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the object of the agreement in the present case was fraudulent and it is therefore void under section 23 of the Contract Act.

It may also be pointed out that the fraud has been successful inasmuch as Pearey Lal has received no more than his rateable share in the sale-proceeds. The plaintiff and the defendant both are equally parties to the fraud and under the circumstances the maxim *in pari delicto potior est conditio possidentis* applies. In this view also the plaintiff is not entitled to any relief from the Court.

The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

FULL BENCH

Before Mr. Justice Muhammad Raza, Mr. Justice Bisheshwar Nath Srivastava, and Mr. Justice H. G. Smith

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November, 21

PARBATI, MUSAMMAT, AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* MOHAMMAD IBRAHIM AND OTHERS (DEFENDANTS-RESPONDENTS)*

Limitation Act (IX of 1908), Article 132—Foreclosure suit—Mortgage deed entitling mortgagee to sue on default in payment of interest or to remain silent—Suit filed within 12 years of the term fixed in the deed but after 12 years of the default in payment of interest, if time-barred.

Where a deed of mortgage entitles a mortgagee to institute a suit for a relief under the mortgage on default being made in payment of interest agreed to be paid yearly and there is a further covenant to the effect that the mortgagee may not sue on such a default, the limitation does not commence to run from the date of the default. The mortgage money does not "become due" within the meaning of Article 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. Therefore a suit for foreclosure by the mortgagee filed within 12 years from the date of the expiry of the term fixed in the mortgage deed but more than 12 years after the

* First Civil Appeal No. 32 of 1931, against the decree of Babu Gopendra Bhushan Chatterji, Subordinate Judge of Rae Bareilly, dated the 24th of November, 1930.

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default in payment of the yearly interest is not barred by limitation under Article 132. *Lasa Din v. Gulab Kuar* (1), followed.

The case was originally heard by a Bench consisting of the Hon'ble the Chief Judge and Mr. Justice Mohammad Raza who, thinking the question involved to be of considerable importance, referred it to a Full Bench for decision. The referring order of the Bench is as follows :

HASAN, C. J., and RAZA, J. :—This appeal arises out of a suit brought by the plaintiffs-appellants for the relief of foreclosure of immoveable property on the foot of a mortgage dated the 11th of September, 1913. The suit has been dismissed by the learned Subordinate Judge of Rae Bareilly as barred by limitation.

The present case is an addition to a large number of cases which have been decided by this Court and also by the late Court of the Judicial Commissioner in which decision has been given on the question of limitation under Article 132 of the Indian Limitation Act against a plaintiff, on the ground that when the deed of mortgage entitles a mortgagee to institute a suit for a relief under the mortgage on default being made in payment of interest agreed to be paid yearly, the limitation commences to run from the date of such default, in spite of a further covenant to the effect that the mortgagee may not sue on such a default. It is not necessary to cite those cases, nor cases which have followed the same principle decided in the High Court at Allahabad. These will all be cited at the hearing of the reference. There are also cases of other High Courts in British India contrary to the view held in this Court on this question. There are also observations relevant to this question in a very recent decision of their Lordships of the Judicial Committee. All the cases decided by this Court, except one, are cases of Divisional Benches. The one which is an exception is not directly relevant. We are accordingly of opinion that the question is of such an importance that it should be referred to and decided by a Full Bench of this Court. Accordingly under section 14(1) of the Oudh Courts Act, 1925, we refer the following question for decision to such a Bench :

Is the suit out of which this appeal arises barred by limitation?

It may be mentioned that in the arguments before us the learned counsel for the appellants also relied on Article 147

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of the First Schedule of the Indian Limitation Act. The question of the applicability of that article will also fall within the general question which we are referring to a Full Bench for decision.

Messrs. *Ali Zaheer* and *Ghulam Imam*, for the appellants.

Mr. *Siraj Husain*, for the respondents.

RAZA, SRIVASTAVA, and SMITH, JJ. :—This appeal arises out of a suit brought by the plaintiffs for foreclosure on the basis of a mortgage deed dated the 11th of September, 1913. The mortgage in suit was executed by the defendants in favour of one Gauri Shankar Misra for Rs.5,000, bearing interest at 4 annas per cent. per mensem. A deed of further charge was also executed by the defendants on the 29th of January, 1914, for Rs.422-9, bearing interest at Re.1 per cent. per mensem. The plaintiffs are the legal representatives of the deceased mortgagee. The term of the mortgage was five years, which was to expire on the 11th of September, 1918. The present suit was brought by the plaintiffs on the 10th of September, 1930.

A preliminary objection was raised on behalf of the defendants to the effect that the suit was barred by time, as the cause of action had accrued to the plaintiffs on default of payment of the first year's interest, which fell due on the 11th of September, 1914.

The learned Subordinate Judge accepted the contention of the defendants, and dismissed the suit, holding that it was barred by time. The other issues involved in the case were neither framed nor tried by the learned Subordinate Judge. This appeal was filed by the plaintiffs on the 28th of February, 1931. The finding of the learned Subordinate Judge on the question of limitation was challenged by the appellants. Thus the only point for decision in this appeal is whether

the plaintiffs' suit is barred by time. The present case is an addition to a large number of cases which have been decided by this Court, and also by the late Court of the Judicial Commissioner of Oudh, in which decision has been given on the question of limitation under Article 132 of the Indian Limitation Act against a plaintiff, on the ground that when the deed of mortgage entitles a mortgagee to institute a suit for a relief under the mortgage on default being made in payment of interest agreed to be paid yearly, the limitation commences to run from the date of such default, in spite of a further covenant to the effect that the mortgagee may not sue on such a default. There are also cases of other High Courts in which the question of limitation was decided contrary to the view which has hitherto been taken by this Court. When this appeal came up for hearing before a Bench of this Court on the 12th of November, 1931, it was thought proper to refer the following question to a Full Bench for decision :

“Is the suit out of which this appeal arises barred by limitation?”

Since then we have reviewed the decision of their Lordships of the Judicial Committee in the case of *Lasa Din v. Gulab Kuar and others* (1). That decision is clearly in favour of the appellants. The learned counsel on both sides agree that that decision must govern the present suit; and in view of that decision the question of limitation must be decided in favour of the plaintiffs.

The mortgage deed in suit, so far as is material to the present question, runs as follows :

“(1) That the interest on the said amount is agreed to be 4 annas per cent. per mensem within

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the stipulated period and after the expiry thereof up to the date of realization.

* * * * *

(3) That the stipulated period for the payment of the said amount is agreed upon to be five years and interest on the said amount shall be paid by the mortgagors from year to year. If interest for any year be not paid, then in case of breach of promise as to interest, the mortgagee has power either to start foreclosure proceedings and enter into proprietary possession of the property mortgaged or to remain silent. If he remains silent, the amount of interest shall be added to the principal, and interest thereon also shall continue to run at the rate of Re.1 per cent. per mensem and shall be so maintained up to the date of payment.

(4) That if the mortgagors continue to pay interest from year to year, then after the expiry of five years the mortgagee has power either to start foreclosure proceedings and enter into proprietary possession or to realize the entire amount due to him by sale of the mortgaged property as well as other moveable and immoveable properties of every description belonging to the mortgagors, their heirs and legal representatives, or to do anything whatever he may please."

The clause upon which the defence was founded in *Lasa Din's case* (1) ran as follows :

"In case of default, the said creditor shall, at all times, within and after the expiry of the stipulated period of six years aforesaid, have the power to realize the entire mortgage money and the remaining interest and compound interest due to him, in a lump sum, through court, by attachment and sale of the said mortgaged share, as well as from my person and all other kind of my

property, both moveable and immoveable, together with costs of court, and I, my heirs, relations, and representatives shall have no occasion for objection and refusal; that the aforesaid rate of interest, fixed by me, shall stand within and after the stipulated period and after the decree till payment of the entire demand hereunder and that I shall at no time demand reduction in interest."

In deciding the question of limitation their Lordships of the Judicial Committee referred to Article 132 of the First Schedule to the Limitation Act and then made the following observations in their judgment:

"There can be no doubt that, as pointed out by Lord BLANESBURGH, a proviso of this nature is inserted in a mortgage deed, exclusively for the benefit of the mortgagees, and that it purports to give them an option either to enforce their security at once, or, if the security is ample, to stand by their investment for the full term of the mortgage. If, on the default of the mortgagor—in other words, by the breach of his contract—the mortgage money becomes immediately due, it is clear that the intention of the parties is defeated, and that what was agreed to by them as an option in the mortgagees, is, in effect, converted into an option in the mortgagor. For, if the latter, after the deed has been duly executed and registered, finds that he can make a better bargain elsewhere, he has only to break his contract by refusing to pay the interest, and *co instanti*, as Lord BLANESBURGH says, he is entitled to redeem. If the principal money is due, and the stipulated term has gone out of the contract, it follows, in their Lordships' opinion, that the mortgagor can claim to repay it, as was recognized by WAZIR HASAN, J., in his judgment in the Chief Court. Their Lordships think that this is an impossible

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result. They are not prepared to hold that the mortgagor could in this way take advantage of his own default; they do not think that upon such default he would have the right to redeem, and in their opinion the mortgage money does not 'become due' within the meaning of Article 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would, of course, also be the position if the mortgagee exercised the option reserved to him."

We have already observed that the learned counsel on both sides agree that the decision of their Lordships of the Judicial Committee in *Lasa Din's case* (1) governs the present suit. This being the case, the question of limitation mentioned above must be answered in the negative and decided in favour of the plaintiffs. We answer the question accordingly.

APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge and
Mr. Justice B. S. Kisch

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MAHABIR PRASAD AND ANOTHER (DEFENDANTS-APPELLANTS) v. SYED MUSTAFA HUSAIN AND OTHERS (PLAINTIFFS-RESPONDENTS)*

Muhammadian law—Waqf—Waqf-alal-aulad—Direction given by testator to his widow to create waqf-alal-aulad—Testamentary direction, if amounts to valid wasiyat-bil-waqf—Consent of heirs to creation of waqf-alal-aulad—Subsequent repudiation—Repudiation followed by subsequent consent, validity of—Widow creating waqf-alal-aulad under direction of husband reserving less than one-third of net income for herself, validity of—Mutawalli—Absence of provision for mutawalli's remuneration—Court's power to fix the remuneration.

* First Civil Appeal No. 6 of 1931, against the decree of Dr. Chaudhry Abdul Azim Siddiqi, Additional Subordinate Judge, Lucknow, dated the 25th of September, 1930.

(1) (1932) I. L. R., 7 Luck., 442.