(1951) 06 P&H CK 0009

In the Punjab And Haryana At Chandigarh

Case No : Second Appeal No. 383 of 2005

Mst. Har Kaur APPELLANT

Vs

Court of Wards, S. Kuldip Singh and another RESPONDENT

Date of Decision : 14-06-1951

Acts Referred:
Limitation Act, 1963 — Article 75

Citation : (1951) 06 P&H CK 0009

Hon'ble Judges : Chopra, J

Bench : Single Bench

Advocate : Daya Sarup Nehra, for the Appellant; Daya Kishen Puri, for the Respondent

Final Decision : Dismissed

Judgement

Chopra, J.—This is a second appeal by the defendant in a suit brought upon an instalment bond which provided for payment of the principal Bum by certain instalments and gave an option to the obligee to realise the entire amount on default in payment of any instalment. The bond which was for the payment of Rs. 686 2-0 provided that the amount would be paid by instalments of Rs. 137-3-7 annually i.e. Rs. 68-9-9 per harvest commencing from Rabi 1997 and ending in kharif 2001. The bond was originally executed on 30 2-1997 and was completed on l 3-1997 by adding the default clause which is the subject-matter of dispute in the case. The nonpayment of an instalment, according to this clause, gave the creditor the choice to recover the entire amount then remaining due together with interest @ /l2/- % per mensem or to institute a suit for each instalment as it fell due. The obligee, Court of Wards to the estate of S. Kuldip Singh, brought the present suit on 24-2-2003 with the allegation that Rs. 390 had been received from the debtor on different dates and that Rs. 96-2-0 principal and Rs. 81.4.9 by way of interest on the amount that remained unpaid, were due on the bond. The defendant Mt. Harsaran Kaur, widow of Tarlochan Singh the debtor, denied the execution of the bond and also payment of any instalments and pleaded the suit to be barred by time. The trial Sub-Judge found the execution of the bond to be proved but dismissed the suit as time barred. The learned District Judge, on appeal before whom the execution of the bond was not challenged, granted the plaintiff a decree for Rs. 274-7 0, the amount of the last two instalments which he found to be within time. This is defendant''s appeal and the only question agitated in it is regarding limitation.

2. The plaintiff gave the following details of the alleged payment of Rs. 390:

date op Payment

amount Paid

15-3-1997

Rs. 50

30-6-1998

" 40

14-2-1999

" 30

26-8-2000

" 70

18-10-2000

" 200

The defendant did not admit that any payment had been made to the plaintiff. Out of these, the plaintiff proved only the first and the last items of Rs. 50 and Rs. 200 respectively. After the payment of Rs. 50 on 15-3-1997 nothing is proved to have been paid till 18-10-2000 when eight instalments amounting to Rs. 548.14.0 had become due. Out of this only Rs. 50 had been paid, and Rs. 498.14.0 were due when the last item of Rs. 200 was paid. This makes it clear that a default was made in the payment of the very first instalment of Rabi 1997. Even if the intervening payments be taken into consideration though they were never attempted to be proved the result would be the same. The first instalment besides having not been paid in time was short by RS. 18-9-9; the second instalment due in Kharif 1997 was not paid at all; and the next alleged payment was of Rs. 40 on 30 6-1998 when two more instalments had also become due. There cannot, thus, be any doubt that the debtor had become liable to pay the entire amount with interest in Rabi 1997 when the first instalment fell due. If Art, 75, Limitation Act, applied and if the plaintiff failed to prove waiver of the option to take benefit of the default clause, the suit brought in 2003 was hopelessly barred by time.

3. The contention of Mr. Puri, the learned counsel for the respondent, in the first

instance, is that the bond clearly gave the obligee an option to take benefit of the default clause and to claim the entire amount that remained due on any default or to sue only for the unpaid instalment. He, therefore, urges that Art. 75 had no application and that the bond could be sued upon as one for simple instalment without a default clause, under Art. 74 and the suit for the last two instalments payable within three years would be within time. In the alternative, the counsel maintained that the creditor had waived his right to take benefit of the default clause and that on all the instalments having become due, he was entitled to sue for those which came within three years of the suit.

4. Mr. Daya Sarup on the other hand stressed that Art. 75 did not make any distinction between cases where the bond provided that the amount shall become due and cases where the bond gave the option to the obligee to call in for the entire amount. His argument is that the question is not ''what the creditor may do,'' but ''when the debtor is liable for,'' and that when on default the debtor at once becomes liable to pay the whole sum, the amount becomes due to the creditor within the meaning of Art. 75, even though the bond gives the creditor an option in the matter.

5. A number of authorities has been cited by the counsel for the parties in support of their respective contentions. But I do not think it is necessary for me to refer to them all in detail, because I am of the view that the matter is set at rest by the wordings of the default clause in the bond in question. In an instalment bond with a condition of eligibility on one default the question as to when time begins to run really depends upon the construction of the document and the contract between the parties. In the present case, the debtor expressly contracted to give the creditor an option to treat or not to treat the default as enabling him to sue for the whole amount. It was stipulated that the creditor might sue only for the instalment or instalments that fall due or, if he so liked, he might call upon the debtor to pay the -whole of the amount that remained unpaid. The language employed makes it clear that what was conferred upon the obligee was an option which he may or may not exercise on default in payment of an instalment. It was expressly contracted by the debtor that the creditor, even in case of default, could sue for the instalment that had fallen due without taking benefit of the default. The debtor gave his consent in advance that the creditor could waive his right to enforce the default clause which was for his benefit, A suit by the creditor, under the circumstances, only for the instalments that were within time would not be barred under Art. 75, if he did not choose to take benefit of the default clause. The present suit was brought when all the instalments had become due and the plaintiff has been granted a decree only for the last two instalments that were within time.

6. In AIR 1937 1 (Lahore) the bond that was the basis of the suit recited that if the executant did not pay three consecutive instalments, the creditor would be entitled to realise the amount of the three instalments and interest thereon, or to realise the entire balance by means of a suit. Even the first instalment was not

paid and 27 of the instalments had become barred by time when the suit was brought. The Division Bench decreeing the suit for the instalments that were within time held that;

in view of the wordings of the bond Art. 74 and not Art. 75, Limitation Act, applied, and hence it was open to the creditor to sue at any time for all those instalments which had become payable within three years of the institution of the suit.

In a suit on a bond similarly worded, a Division Bench of the erstwhile Patiala High Court in Lalu v. Budh Ganesh, 9 Patiala L.R. 324 made the following observations:

Where an instalment bond provided that in default of payment of any instalment, the whole amount shall become duo at the option of the promisee, the obligee is not bound nor can he be forced to exercise his choice on the occurrence of tie first default. If he does not choose to exercise his right to demand the whole amount at the first default, he can sue for the instalment that have fallen due within three years of the suit.

I am in respectful agreement with the view expressed in the two cases referred to above. A decision of a single bench of the Madras High Court in S. K. S. Ayyathurai Mudaliar v. Ibramsa Rowther, A.I.R 1949 Mad. 502 may also be quoted with advantage. In this ease Mack J. compared the two articles providing limitation for suits on instalment bonds and arrived at the conclusion that the plaintiff has the option of enforcing the default clause in Art. 75, and if he does not do so, he must be deemed to have waived the benefit of the provision, and he then can fall back on his ordinary right of suit on the covenant to pay the instalments under Art. 74.

7. In view of my above finding the alternate plea of waiver taken by Mr. Puri need not be gone into and the decision of the learned District Judge must be maintained. The appeal is consequently, dismissed, but because of the question of law involved, the parties are left to bear their own coats. Announced.

