

(1913) 05 AHC CK 0010
In the Allahabad High Court

Bajnath	Vs	APPELLANT
Amolak Chand Bajnath Vs Bholanath		RESPONDENT

Date of Decision : 27-05-1913

Acts Referred:

Citation : (1913) ILR (All) 455

Hon'ble Judges : Tudball, J; Muhammad Rafiq, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Tudball and Mahammad Rafiq, JJ.—This is a defendant's appeal and arises out of a suit on an instalment bond, dated the 7th of July, 1904, for a sum of Rs. 680 as consideration, Rs. 600 being the actual amount of the loan and Rs. 80 being the interest thereon. The whole was repayable in 4 1/2 years in equal instalments of Rs. 75, payable every six months. There was a condition in the bond that if any instalment remained unpaid on the due date, then the creditor would be entitled to recover the whole sum at once with interest or that he might sue for each instalment as it fell due and remained unpaid. The first two instalments were paid on the due dates. The third instalment was due on the 7th of January, 1906. Neither this nor any of the subsequent instalments were paid. On the 17th of August, 1912, i.e., six year and seven months after the 7th of January, 1906, the plaintiff brought the present suit. An examination of his plaint would show that he sued to recover the full amount which was due on the 7th of January, 1906, together with interest at the stipulated rate, and which fell due by reason of the default of the 7th January, 1906, i.e., Rs. 530, principal, plus Rs. 223-2, interest. In his plaint he distinctly states that the cause of action for the suit accrued on the 7th of January, 1906. It is to be noted that he does not sue for each of the instalments, which fell due successively every six months together with interest on each instalment from its due date. He is clearly electing to take one of the two options given him by the bond, viz., that one which enabled him to recover the full amount of the debt due by reason of the default

in one instalment.

2. The court of first instance dismissed the suit as time-barred, under Articles 75 and 120 of the second schedule of the Limitation Act. The court below, relying mainly on the decision of *Ajudhia v. Kunjal* ILR (1908) All. 123, held that the suit was not barred by limitation and remanded it to the court of first instance for decision on the merits. The defendant has come here on second appeal, and it is strongly urged, first, that the ruling referred to does not apply, and secondly, that in view of Article 75 of the Limitation Act, the suit is clearly barred. In our opinion, the appeal must succeed. Both under the terms of this bond as well as in law, when the debtor failed to pay the instalment on the 7th of January, 1906, it was open to the creditor either to claim the whole of the debt or to waive that right and take the other option of recovering the instalments. Article 75 distinctly states that the period of limitation begins to run when the default is made, unless where the payee waives his right based on the provision, and then when fresh default is made in respect of which there is no such waiver. It is perfectly clear from the plaint itself that the plaintiffs have not waived that right, which entitled them to recover the whole of the balance due by reason of the default of the 7th of January, 1906. In fact, they take their stand upon that provision and seek to enforce their right. The existence of a waiver is distinctly negated by the plaint, which states that the right accrued on the 7th of January, 1906. To enforce that right they had six years from that date. The present suit has been brought beyond the period of limitation allowed by law. In regard to the ruling in *Ajudhia v. Kunjal* I.L.R (1808) . All. 123. I.L.R.(1906) Cal 789, an examination thereof shows clearly that it cannot apply to the facts of the present case. That suit was brought to recover the last three of the instalments that were due under that bond and not the whole amount due by reason of a default in payment of an instalment. It appears to have been proved or assumed that the plaintiffs had forborne to sue, in other words, had waived their rights based on the special provision of the bond and were enforcing their rights in respect of the instalments that were due and had not been paid. In the present case, the facts are directly the contrary. The claim is to enforce the condition which entitled the creditor to recover the whole amount due by reason of the default in payment of one instalment on the 7th of January, 1906. In our opinion, the suit is clearly barred under the provisions of the above-mentioned articles. We allow the appeal, set aside the order of the court below and restore the decree of the court of first instance with costs.