

THE
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APPELLATE CIVIL.

Before Courtney Terrell, C. J. and Varma, J.

1935.

RAGHUNANDAN SINGH.

April 26, 29.

v.

KISHUN SINGH.*

Mortgage Bond—principal money payable by instalments—creditor given the right to sue for entire money in the event of default of any one instalment—suit brought after more than twelve years from the date of first default—suit, whether barred by limitation—cause of action, when arises—Limitation Act, 1908 (Act IX of 1908), Article 132—person in possession of mortgaged property, whether proper or necessary party to mortgage suit—abatment of suit against defendant interested in equity of redemption—suit whether abates against persons not so interested.

A person in possession and occupation of mortgaged property and likely to resist a decree for sale is a proper but not a necessary party in a suit on a mortgage.

Where a suit to enforce a mortgage abates against a defendant who is interested in the equity of redemption, it

* Appeal from Appellate Decree no. 382 of 1931, from a decision of A. C. Davies, Esq., I.C.S., District Judge of Arrah, dated the 1st December, 1930, confirming a decision of Babu Nand Kishore Chowdhry, Munsif of Arrah, dated the 23rd November, 1929.

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cannot by that reason abate against other defendants who are not interested in the equity of redemption, nor sued as having any joint interest with the deceased defendant.

The class of cases where the mortgagee has the right to recover the whole of the capital amount when any instalment of interest is overdue (in which case the period of limitation will date from the moment when the right to recover the whole of the bond money has accrued) differs from the class of cases where the creditor is given a different right for each instalment in respect of which default may be made. In such cases he is entitled to take the most recent instalment as that which gives rise to the particular cause of action upon which he sues, provided that that cause of action arose not more than twelve years before the institution of the suit under Article 132 of the Limitation Act, 1908.

Where, therefore, a mortgage bond provided for the repayment of the principal sum by twenty yearly instalments, the first becoming due in May or June, 1913, and the material clause in the bond was to the following effect :

" If..... any one instalment be defaulted, the said..... have and shall have power to recover in a proper way the expired and unexpired instalments in one lump with interest thereon..... by sale of the mortgaged properties....."

and no instalment having been paid, the mortgagee brought a suit in August, 1928, that is to say, after more than twelve years from the date when the first instalment became due and the first default was made.

Held, (i) that the meaning of the clause is that if any of the instalments shall fall due and remain unpaid the creditor shall thereupon have the right to sue, first, for such of the instalments as have already fallen due and have not been paid and this part of the claim will be subject to the statute of limitation, and, further, that he is to have the right to recover the future instalments which up to that date have not become due or payable;

(ii) that the cause of action in respect of any particular instalment is different from the cause of action in respect of any other instalments;

(iii) that, therefore, the plaintiff was entitled to a decree for such of the instalments as had not been barred by limitation.

Ramsekhar Prasad Singh v. Mathura Lal(1), followed.

Gaya Din v. Jhumman Lal(2), *Shib Dayal v. Meharban*(3), *Umedmull Mangalchand v. Maniram Agarwala*(4), *Narna v. Ammani Anma*(5), *P. M. A. Muthia Chettiar v. Venkatasubbarayulu Naidu*(6), *Sitab Chand Nahar v. Hyder Malla*(7), *Ganpati Bala Dhobale v. Bhiku Sakharam Ghodke*(8) and *Puncham v. Ansar Husain*(9), referred to.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C. J.

Baldeo Sahay and Harinundan Singh, for the appellant.

Rai Indra Behari Saran, for the respondents.

COURTNEY TERRELL, C. J.—This is an appeal from the decision of the District Judge of Shahabad, affirming a decision of the Munsif dismissing a suit for sale on a kistbandi mortgage bond. In view of the points, particularly the preliminary point, raised on behalf of the defendant respondents to this appeal, the family of the borrower may be shortly described.

One Bujur Rai had four sons, Kishun Rai, defendant no. 1, and three other sons named respectively, Charitar Rai, Bujhawan Rai and Gulzar Rai who are deceased. Charitar Rai left three sons, respectively, defendants 2 (Ram Ekbal), 3 and 4 and Gulzar Rai left three sons, respectively, defendants 5, 6 and 7. Bhujawan had two sons who predeceased their father and Ramekbal since the institution of the appeal to this court has died but no substitution has been made of his heirs and it is alleged that he left a son surviving him.

(1) (1925) I. L. R. 4 Pat. 820.

(2) (1915) I. L. R. 87 All. 400, F. B.

(3) (1922) I. L. R. 45 All. 27, F. B.

(4) (1928) 33 Cal. W. N. 275.

(5) (1916) I. L. R. 39 Mad. 981.

(6) (1926) A. I. R. (Mad.) 160.

(7) (1896) I. L. R. 24 Cal. 281.

(8) (1930) 125 Ind. Cas. 701.

(9) (1926) L. R. 53 I. A. 187.

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The money was borrowed by Bhujawan on a simple mortgage bond, providing for repayment by instalments, the first instalment becoming due on the 30th Jeth, 1320 Fasli, and the other 19 instalments at yearly intervals from that date. No money, it has been found, has been paid upon the bond.

To deal first with the question of abatement which was argued on behalf of the defendants, it is contended that owing to the fact that Ramekbal died pending the appeal and there having been no substitution on the part of his heirs, the whole suit failed by abatement.

Now in the plaint the suit is brought against Kishun Rai, defendant no. 1, and paragraph 2 of the plaint states that the other defendants were allowed into possession and occupation of the property left by Bhujawan Rai by mutual agreement, that is to say, the other defendants are sued not by reason of an allegation that they are interested in the equity of redemption of the mortgage but by reason of the fact that they were in possession and occupation; and it is perfectly clear that a person in possession and occupation and likely to resist a decree for sale is a proper but not a necessary party in a suit on a mortgage.

Now Ramekbal having died and his heirs not having been joined, the suit will abate against Ramekbal but will not abate against the other parties who are not interested in the equity of redemption, nor sued as having any joint interest with defendant no. 1. This disposes of the preliminary objection to the appeal and I now approach the main question which we have to decide.

The mortgage bond provided for the repayment of the principal sum by 20 instalments, the first, as I have said, becoming due on the 30th Jeth, 1320 Fasli, corresponding to May or June of 1913, and the clause in the bond in regard to the instalments which has been translated for us is as follows:—

“ If God forbid any one instalment be defaulted, the said Babu and his heirs have and shall have power to recover in a proper way the

expired and unexpired instalments in one lump with interest thereon at the rate of 1 per cent. per month by sale of the mortgaged properties specified below and from other properties and persons and assets of me and my heirs and representatives."

It has been found that no instalments have been paid.

The suit was begun on the 11th August, 1928, corresponding to 10th Sawan, 1335 Fasli, that is to say, more than 12 years from the date when the first instalment became due and the first default was made. It being a mortgage bond it is clear and it is admitted that Article 132 of the Limitation Act applies.

It is the contention on behalf of the respondents to this appeal, and upon this contention they succeeded in the lower courts, that the right to recover the whole amount of the mortgage money accrued when the first default was made and that the suit not having been brought within 12 years of that default, that is to say, when the money became due, it is barred by limitation; and a large number of cases have been cited which on the face of them have little, if anything to do with the real merits of this case which must depend for its solution upon the construction of the bond in suit. The following cases were cited: *Gaya Din v. Jhumman Lal*(1), *Shib Dayal v. Meharban*(2), *Umedmull Mangalchand v. Maniram Agarwala*(3), *Ramsekhar Prasad Singh v. Mathura Lal*(4), *Narna v. Ammani Amma*(5), *P. M. A. Muthia Cheyyiar v. Venkatasubbarayudu Naidu*(6), *Sitab Chand Nahar v. Hyder Malla*(7), *Ganpati Bala Dhobale v. Bhiku Sakharam Ghodke*(8) and *Pancham v. Ansar Husain*(9).

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Now the meaning of the bond and the clause which I have quoted is, to my mind, perfectly clear. It is a provision that if any one of the 20 instalments shall fall due and remain unpaid, and of course there shall not be a waiver by subsequent acceptance of money of later instalments, the creditor shall thereupon have the right to sue, first, for such of the instalments as have already fallen due and have not been paid and this part of the claim will be subject to the statute of limitation, that is to say, the plaintiff will not be allowed to recover such instalments as have become time barred; and, further, that the plaintiff is to have the right to recover the future instalments which up to that date have not become due nor payable. The meaning of the bond, therefore, is perfectly simple. It is not that the same cause of action will arise in respect of each instalment as and when it becomes due and is unpaid but the cause of action in respect of any particular instalment is different from the cause of action in respect of any other instalments. In each case what has to be considered is how much has fallen due and has not been paid and is not barred by limitation; and, secondly, how much remains to be paid even though up till that moment the instalments have not fallen due. It is obvious that the answer to this question will be different in the case of every particular instalment.

The authorities cited may, I think, be simply summed up by stating that they fall into two classes, in one where the mortgagee has the right to recover the whole of the capital amount when any instalment of interest is overdue, in which case of course the period of limitation will date from the moment when that right to recover the whole of the bond money has accrued; the other class of case is like the one that we have to deal with in the present appeal where the creditor is given a different right for each instalment in respect of which default may be made. He is entitled to take the most recent instalment as that which gives rise to the particular cause of action upon

which he sues provided that that cause of action arose not more than 12 years before the institution of the suit under Article 132. To my mind the case falls exactly within the class illustrated by the decision in *Ramsekhari Prasad Singh v. Mathura Lal*(1). This aspect of the matter, that is to say, the proper construction of the bond in suit does not seem to have been present in the minds of either of the tribunals below; and as against defendants 3 to 7 the decree is passed in their presence, they being sued merely as persons in possession. They might have, if they so wished, put in a separate defence and have stated that they were neither necessary nor proper parties to the suit and have contested it on their own account; they did not, however, choose to do so but made common cause with defendant no. 1 and raised the same points in defence. Accordingly they having taken that attitude they must bear the burden of the decree and will be subject to all the liabilities which that decree may involve.

The plaintiffs made no claim for the first four instalments under the bond on the allegation that they had received those instalments. This, as has been found, was done by way of an attempt to overcome the argument they anticipated would be made against them by way of waiver. Therefore, there will be no decree in respect of the first four instalments under the bond.

The result is that the appeal is allowed; the defendants with the exception of defendant no. 2 must pay the plaintiffs' costs throughout. Interest at the bond rate will be payable up to the date of the decree of the High Court and after that interest at the rate of 6 per cent. per annum until the date of realisation.

VARMA, J.—I agree.

Appeal allowed.

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