prasad, banker of the city of Allahabad.

According to the terms entered in the document the interest was to be 1 per cent. per mensem and the executants stipulated to repay the loan in 12 years. They further stipulated that they would pay annually a sum of Rs. 500 on account of principal and interest. The interest at 1 per cent. per mensem for one year amounted to Rs. 480, so that, this sum allowed for the payment of the annual interest and a little over. They stipulated that the amount thus paid annually should be set off against the interest and the balance should be credited towards the principal. Further on in the document the mortgagors stipulated that if in any year they were unable to pay the interest, the interest might be treated as principal and would carry interest at the rate of 1 per cent. per mensem. Further on in the deed they further stipulated that, if there was any default in payment of the Rs. 500 per annum, the mortgagee was to have power, without waiting for the expiry of the stipulated period, to set aside all the other stipulations embodied in the document and to bring a suit in court to realize the entire principal together with interest and costs from the persons of the mortgagors and from the hypothecated property. Musammat Sadar-un-nissa and Zauwar Husain are both dead and the persons who are now sued are their heirs. They pleaded in defence that the deed had not been executed by Zauwar Husain and Musammat Sadar-un-nissa. They pleaded that no consideration had passed; and they lastly pleaded that the suit was barred by limitation. We may note here that it is an admitted fact that all the 13 items of mortgagee rights which were hypothecated under the deed in suit have disappeared, that is, the original mortgagors have paid off the mortgages, but not to Pancham or

1921

PANCHAM
v.
ANSAR
HUSAIN.

any of the present plaintiffs. The plaintiffs have not made the original mortgagors of those properties parties to the present suit. The court below has held that Rs. 3,000 out of the Rs. 4,000 entered in the deed as consideration was actually paid. It has further held that the deed was duly executed by Zauwar Husain and Musammat Sadar-un-nissa. It has held that the suit is barred by limitation.

The plaintiffs in their appeal urge—

That the Rs. 1,000 of consideration which the court below has disallowed has been established. They further plead that the suit is not barred by limitation.

So far as the Rs. 1,000 of the consideration is concerned the appeal has not been particularly strongly pressed. The learned vakil for the appellants states that his clients will be quite satisfied if they can get a decree for Rs. 3,000 principal together with interest thereon by sale of the hypothecated property. With regard to this item, therefore, we need not say much, except that we agree with the court below that the appellants have failed to establish the payment of this item. It was a sum which they had to pay to the decree-holder Nawaz Khan. Excepting the bare statement of the plaintiff Pancham, there is practically no evidence. No receipt has been produced, and the best evidence which was obtainable from the records of the Civil Court has not been put forward. We, therefore, agree with the court below that the plaintiffs have failed to establish the payment of this Rs. 1,000.

We next come to the question of limitation. This may be divided into two heads. First of all it is pleaded that the plaintiffs had a period of 24 years within which to bring their suit on the basis of the bond. Next it is pleaded that, even if they had not this lengthy period, still the plaintiffs have adduced evidence and have established the payment of some ten sums of money on various dates on account of interest due under the deed and that these payments of interest have given the plaintiffs further time and the suit is therefore within 12 years of the last payment. The first portion of the plea is based upon the terms of the deed. The document is dated the 21st of February, 1893. The period fixed for payment was 12 years,

1921

PANCHAM
v.
ANSAR
HUSAIN.

which would bring the time up to the 21st of February, 1905. The suit is within 12 years of this date, it having been filed on the 21st of February, 1917, that is, on the very last day of limitation. The court below, however, has held, relying on the Full Bench decision of this Court in *Gaya Din* v. *Jhumman Lal* (1) that the suit ought to have been brought within 12 years of the 21st of February, 1894. It is an admitted fact that the sum of Rs. 500 which the mortgagors stipulated to pay annually was not paid at any time. The first sum of Rs. 500 was due on the 21st of February, 1894. Admittedly it was not paid. Even the entries of the alleged payments on the back of the document do not begin before the 15th of December, 1899. According to the terms of the deed the mortgagee was entitled to sue on the 21st of February, 1894, by reason of the default. Article 132 of the Limitation Act clearly applies to the suit and that article fixes a period of 12 years from the date on which the money became due. The lower court has also held that, excepting the one alleged payment of the 15th of December, 1899, none of the other alleged payments of interest have been proved. It has, therefore, held that the suit is out of time. It is urged before us practically that we should not apply the ruling in *Gaya Din* v. *Jhumman Lal* (1) because in the cases of certain other suits to which article 132 does *not* apply this Court has in certain instances come to a decision which in principle may clash with the principle laid down in the Full Bench ruling. We do not think that this is a good argument. The first question is whether the circumstances of the two cases, that is of the reported case and the case before us, are identical or not, and whether the Full Bench ruling does as a matter of fact apply to the suit before us. We have compared the two cases and find it impossible to distinguish between them. In the present suit no option whatsoever was given to the mortgagee in the matter. The stipulation laid down (and the mortgagors agreed) that if they failed to pay the annual sum of Rs. 500 the mortgagee had a right to sue. On the face of this document now in suit the mortgage money became due on the 21st of February, 1894, and time

(1) (1915) I. L. R., 37 All., 400.

1921

PANCHAM v. ANSAR HUSAIN.

began to run. That time, in the absence of any payments on account of interest, came to an end at the end of 12 years and the present suit was brought, as we have already pointed out, at the end exactly of 24 years from the execution of the document. It is true that the Madras High Court has, in a recent case, differed from the decision of this Court. In doing so, it has had to go contrary to one of its own former decisions, whereas the Calcutta High Court has consistently followed the opinion of this Court, or rather, the decision in the Full Bench is based partly on the decisions of the Calcutta High Court, and we see no reason whatsoever not to follow the decision of this Court which up to the present moment has not been upset and with which we agree. Unless, therefore, the plaintiffs are able to satisfy us that the alleged payments of interest entered on the back of the document were made, their suit is clearly barred by limitation.

[The judgment then discussed the evidence as to the endorsements of payment of interest on the bond, and concluded.]

We cannot and we do not believe that any of the payments endorsed on the document were ever made. They certainly have not been established to our satisfaction. In any view, it is clear that the suit was barred by limitation and was properly dismissed by the court below. The appeal fails and we dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Lindsay.

1921 *April*, 14.

RAM PIARI AND ANOTHER (DEFENDANTS) *v.* KRISHNA PIARI (PLAINTIFF) *

Construction of document—Will—Bequest to two brothers without specification of shares—Tenancy in common.

Held that a devise of separate property made by a maternal grand father in favour of two grandsons without specifying what share each was to take has the effect of creating a tenancy in common and not a joint tenancy. *Mankamna Kunwar* v. *Balkishan Das* (1) dissented from. *Kishori Dubain* v. *Mundra Dubain* (2) followed. *Jojeswar Narain Deo* v. *Ram Chandra Dutt* (3) and *Gordhandas Soonderdas* v. *Bai Ramcoover* (4) referred to.

* Second Appeal No. 235 of 1919 from a decree of E. Bennet, District Judge of Farrukhabad, dated the 29th of November, 1918, reversing a decree of Rama Das, Subordinate Judge of Fatehgarh, dated the 31st of July, 1918.

(1) (1905) I. L. R., 28 All., 38.
(2) (1911) I. L. R., 33 All., 665.
(3) (1896) I. L. R., 23 Calc., 670.
(4) (1901) I. L. R., 26 Bom., 449.