

(1930) 10 BOM CK 0006

Bombay High Court

Case No: Second Appeal No. 238 of 1928

Pandurang Vishvanath

APPELLANT

Vs

Mahadev Vishweshwar Karve

RESPONDENT

Date of Decision: Oct. 13, 1930

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 48(1)

Citation: (1931) 33 BOMLR 459

Hon'ble Judges: Madgavkar, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Madgavkar, J.

The question in this appeal is whether the darkhast is barred by limitation. The decree is dated January 26, 1912, and the relevant Clauses are 3, 4 and 5. Under Clause (3) the principal amount together with interest is repayable within twelve years from the date of the filing of the award, i.e., January 26, 1912, and in default the immovable property is liable to be sold after twelve years. Clause 4 provides for simple interest, and in default, compound. Then follows Clause 5:--

If there remains any balance in respect of interest to the extent of the amount of any two years due by the defendant, the plaintiff, if he so chooses, should get the mortgaged property of the defendant which is liable for payment of the amount, sold through Court without waiting till the period of twelve years expires, as mentioned in Clause 3 (above) and should recover the amount due to the plaintiff by the defendant. If there be any deficit, he should recover the same from the defendant (personally).

2. On January 23, 1917, two installments of interest were in default and the decree holder-respondent gave the darkhast of 1917 in execution for the entire decretal amount (principal and interest) by sale of the property. That darkhast was not

pursued, and more than three years after it in 1920 he gave a second darkhast to which objection was taken on the ground of limitation and it was also struck off. On June 25, 1926, he gave the present darkhast.

3. The trial Court held, mainly on the authority of *Bhagwan Das v. Janki* ILR (1905) All. 249, that the present application was barred by limitation and dismissed it. The District Court distinguished the Allahabad case on the ground that there was a mortgage decree payable by installments and that there was no "equity in confining the liberty of action of a decree-holder in this way as the judgment-debtor was not in any way prejudiced in the present case," and held that the darkhast was in time and ordered to proceed. The judgment-debtor-appellant appeals.

4. One of two possible views can be taken of Clauses 3 and 5. In regard to Clause 5 it may be said that each default of two years gives the decree-holder a recurring right and that the right under Clause 3 is a separate right from Clause 5. That would not, in my opinion, be the correct construction of the decree. Under the ordinary canons of construction the document must be read as a whole with both clauses harmonising. The construction, to my mind, is rather this that so long as interest is regularly paid, the judgment-debtor has twelve years to pay the decretal amount of principal and interest, and his property cannot be sold until after twelve years. If, on the other hand, he makes default in respect of two years interest, then the total decretal amount becomes due, and the decree-holder can obtain it by sale of the property without waiting for the twelve years, as in fact Clause 5 expressly specifies. In the present case, not only was there such default but the decree-holder actually exercised the option and claimed the entire decretal amount by sale. The question is, whether, notwithstanding the two previous darkhasts on which he relied on his penal right under Clause 5, he can still fall back on Clause 3. I am of opinion that he cannot do so on the authorities as they stand. Under Article 182, Clause (7), time would begin to run from the date of the payment which the decree directed him at a certain date. On the showing of the respondent himself that date was January 23, 1917, and not January 23, 1926. As was observed by Banerji J. in *Bhagvan Das v. Janki* (page 251):--

His right to execute the decree arose when default was made in the payment of installments, and he exercised that right. Therefore it is no longer open to him to say that he could give effect to the provisions of the decree and receive installments.

5. The same view has been taken by this Court in *Shrinivas v. Chanbasapagowda* (1922) 25 Bom. L.R. 203 and [Gulabrao Yeshvant Harphale Vs. Magan Ghelabhai Gujarathi](#). The full bench of the Allahabad High Court in *Shib Dayal v. Meharban* ILR (1922) All. 27 has in fact gone further and held that in such cases time begins to run from the date of the first default in payment of interest and it makes no difference where the right to sue for payment is optional or compulsory. A doubt as to whether the decision goes too far is permissible in view of the observations of the Privy Council in [Maung Sin Vs. Ma Tok](#), *Pancham v. Ansar Husain* ILR (1926) All. 457., and

the case of *Reeves v. Butcher* (1891) 2 Q.B. 509, followed in *Shib Dayal v. Meharban* ILR (1922) All. 27. Speaking for myself, where the right is not compulsory but is optional and the decree-holder has not exercised that option, it would be at least arguable that he elects to continue to treat the decree as an installment decree. If he elects to wait till the entire period of twelve years, for instance in the present case, it is difficult to say that time began to run from the date of the first default of installment. The question, however, does not arise in the present case. The decree-holder has elected and applied in two darkhasts to recover the entire amount; in other words, he has treated the installment decree as at an end and the entire amount repayable as early as 1917. If so, on the authorities as they stand, and for the reasons stated above, the present darkhast is barred by limitation both under Article 182, Clause (7), of the Indian Limitation Act, and u/s 48, Clause (1), Civil Procedure Code. For these reasons the decision of the trial Court was, in my opinion, right and the lower appellate Court wrong.

6. The appeal is allowed, the order of the lower appellate Court set aside, and the order of the trial Court dismissing the darkhast restored, with costs throughout on the respondent.