

**(1929) 02 AHC CK 0040**  
**In the Allahabad High Court**

Ghasi Khan

APPELLANT

Vs

Thakur Kishori Ramanji Maharaj and Others

RESPONDENT

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**Date of Decision :** 22-02-1929

**Acts Referred:**

Limitation Act, 1963 — Section 21(2)

**Citation :** AIR 1929 All 380

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**Judgement**

1. This is a defendant's appeal in a suit for sale on a mortgage of 31st July 1910 executed by the appellant and Zabar Khan in favour of the respondent. The defence to the suit by the appellant among others was that the claim of the plaintiff was barred by limitation and that no money had passed to them.

2. The mortgage was for a term of six years, and it was provided in the deed that upon failure of payment of interest for one year the mortgagee would be entitled to recover the whole of the mortgage money without waiting for the expiry of his stipulated time. It is, therefore, clear that no interest having been paid for one year the mortgagee was entitled to recover the money by suit on foot of the mortgage. The present suit having been brought after 12 years from that date the claim of the plaintiff must be held to be barred unless the plaintiff proved either payment of interest or principal, or claimed that the suit was not barred by reason of an acknowledgment. The plaintiff claimed that the two mortgagors had made certain payments, but the Courts below have found that the payment of any interest by Zabar Khan had not been proved, but that payment of interest by Ghasi Khan had been proved and the claim as against him was not barred by time. The Court of first instance having decreed the suit against Ghasi Khan alone, the plaintiff preferred an appeal and the present appellant Ghasi Khan filed cross objections. At p. 15 of the paper book will be found the points that were contested before the learned Judge. The result of the findings was that the Court accepted the findings of fact arrived at by the first Court, namely that the alleged payment by Zabar Khan had not been proved, but that the payment of interest by the appellant had been proved. As the Court of first instance had reduced the amount of interest as provided for by the deed, the learned Judge in

appeal modified the decree of the first Court as against Ghasi Khan.

3. Ghasi Khan has come up in appeal before us. Two points have been argued by the learned advocate for the appellant. The first is that payment of interest by one of the two co-mortgagors does not keep alive the mortgage but only the personal liability of the person who actually pays interest. The second point taken is that the appellant should not be made responsible for the whole debt when the claim as against his co-mortgagor had been dismissed. It may, however, be mentioned that these grounds were not definitely taken in the memorandum of appeal and were not taken and argued before the lower appellate Court.

4. The learned advocate has cited in support of the first proposition argued by him the case of *Chunni v. Hukum Singh* [1911] 8 A.L.J. 60. This case in our opinion is no authority for the proposition, but the learned advocate argued that we should accept the converse of what has been laid down in that case. The case of a mortgagee is different from that of a mortgagor, and we cannot accept that everything that applies to a mortgagee must apply to a mortgagor. Their rights and liabilities are different.

5. It is further submitted that as Section 21(2), Lim. Act, provides that the acknowledgment of a debt or payment of interest by one of two debtors only keeps the debt alive as against the person who acknowledges the debt or pays the interest, the liability of the co-mortgagor had ceased by reason of the fact that he had made no payments. A mortgage deed is not the same as a simple debt and we think that the liability which attaches to a mortgagor by reason of his having executed the mortgage and paying interest cannot be get rid of by saying that the payment of interest was of a simple debt as such.

6. Mr. Das has referred to the case of *Budhmal Kevalchand v. Rama, Yesu* [1920] 44 Bom. 223 as authority for the proposition that his client should be only made responsible for a proportionate amount of the debt. That case follows a decision of the Calcutta High Court reported in *Imam Ali v. Baijnath Sahu Ram* [1906] 33 Cal. 613. In the case of *Sanwal Singh v. Ganeshi Lal* [1913] 35 All. 441 a Bench of this Court considered the case reported in *Imam Ali v. Baijnath Sahu Ram* [1906] 33 Cal. 613 and has referred to cases of the other High Courts and held that the rule in that case was intended to govern the particular facts of that case on the point and not to lay down any general rule. Having examined that case we are of the same opinion and we think that no general rule was laid down either in the case reported in *Budhmal Kevalchand v. Rama Yesu* [1920] 44 Bom. 223 or in the case reported in *Imam Ali v. Baijnath Sahu Ram* [1906] 33 Cal. 613. We see no reason to differ from the view of this Court in the case of *Imam Ali v. Baijnath Sahu Ram* [1906] 33 Cal. 613 and no materials have been laid either before the Court below or before us from which we could say that the ordinary principle applicable to mortgages does not apply to the facts of this case. Ordinarily if two properties are jointly mortgaged for the same debts each of those properties is liable for the whole, and it is open to the mortgagee either to

proceed against the whole mortgaged property or against a part of such property. There may no doubt be special cases where an exception may be made, but in our opinion in this case there is nothing shown which would lead us to depart from the ordinary rule. We are, therefore, of opinion that there is no force in this appeal and we dismiss it with costs.