

Such being our view of the law, we hold that the mere notice of the 2nd of February, 1922, which was never persisted in and which was ultimately given up, did not create a disruption of the joint family.

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BANKI
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v.
BRIJ BIHARI.

The result is that the family was joint when Bhagwan Das died on the 1st of May, 1922. It follows that the plaintiff is entitled to a half share in the entire joint family property.

We allow the appeal, modify the decree of the court below and decree the plaintiff's suit for partition, in its entirety. This will be the preliminary decree in the suit and the partition will be carried out in accordance with law. The plaintiff will have his costs of the suit and of the appeal.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

KUNJ BIHARI AND OTHERS (PLAINTIFFS) v. BINDESHRI PRASAD AND OTHERS (DEPENDANTS).*

1928
December,
20.

Instalment decree—Instalments not directed to be payable only in court—Date for payment expiring on court holiday—Deposit on re-opening of court—Validity of payment.

An instalment decree made the first instalment payable on a certain date, but it did not direct that the amount was to be deposited in court. The date specified expired during the vacation of the court, and the amount was tendered in court on the re-opening day. *Held* that as the judgment-debtors had the power to make the payment direct to the decree-holders, and depositing it in court was not the only course open to them, they could not take advantage of the fact that the court was closed on the specified date, and the payment made by them was not made in time. *Muhammad Jan v. Shiam Lal* (1), distinguished.

THE facts of the case sufficiently appear from the judgement of the Court.

Mr. B. Malik, for the appellants.

*First Appeal No. 398 of 1925, from a decree of Raja Ram, Subordinate Judge of Jaunpur, dated the 20th of May, 1925.

(1) (1923) I.L.R., 46 All., 328.

1928

KUNJ BIHARI
v.BINDESHRI
PRASAD.

Babu *Piari Lal Banerji* and *Maulvi Iqbal Ahmad*,
for the respondents.

SULAIMAN and KENDALL, JJ. :—This is a plaintiffs' appeal arising out of a suit on the basis of two mortgage-deeds for recovery of the principal and interest due on them. Previous to this litigation there was a suit instituted by the plaintiffs which was compromised. Under the compromise decree it was agreed that the amount due on the two bonds would be Rs. 18,750-2-0 and that simple interest on that sum would be paid at the rate of eight annas per cent. per mensem from the date of the execution of the "document" up to the date of realization. Five instalments were fixed, the first one was of Rs. 3,750-0-4, payable with interest on the 15th of June, 1924. There was an express provision that in default of payment of any instalment it was to be paid in a lump sum. There were further provisions in the decree which showed that the effect of the regular payment would be to prevent the mortgagees from bringing any suit to recover the amount due on the decree. The plaintiffs claimed that inasmuch as the defendants did not pay the first instalment on the 15th of June, 1924, they were entitled to recover the full amount borrowed on the two documents. The principal defence was that on the 15th of June, 1924, the civil court was closed, and that a tender was actually filed on the 3rd of July, 1924, when the court re-opened. The tender was signed by the judicial officer on the 4th of July, 1924, and the cash was actually deposited in the Government Treasury on the 5th of July. The plea has found favour with the court below, which has held that inasmuch as the civil court was closed on the 15th of June the defendants were entitled to make the tender on the re-opening date and that accordingly there was no default. For this view the learned Judge has relied on the recent Full Bench case of

Muhammad Jan v Shiam Lal (1). The learned advocate for the respondents has strongly urged before us that under the terms of the decree the amount had to be deposited in court in the execution department. In the next place it is argued that, even if that was not so, under order XXI, rule 1, his clients had the option of either paying the amount direct to the decree-holders or depositing it in court, and inasmuch as they had the right to deposit it in court they could wait till the civil court re-opened.

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O.
BINDESHI
PRASAD

In our opinion the payment of the instalments and the right of the decree-holders to recover the amount due was not intended to be exercised through the execution court. There is an express mention in the decree of the mortgagees' power to bring a suit and recover the amount. In that view it may be difficult to apply order XXI, rule 1.

But assuming that the defendants had the power to make the payment direct to the mortgagees or to deposit the amount in court, they cannot take advantage of the circumstance that the civil court was closed on the 15th of June, 1924. If the only course open to them had been to deposit it in court and the court was closed on the last date on which they could have made the deposit, then the ruling in the Full Bench case would have been applicable. That was a case of a deposit under a pre-emption decree, and in view of the provisions of order XX, rule 14, that deposit had to be made in court. The judgement-debtors in that case had no option but to deposit the amount in court, and accordingly it was held by the Full Bench that if the court by its own act prevented the judgement-debtors from making the deposit within the time they should not be deprived of their right to do so, provided they came into court at the first opportunity available, namely the re-opening day of the court.

1928

KUNJ BIHARI
v.
BYNDESHRI
PRASAD.

In the present case the defendants on their own showing had the option of making the payment to the mortgagees direct. From this they were in no way prevented on account of the court being closed. They were not compelled to wait till the court re-opened. They had an opportunity available to them of which they did not take advantage. We do not, therefore, think that they were entitled to say that the time fixed in the compromise decree for the payment of the first instalment should be extended. Accordingly there was a default on the 15th of June, 1924, which entitled the plaintiffs to claim the whole amount. As matters stand now, all the dates fixed for the payment of all the instalments have expired and the whole amount has undoubtedly become due under the terms of the compromise decree. We accordingly allow the appeal with costs and, setting aside the decree of the court below, decree the plaintiffs' claim for the whole amount of Rs. 18,750-0-0 due on the two bonds as principal, together with interest at eight annas per cent. per mensem from the dates of the execution of the hypothecation bonds. The usual decree under order XXXIV will be prepared and six months' time from this date should be fixed for payment.

1929

January, 3.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

KUNDAN LAL AND ANOTHER (DEFENDANTS) v. BHIKARI DAS ISHWAR DAS AND ANOTHER (PLAINTIFFS)*.

Cause of action—Hundi—Inadmissible in evidence for non-cancellation of stamp—Original consideration—Money had and received—Evidence aliunde—Act No. I of 1872 (Evidence Act), section 91—Notice of dishonour, when unnecessary—Act No. XXVI of 1881 (Negotiable Instruments Act), section 98(e)—Act No. IX of 1872 (Contract Act), section 70.

If a *hundi* is the embodiment of the whole contract between the parties, and the *hundi* is not admissible in evidence

*First Appeal No. 443 of 1925, from a decree of Sved Ali Mohammad, Subordinate Judge of Meerut, dated the 27th of July, 1925.