

Gopal Naicker Vs. Alagirisami Naicker

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Court : Chennai

Decided On : Feb-26-1942

Reported in : AIR1942Mad581; (1942)1MLJ532

Appellant : Gopal Naicker

Respondent : Alagirisami Naicker

Judgement :

King, J.

1. This appeal arises out of a mortgage suit in which a preliminary decree was passed in June, 1933. It provided for the payment of the mortgage money in seven annual instalments of Rs. 115 each in June of each year; and also that if there were default in the payment of any instalment the decree-holder might then proceed to sell the mortgaged property for the whole of the amount of the instalments still remaining unpaid, and also for the sum of Rs. 262, which he had provisionally relinquished. No instalment was in fact paid in either 1934. 1935. 1936 or 1937. On 22nd June, 1938, before the 1938 instalment had become due, the decree-holder applied for a final decree, conceding, however that though the first instalment had not been paid, he could not claim it as still due. The judgment-debtor contended that the application was barred by limitation. This view was accepted by the learned District Munsif of Koilpatti, but on appeal a final decree was granted by the learned Sub-Judge of Tuticorin. This is a second appeal by the

first judgment-debtor.

2. It is common ground that the article in the Limitation Act which applies to this case is 181, and that time begins to run when 'the right to apply accrues'. The essential point at issue is whether that right accrues only once, on the occurrence of the first default, or as often as any default occurs.

3. The appellant's learned advocate relies in the first place upon the language of the compromise decree itself. No doubt the language of the translation runs that in default of payment such and such amounts 'shall be collected by the plaintiff' but I am satisfied that there is nothing at all in the original Tamil to connote the idea of compulsion, and it is clear from the judgment of the learned Subordinate Judge that it must have been practically the agreed background of the discussion before him that the respondent was given by the decree an option to enforce its penalties or to refrain from doing so. It would certainly require the most explicit language before one could accept the interpretation that a creditor who has agreed to make a concession should bind himself to withdraw it the moment any default should occur.

4. The authorities which have been brought to my notice in this matter of the interpretation of Article 181, where periodical payments have to be made are almost equally divided. There is none in Madras which is binding upon me. *Muhammad Islam v. Muhammad Ahsan* I.L.R. (1894) All. 237 and *Har Gopal v. Ram Rachhpal* I.L.R. (1921) Lah. 155 lay it down that every fresh default gives rise to a new cause of action, and in my opinion the ante-penultimate paragraph in the judgment of the Privy Council reported in *Maung Sin v. Ma Tok* (1927) 53 M.L.J. 22 : L.R. 54 IndAp 272 : I.L.R. Bang. 422, is to the same effect. On the other hand *Raichand Motichand v. Dhondo Laxuman* I.L.R. (1918) Bom. 728 and *Ram Prasad Ram v. Jadunandan Upadhia* I.L.R. (1934) All. 921 are very definitely to the contrary.

5. It is the former of these two views which very emphatically commends itself to me. *Raichand Motichand v. Dhondo Laxman* I.L.R. (1918) Bom. 728 is mainly based upon the principle that provisions for payment in instalments are intended to benefit not the creditor but the debtor; but I am unable with respect, to see why

such a principle should continue to be applied when the debtor refuses to carry out those provisions, going even so far as--in the Bombay case--refusing to make any payment for six years. In *Ram prasad Ram v. Jadunandan Upadhia* I.L.R. (1934) All. 921, it is pointed out with undoubted force that the right to apply has certainly accrued whenever a first default occurs but the learned Chief Justice does not say why this fact should prevent a second right to apply from accruing when a second default occurs, and with respect I cannot understand what Mukerji, J., means when he says

A right to apply may accrue on several occasions but, for the purposes of limitation the first occasion when the right to apply accrues must be taken as the crucial date.

The Limitation Act does not specifically use the word 'first' in Article 181, as it does e.g., in Article 130 or 131. And it seems to me that to read the word 'first' into Article 181, in a case like the present is to nullify the real significance of the decree which provides that the enforcement of the penalty may follow upon any default, and, as I read it, that the decree-holder is at no time bound to enforce the penalty.

6. It seems to me further that if the view contended for by appellant's learned advocate be accepted limitation must begin to run as soon as the first default occurs, and nothing can stop it running. Let me take a hypothetical case, and suppose that the 1934 instalment, instead of not having been paid at all, had been paid a month late, that the instalments for 1935 and 1936 had been paid punctually, and finally there had been a fresh default in 1937. It is argued for the appellant that the tardy payment in 1934, would serve as an acknowledgment under Section 19, but I am quite unable to see how such a payment could in any sense amount to a recognition of the right of the decree-holder to apply for a final decree. It is merely a payment under the preliminary decree and is no more an acknowledgment of anything than a prompt payment would have been. It seems therefore that the intervening payment could not prevent the period of limitation which had commenced in 1934 from continuing to run, so that, in the circumstances which I have supposed to exist, the decree-holder, because of his clemency in accepting the first instalment one month late, would be prevented

from taking advantage of the subsequent default. Such a result would certainly seem to me to frustrate the clear intentions of the parties to the agreement,

7. I am accordingly of opinion that the view of the learned Subordinate Judge is right and must be upheld. The appeal is dismissed with costs. Appellant must pay the court-fee to Government.

8. Leave refused.

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