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Court : Kolkata

Decided On : May-19-1925

Reported in : AIR1926Cal789,96Ind.Cas.594

Judge : Newbould and; Graham, JJ.

Appellant : Basanta Kumar Singha and anr.

Respondent : Nabin Chandra Shaha and ors.

Judgement :

1. This is an appeal against a decree in a suit on an instalment bond. The question that has to be decided is whether the suit was barred by limitation. The first Court held that no portion of the claim was barred and decreed the plaintiff's suit in full. On appeal the lower Appellate Court held that the suit was barred in respect of the first four instalments.

2. The instalment bond contains the following provisions in case of default:

In default of kists, we shall pay interest for the sum defaulted, at the rate of Rs. 3-2-0 per month, without objection, amicably or upon suit, till the last day of payment. If default is made in any one instalment' you will be at liberty to realise the entire money with interest amicably or by suit.' The learned District Judge has held' that no authority binding in his Court has been produced in support of the view that the stipulation that on default of one kist the plaintiffs would be at liberty to claim the whole sum has the same effect as the stipulation that in such an event

the whole sum shall become due. Obviously, the attention of the learned District Judge was not drawn to the case of *Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutty* 31 C. 297. There the learned Judges quoted with approval certain remarks in the decision in *Hurri Pershad Chowdhry v. Nasib Singh* 21 C. 542 : 10 Ind. Dec. (N.S.) 992. In the report at page 300 Page of 31 C.-[Ed.] there is an obvious mistake in the quotation. The passage quoted should be as follows: 'Nor do we think (that any distinction can be drawn, as has been attempted to be drawn, between a case in which it is provided that on nonpayment of an instalment the whole amount shall become due, and one in which it is provided that on non-payment of an instalment the whole amount may be sued for.' The learned District Judge has further held that the condition as to payment of interest showed that the plaintiffs had option either to claim at once or to wait on the chance of payment with interest. We are unable to see why this option to wait on the chance of payment with interest should be held to give the creditor a right to wait until after the period of limitation had expired. On the condition in the bond which gave the plaintiffs the right to sue on the default of one instalment, limitation would commence to run from the first under Article 75 of the First Schedule to the Limitation Act unless there was waiver. In this case there certainly has not been a waiver. Although the defendants in their written statement alleged payment of certain sums towards the principal, the plaintiffs on their own case did not accept these payments on account of the instalments in arrear. They admittedly received these sums amounting to Rs. 150. Of that amount about Rs. 97 was credited to some other debt and Rs. 53 was credited, not in payment of instalments, but in payment of interest.

3. It is contended on behalf of the respondents that there might be waiver otherwise than by acceptance of payment of overdue instalments. But on the case made by them there is no suggestion how there could have been such a waiver. There is neither evidence nor allegation of express waiver.

4. We, therefore, hold that this suit was barred by limitation.

5. We accordingly decree this appeal and set aside the decrees of the lower Courts and dismiss the plaintiffs' suit.

6. The appellants will get their coats in all Courts.

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