

(1930) 02 BOM CK 0012
In the Bombay High Court
Case No : Second Appeal No. 834 of 1927

Ganpati Bala Dhobale

APPELLANT

Vs

Bhiku Sakhabam Ghodke

RESPONDENT

Date of Decision : 14-02-1930

Acts Referred:

Limitation Act, 1963 — Article 132

Citation : AIR 1930 Bom 297 : (1930) 32 BOMLR 683

Hon'ble Judges : Madgavkar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Madgavkar, J.—The question in this appeal is whether the plaintiff-appellant's suit is barred by limitation, as both the lower Courts have held.

2. The appellant sued to recover on a mortgage-bond in his favour dated July 12, 1908, passed by the defendant-respondent. The principal amount payable was Rs. 500 and the relevant clauses in the bond are as follows:-

In the month of Shrawan every year, I shall repay Rs. 23 and in 1900 and in 1928 Shrawan I shall pay the last instalment of Rs. 25 and shall repay the entire amount in twenty years. I shall pay the first instalment on July 12, 1909.

In case I fail to pay any instalment on the due date as above I shall pay interest at the rate of twelve per cent, per year on the instalment amount and if I do not pay any instalment on the due date then you should after waiting for a year from the date of such default and if I still fail to pay the amount of this instalment then without waiting for the due date you should recover the entire amount and have the property sold through Court.

3. The appellant alleged certain instalments of which no documentary evidence was forthcoming. Both the lower Courts held that nothing had been paid and that under Article 132 of the second schedule of the Indian Limitation Act, the

moneys sued for became due on July 12, 1910, and the present suit instituted on August 27, 1925, was barred by limitation.

4. It is argued in appeal that the agreement really consists of three separate clauses, the first, fixing the instalment of Rs. 25, the second stipulating twenty years as the period of redemption and the third, the concluding penal clause, and that the second clause kept the mortgagee's right to sue for the entire amount alive up to July 12, 1928, and the present suit of 1925 is therefore well within time.

5. Reliance is placed on authorities such as *Narna v. Ammani Amma* ILR (1916) Mad. 981, and the observations of their Lordships of the Privy Council in *Panckam v. Ansar Husain* 31 C. W. N. 324, doubting the correctness or the applicability of the decisions of the Full Bench of the Allahabad High Court in *Gaya Din v. Jhumman Lal* ILR (1915) All. 400 and *Shib Dayal v. Meharban* ILR (1922) All. 27

6. It is contended for the respondent that in virtue of the authorities quoted above the appellant-mortgagee's right to recover the mortgage amount, for which he now sues, arose, as the lower Courts held, on July 12, 1910, so that the present suit was barred as being brought more than twelve years thereafter, and the second clause on which reliance is placed for the appellant is in fact one with the first clause and follows on an arithmetical division of 500 by 15, but cannot extend the period of limitation to the appellant.

7. The decision turns on the question when the moneys sued for, that is, the mortgage amount with interest became due within the meaning of Article 132 of the Indian Limitation Act. In my opinion it clearly became first due at least on July 12, 1910, the first instalment not having been paid on the due date, viz., July 12, 1909.

8. It is not necessary perhaps to refer to analogous decisions such as *Kankuchand Shivchand v. Rustomji Hormusji* ILR (1895) 20 Bom. 109, which is a decision under Article 75 of the second schedule, though it was held that actually in the case of an instalment bond with a penal clause, when default was made, the amount became due and time began to run under Article 75 against the creditor from the date of the first default and not of the last, unless waiver has been expressly proved.

9. It is also not perhaps necessary to refer to similar principles in the case of instalment decrees to which Article 182 (7) of the Indian Limitation Act applies such as *Raichand Motichand Gujar Vs. Dhondo Laxuman Bhure*, On the point now in question I am bound, I think, by the decision of the Division Bench in *Shrinivas v. Chanbasapagowda* (1922) 25 Bom. L.R. 203, in which it was held that in the case of a similar mortgage bond with instalments the suit was not only barred under Order II, Rule 2, by reason of a previous suit for the first two instalments, but was also barred under Article 132 to the second schedule and limitation began to run from the date of the first default. In that decision the

view in *Gaya Din v. Jhumman Lal* ILR (1915) All. 400 and *Nathi v. Tursi* ILR (1921) All. 671 was preferred to the decision in *Narna v. Ammani Amma* ILR (1916) Mad. 981. To the former may be added the subsequent decisions of the same Court in *The Collector of Jaunpur v. Jamna Prasad* ILR (1922) All. 360 and *Shib Dayal v. Meharban* ILR (1922) All. 27 in which it was held that limitation began to run against the mortgagee from the date of the first default in payment of interest, and that it made no difference whether the right to sue for repayment before the stipulated period was optional or compulsory.

10. I accept the remark of Banerji J. in the dissentient judgment in *Gaya Din v. Jhumman Lal* at page 405 that the date, when the money becomes due, depends upon the terms of each document, and a true construction of those terms. In that case the learned Judge thought that by virtue of a clause in the bond, viz., "if the mortgagees in order to get interest do not bring a suit in default of payment of any instalment, and we are unable to pay the money, the interest should continue up to the stipulated period of ten years, and also after it up to date of realization", and that this clause extended the period, when time began to run, to the expiry of the ten years and not from the date of the first default—a view not accepted by the other two Judges. There is, however, no such clause in the present deed and I am unable to accept the argument for the appellant that the words, "we shall repay the entire amount in twenty years" following the agreement to fix the instalment at Rs. 25 suffice to give the appellant-mortgagee a further start for limitation under Article 132.

11. The decision in *Narna v. Ammani Amma* may also perhaps be distinguished on the ground that there was a clause in that mortgage under the default clause which enabled the mortgagee to claim a higher rate of interest in case of default from the date of default. But in the suit he claimed not that rate but the ordinary rate in the absence of default, so that he may be said to have had an option of a higher rate in case of default with limitation running from the period of default or of the ordinary rate apart from default, in which case limitation would not run until the due date of the last instalment. But, however that may be, as stated above, I am bound by the decision of the Division Bench in *Shrinivas v. Chanbasapagowda*, preferring the Allahabad decisions to the Madras decision referred to above.

12. In this view, I do not think it necessary to refer to the remarks of Fawcett J. in *Ishram Govinda Patil Vs. Trimbak Ganpat*, as to the applicability of Article 132, as that case was actually decided under Article 120.

13. In *Pancham v. Ansar Husain* their Lordships of the Privy Council have referred to the remarks and the importance of the question raised in the Full Bench Allahabad decisions in *Gaya Din v. Jhumman Lal* and *Shib Dayal v. Meharban*, The Privy Council have not, however, so far decided the question and their decision, therefore, is of no avail to the appellant. The Calcutta High Court is of the same opinion as the Allahabad High Court : *Vishvanath Bhiva Raul Vs. Tukaram Vithu*, .

14. In the case of this particular document, therefore, the sum sued for first became due on July 12, 1910, and the present suit of 1925 was therefore rightly held to be barred by limitation under Article 132 of the second schedule.

15. The appeal fails and must be dismissed with costs.