

1881

IMDAD  
HUSAIN  
v.  
ANNU LAL.

The Court (PEARSON J., and SPANKIE J.,) delivered the following

JUDGMENT.—The fifth clause of the deed in question which declared that, in the event of the principal sum lent not being repaid at the end of seven years, the conditional sale shall become absolute, does not dispense with the necessity of complying with the provisions of s. 8, Regulation XVII of 1806, and is compatible with them. On or after the expiry of the stipulated period, application for the foreclosure of the mortgage and rendering the sale absolute in the manner prescribed by the Regulation may and must be made. But the fourth clause, which declares that, in the event of default of payment of interest in any year, the term of seven years shall be cancelled and the conditional sale shall at once become absolute, without substituting any new term for the repayment of the principal sum lent, on or after the expiration of which proceedings of the nature contemplated in s. 8, Regulation XVII of 1806, may be taken, does in effect defeat and violate the provisions of that law, and summarily convert a conditional into an absolute sale in disregard and defiance thereof. The foreclosure proceedings taken by the plaintiff in this case before the expiration of a period stipulated for the repayment of the principal sum lent were irregular; and it would seem that the sale can only be rendered conclusive in the manner prescribed by the Regulation in pursuance of the fifth clause of the deed. Accordingly we decree the appeal with costs, reverse the lower appellate Court's decree, and restore that of the Court of first instance.

*Appeal allowed.*

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February 8.

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

AHMAD ALI (PLAINTIFF) v. HAFIZA BIBI AND ANOTHER (DEFENDANTS).\*

*Bond payable by instalments—Limitation—Waiver.*

On the 24th May, 1866, *H* gave *A* a bond payable by instalments which provided that, if default were made in the payment of one instalment, the whole should be due. The first default was made on the 23th June, 1866. No payment was made after Act IX of 1871, sch. ii, No. 75, came into force. *Held*, in a suit

\* Second Appeal, No. 865 of 1880, from a decree of W. Tyrrell, Esq., Judge of Allahabad, dated the 28th May, 1880, affirming a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 22nd April, 1880.

upon such bond, that limitation began to run when the first default was made, and no waiver before Act IX of 1871 came into force could affect it.

THE plaintiff in this suit claimed Rs. 2,699-13-3, the balance of the principal amount, and Rs. 795-2-0 interest, due on a registered bond dated the 24th May, 1866, which had passed into his hands by assignment. He claimed to recover such moneys from the defendants personally and from the immoveable property hypothecated in the bond. This bond, the plaintiff alleged, had been executed by the defendant Husain Bakhsh for himself and on behalf of the defendant Hafiza Bibi. It provided that the principal amount, Rs. 4,500, with interest at twelve per cent. per annum, should be payable in fourteen annual instalments. The instalments were payable in the month of Jaith. The first instalment, payable on the 28th June, 1866, was Rs. 50 and the interest due on the whole amount. The following ten instalments were Rs. 300 each and the interest due on the balance. The next two were Rs. 500 each and the interest due on the balance. The last was Rs. 450 and the interest on that sum. The bond also provided that, in the event of default in payment of any one instalment, the obligee "should be at liberty, without waiting for the instalment term mentioned in the bond to expire, to realize from the obligors the whole of his money, principal with interest, and costs, in a lump sum, by avoiding the instalment arrangement, in any manner he pleased." No payment was made on the 28th June, 1866, or in that year; but from the account-books of the original obligee of the bond, one Manik Chand, it appeared that a payment of Rs. 329 on account of interest was made on the 1st January, 1867. It also appeared from the same account-books that after that date instalments were for some years duly paid, the last payment entered being one for Rs. 692 (Rs. 300 principal, Rs. 392 interest) made on the 2nd June, 1871. Besides these payments there were two other payments recorded by the plaintiff on the back of the bond. One purported to be for Rs. 1,150 on account of interest made on the 17th May, 1877, and the other for Rs. 1,184 on the same account made on the 27th September, 1877. The plaintiff alleging that his cause of action arose on the 22nd June, 1872, when default had been made in payment of the instalment payable on that date, relied on the alleged payments of interest on the 17th May,

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1877, and on the 27th September, 1877, as giving him a fresh period of limitation. The suit was instituted on the 12th March, 1880. The defendant Hafiza Bibi contended that the suit was barred by limitation. The lower Courts held that this was so, the lower appellate Court holding that, having regard to the terms of the bond, limitation ran from the date of the first default, and that, assuming that the payment which appeared from the books of Manik Chand to have been made on the 2nd June, 1871, had been made in good faith on behalf of the defendants, such payment did not give the plaintiff a fresh period of limitation, as such period had expired at the time such payment was made, and that it was not proved that the payments recorded on the bond had been made.

On second appeal by the plaintiff to the High Court it was contended on his behalf, *inter alia*, that the suit was within time.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellant.

Babu *Oprokash Chandar Mukarji*, for the respondents.

The judgment of the Court (PEARSON, J., and SPANKIE, J.,) was delivered by

SPANKIE, J.—We must accept the finding of the Judge, which is one of fact, that the two payments of interest said to have been made in May and September, 1877, were not so made. The lower appellate Court has also found that it was not sufficiently proved that the payment of Rs. 692 as principal and interest on the 2nd June, 1871, was a *bonâ fide* payment on account of the debtors, made by or on behalf of Husain Bakhsh. But even if it were otherwise the Judge is right in finding that the suit for the money as claimed is barred by the lapse of more than six years from the alleged payment on the 2nd June, 1871. By the terms of the bond the whole sum was recoverable at once on the failure of one instalment, and more than twelve years have expired from this date. Therefore the suit would appear to be barred. The bond was executed in 1866, and in holding the claim to be barred we should follow the decisions of this Court and of the Courts of the other Presidencies in dealing with similar cases. The Bombay case—*Ramkrishna Mahadev v. Bayaji bin Santaji* (1),—cited by appel-

(1) 5 Bom. H. C. Rep., A. C. J., 35.

plaintiff's pleader was not followed in a later decision of that Court, — *Gumna Dambarshet v. Bhiku Hariba* (1); and the ruling of this Court in *Madho Singh v. Thakur Pershad* (2) was followed by this Court on several occasions—S.A. No. 461 of 1879, decided the 23rd August, 1879 (3). It was pressed upon us that a decision of the Judicial Committee—*Janeswar Dass v. Mahabeer Singh* (4)—took a different view. But the circumstances of that case were peculiar, as the suit against the defendants Nos. 2 and 3 had for its object a sale of the land hypothecated in a bond of which they had become purchasers under a subsequent mortgage-bond. It was therefore as against them a claim founded not upon the contract to pay the money, but upon the hypothecation of the land. The ruling in this case does not affect the decision of this Court referred to above, that part-payment of a debt contracted when Act XIV of 1859 was in force, after default, does not affect the limitation. The last instalment was paid, if paid at all *bonâ fide*, on the 2nd June, 1871, and twelve years have passed since the first default occurred on the 28th June, 1866. The term of twelve years expired on the 28th June, 1878. No waiver could affect the limitation law until art. 75, sch. ii, was published in Act IX of 1871, which came into force on the 1st July, 1871, and nothing has been paid since 2nd June, 1871. The suit was brought on the 12th March, 1878. The intermediate alleged payment of interest has not been proved; so clearly more than six years have passed since the 2nd June, 1871, and neither Act IX of 1871 nor Act XV of 1877 could help the plaintiff's case. We dismiss the appeal and affirm the decree with costs.

*Appeal dismissed.*

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

RAM ANUJ SEWAK SINGH (OBJECTOR) v. HINGU LAL (DECREE-HOLDER).\*

*Application for Execution of Decree—Legal representatives of deceased judgment-debtor—Act XV of 1877 (Limitation Act), sch. ii, No. 179.*

An application for execution of a decree against one of the several legal representatives of the deceased judgment-debtor, takes effect, for the purposes of limitation, against them all.

\* First Appeal, No. 154 of 1880, from an order of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 12th July, 1880.

(1) I. L. R., 1 Bom. 125.

(3) Unreported.

(2) N.-W. P. H. C. Rep. 1873, p. 35.

(4) I. L. R., 1 Calc., 168.

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