1922
January, 30.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

THE COLLECTOR OF JAUNPUR (DEFENDANT) *v.* JAMNA PRASAD (PLAINTIFF.)*

Act No. I of 1872 (*Indian Evidence Act*), *section* 124—*Statement of his financial position made by proprietor to the Collector with a view to his estate being put under the Court of Wards—Statement made in official confidence—Mortgage—Limitation*—Terminus a quo—*Act No IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 132.

A statement made to the Collector by a person applying to have his estate taken under the Court of Wards setting forth his financial position, that is to say, the details of his property and liabilities, is a communication made to a public officer in official confidence within the meaning of section 124 of the Indian Evidence Act, 1872, and cannot therefore be used as an acknowledgment of any liability mentioned therein. *Venkatachella Chettiar* v. *Sampathu Chettiar* (1) and *Jadobram Dey* v. *Bulloram Dey* (2) referred to.

A mortgage executed in April, 1895, contained, *inter alia*, the following provisions :—Interest was to be payable on every Jeth *puranmashi*, and if in any year the mortgagor failed to pay interest on the date so fixed, or if he failed to pay the principal amount by the end of ten years (namely, the period of mortgage) the creditor was to have power to recover the amount remaining due to him, together with interest, from the hypothecated and other properties of the mortgagor. *Held* that, no interest at all having been paid, limitation began to run from June, 1895, or at any rate from June, 1896. *Gaya Din* v. *Jhumman Lal* (3) and *Pancham* v. *Ansar Husain* (4) followed.

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

Dr. *S. M. Sulaiman* and Babu *Lalit Mohan Banerji*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—This appeal arises out of a suit brought on the basis of a mortgage alleged to have been executed by one Maulvi Muhammad Ali.

This document is said to have been executed on the 19th of April, 1895, in favour of one Dwarka Prasad, the father of the present plaintiff.

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*First Appeal No. 135 of 1919, from a decree of Pratap Singh, Officiating Second Additional Subordinate Judge of Jaunpur, dated the 3rd of February, 1919.

(1) (1908) I. L. R., 32 Mad., 62. (3) (1915) I. L. R., 37 All., 400.
(2) (1899) I. L. R., 26 Calc., 281. (4) (1921) I. L. R., 43 All., 596.

It is proved that Maulvi Muhammad Ali died in the month of October, 1898. He left his widow Musammat Muslima Bibi, two sons Muhammad Hasan and Muhammad Zahur and four daughters Musammat Kulsum, Musammat Makki, Musammat Fatima and Musammat Ruqiya.

In the month of April, 1908, the estate belonging to Maulvi Muhammad Ali was taken over by the Court of Wards. It appears that an application was made to the Court of Wards. Some of the heirs of Muhammad Ali were of full age at the time the application was made, but two of the daughters, Musammat Fatima and Musammat Ruqiya, were still minors. Musammat Kulsum, one of the daughters whose names have been mentioned, declined to join in the application.

The result of all this was that the Court of Wards took over the property of all the heirs of Muhammad Ali except Musammat Kulsum.

After the notification was issued announcing the taking over of the property by the Court of Wards, a further notice was issued under section 16 of the old Court of Wards Act, (U. P. Act No. III of 1899) calling on all persons who had claims against the estate of Muhammad Ali to notify them to the Collector within six months from the date of notification.

It is apparent from the record in this case that Dwarka Prasad, who is now represented by his son, made no claim in respect of the mortgage-debt now in suit, within the period prescribed by the notification just mentioned. There is on the record a certain petition which appears to have been presented by Dwarka Prasad to the Collector on the 27th of April, 1910, in which he asserts that he had notified his claim to the Court of Wards. There is nothing, however, in this petition to show on what date this claim of his was brought to the notice of the Court of Wards.

The suit with which we are now concerned was instituted on the 16th of April, 1917, and in the plaint it was stated that the original document of mortgage was not forthcoming and that, therefore, the plaintiff was pursuing his claim on a certified copy of the document.

In this suit the defendants impleaded were (1) the Collector of Jaunpur as Manager of the Court of Wards of the estate of

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Maulvi Muhammad Ali and (2) and (3) the two sons of Maulvi Muhammad Ali, namely Muhammad Hasan and Muhammad Zahur. The other heirs of Muhammad Ali whose interests in the estate have been taken charge of by the Court of Wards—that is to say, Musammat Muslima Bibi, the widow, and the three daughters Musammat Makki, Musammat Fatima and Musammat Ruqiya—were not joined as defendants in the suit.

The written statement on behalf of the defendants put the plaintiff to proof that the mortgage bond was in fact executed and there was also raised a plea of limitation. The lower court has decreed the claim in part, holding that the suit was not time-barred.

The issue of limitation is the most important issue in this case and we must deal with that first. We have come to the conclusion that the judgment of the court below on this issue is not correct and that the whole suit was barred.

A translation of the mortgage-deed is to be found at pages 7 and 8 of the respondents' book. From this it appears that the mortgage-deed purports to have been executed on the 19th of April, 1895, to secure a loan of Rs. 2,000. Interest on the loan was at the rate of Re. 1 per cent. per mensem, so that on the principal sum the amount of interest payable every 12 months was Rs. 240.

It is agreed in the deed that the interest is to be payable on every Jeth Puranmashi and the document contained a further stipulation that if in any year the mortgagor failed to pay interest on the date so fixed, or if he failed to pay the principal amount by the end of ten years (namely, the period of mortgage), the creditor was to have power to recover the amount remaining due to him, together with interest, from the hypothecated and other movable and immovable properties of the mortgagor by bringing a suit or in any other way he might choose. The first question we have to consider, therefore, is on what date limitation began to run. The document, as we have said, was executed in the month of April, 1895, and the month of Jeth usually falls in about June. The terms of the document leave us in some uncertainty as to the arrangement for the payment of that portion of the interest which accrued due between the 19th of

April, 1895, and the first month of Jeth which fell thereafter. It is clear of course that the interest amounts under the deed to Rs. 240 per annum. It is also clear that the parties agreed that this sum of Rs. 240 should be payable every Jeth Puranmashi, but obviously the sum which was payable on the first Jeth Puranmashi after the date of execution of the instrument was very much less than Rs. 240. We are inclined to hold that the document means that interest was to be payable in every Jeth and that consequently there was an obligation on the mortgagor to pay in the month of Jeth, which fell about June, 1895, such interest as had accrued due by that time. Thereafter, there was to be payable at each Jeth Puranmashi a sum of Rs. 240 representing the interest of 12 months. In this view, it being admitted that no interest on the debt was ever paid, there was a default about the month of June, 1895. In any case it is quite clear that there was default in the month of June, 1896.

On the face of it, therefore, any suit on this mortgage was time-barred at the time the present case was brought into court. We are unable to distinguish this case from the case which was before the Full Bench in *Gaya Din* v. *Jhumman Lal* (1). That case has been followed in another case, namely, *Pancham* v. *Ansar Husain* (2). According to those rulings limitation in the case of a document like this begins to run from the date of the first default. The plaintiff sought, however, to avoid the bar of limitation by putting forward a document which according to his case amounted to an acknowledgment which under the terms of section 19 of the Limitation Act saved the claim.

The document is marked Ex. A on the record and we have now to state how it came into court. It was not a document which was in the plaintiff's possession at the time the suit was brought, nor indeed was any acknowledgment pleaded in the plaint by way of saving the bar of limitation.

After the suit had been instituted an application was made on behalf of the plaintiff asking the court to direct the Collector as Manager of the Court of Wards to produce a number of documents out of the Court of Wards file relating to the estate of Maulvi Muhammad Ali. In accordance with the summons

(1) (1915) I. L. R., 37 All., 400. (2) (1921) I. L. R., 43 All., 596.

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which was sent to him the Collector produced in court certain documents, but he claimed privilege for them under the provisions of section 124 of the Evidence Act on the grounds that the documents contained statements which were made to him in official confidence and that he objected to produce them on the ground that their disclosure would be prejudicial to the public interest.

The learned Subordinate Judge who was in charge of the suit at this time (not the Subordinate Judge who ultimately decided the case) overruled the plea of privilege raised by the Collector and held that the documents were admissible. One of these documents, as we have said, is the statement Ex. A.

We had better explain at this stage what Ex. A is. It purports to be a statement in which are set out details of the property owned by the deceased Maulvi. We find particulars of the landed property which belonged to this gentleman, and other details relating to debts which were owing from him. There is in the document a statement to the effect that the mortgage now in suit had been executed by Maulvi Muhammad Ali in favour of Dwarka Prasad. At the foot of this document there is a signature which at least one witness in the case has identified as the signature of Muhammad Hasan, the eldest son of the deceased Muhammad Ali.

The court below, therefore, finding this statement and believing it to be signed by Muhammad Hasan, treated it as an acknowledgment of liability. A further question arose in this connection, namely, as to the date upon which this so-called acknowledgment was made. There is no date apparent on the paper itself and certain other evidence had to be relied upon for the purpose of showing that the acknowledgment was made within limitation, that is to say, made prior to the month of June, 1908, at the very latest. Some evidence was forthcoming to show that certain information had been called for by the Collector before this estate was taken over by the Court of Wards, and the first notification announcing the taking over by the Court of Wards appeared in the Gazette of the 10th of April, 1908. It was, therefore, concluded that this particular statement

marked Ex. A had been prepared and sent to the Collector previous to that date.

In appeal here it has been argued that the document was inadmissible in evidence and that the court below was wrong in overruling the plea which was put forward by the Collector under the provisions of section 124 of the Evidence Act.

After careful consideration of this argument we think the appellant is entitled to succeed and that the opinion of the Subordinate Judge in this matter was not correct.

In dealing with this plea the learned Subordinate Judge referred to two rulings, *Venkatachella Chettiar* v. *Sampathu Chettiar* (1) and *Jadobram Dey* v. *Bulloram Dey* (2). On the strength of these rulings he held that statements made under process of law cannot be said to be made in official confidence within the meaning of that expression as used in section 124 of the Evidence Act.

It is quite clear on a proper construction of this section that it is for the court to decide whether or not a particular document for which privilege is claimed is a communication made to a public officer in official confidence. If the court decides that it was so made then it has no authority to compel the public officer to produce it, for according to the section the public officer himself is the sole judge as to whether its disclosure would or would not be in the public interests.

The two cases upon which the learned Subordinate Judge relied for his opinion dealt with returns made by persons under the Income Tax Act. In other words, they were declarations of income which were filed by parties for the purpose of enabling the officer concerned to assess the proper amount of income-tax. It was laid down in the Madras case to which we have referred that "it would be difficult to say that documents produced or statements made under process of law could be said to be made in official confidence."

Assuming that this statement of the law is correct, we are of opinion that the proposition therein so widely laid down cannot be applied to the facts of the present case. There is nothing whatever to show that this statement contained in

(1) (1908) I. L. R., 32 Mad., 62. (2) (1899) I. L. R. 26 Calc., 281.

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Ex. A (assuming for the moment that it is proved to have been signed by Muhammad Hasan) was made "*under process of law.*" In this connection we have been referred to the Court of Wards Manual containing rules which were in force under the old Act (Act No. III of 1899) at the time when this estate was taken over. These rules were made under the provisions of the Act. Rule 4 of Part 1 of the Manual imposes upon the Collector the duty of referring to the Board of Revenue all applications made by proprietors who desire to have their estates taken over. Rule 12 lays down what the report of the Collector is to contain. Amongst other particulars it is to set forth a statement of the financial position of the estate desired to be taken over, together with an estimate of the claims which are likely to be made on the estate. Rule 13 lays down that these statements are to be made in particular forms, namely, Forms 1, 2 and 3.

It is not to be denied that the statement Ex. A, upon which the plaintiff relied in the court below, is one of these forms.

But we have not been referred either to any section of the Act or to any rule contained in this Manual by which a person who desires to have his estate taken over by the Court of Wards, can be compelled to make a disclosure of his debts. There is no question of process of law in this case.

On the assumption, therefore, that the statement Ex. A in this case was drawn up by the defendant Muhammad Hasan and signed by him, we are of opinion that it should be treated as a communication made to the Collector in official confidence. It is hardly to be supposed that a proprietor who is financially embarrassed and who desires the Court of Wards to take charge of his estate, intends that any statement of his indebtedness is to be communicated to a third party or to be made public property. Any statement so made is made solely with the purpose of giving information to the Court of Wards, on the strength of which the Court of Wards may decide whether or not the estate should be taken over. We hold, therefore, that this particular document for which the Court of Wards claimed privilege, was a communication made to the Collector in official confidence, and he was, therefore, not obliged to disclose it in accordance with the law as laid down in section 124 of the

Evidence Act. The learned Subordinate Judge, therefore, was wrong in compelling the Collector to hand over this document and was also wrong in using it as evidence in this case.

It follows from this that if this document is excluded from consideration the suit must fail, for admittedly there is no other evidence upon which it would be possible to hold that the bar of limitation was removed.

It is not necessary for us to enter into other matters in which, it appears to us, the court below has gone wrong. We may say, however, that the evidence on the record does not satisfy us that this statement attributed to Muhammad Hasan, was made before the month of June, 1908. The whole evidence on this point is quite indefinite and we are asked to make a series of presumptions which, in the circumstances, we cannot possibly make. A plaintiff who is prosecuting a suit which is on the face of it barred by limitation, and who is trying to bring it within limitation by proving an acknowledgment under section 19 which gives him a fresh period, must give cogent proof of his allegations, and in the present case we do not find that this requirement has been complied with. Another matter, which we may mention here, is that the lower court was obviously wrong in using this acknowledgment against any one but Muhammad Hasan himself; section 19 of the Limitation Act is clear on the point. Notwithstanding this, the learned Subordinate Judge has given a decree against all the heirs of Maulvi Muhammad Ali except his three daughters, Musammat Makki, Musammat Fatima and Musammat Ruqiya

We need not deal with any of the other matters which were argued before us. It is sufficient for us to say that the claim was time-barred and the suit ought to have been dismissed. We, therefore, allow this appeal, set aside the decree of the court below and direct that the plaintiff's claim stand dismissed with costs in both courts.

Appeal allowed.