

# **Sri Niwas Tewari vs Baleshwar Prasad Bhagat And Anr. on 21 March, 1950**

**Equivalent citations: AIR1950ALL526, AIR 1950 ALLAHABAD 526**

**Author: V. Bhargava**

**Bench: V. Bhargava**

## **JUDGMENT**

V. Bhargava, J.

1. These two second appeals arise out of two suits brought for recovery of possession of mortgaged property by the mortgagee against the mortgagor, The mortgage in one suit was executed on 10th October 1927 and stipulated that interest would be payable on 30th Jeth every year. A condition was attached that, in case the interest was not paid on the due date, the mortgagee would be entitled to take possession of the mortgaged property. No interest was paid in cash but between the years 1927 and 1931 two sarkhats were executed in respect of the interest due. Then on 19th July 1931, another mortgage, which is the basis of the second suit, was executed on 19th July 1931. In this mortgage also, there was a stipulation that the interest was to be paid on 30th Jeth every year and, in default of payment of interest, the mortgagee was to be entitled to take possession. Neither of the two mortgages provided for any other re-medy for recovery of mortgage money. No-interest was paid in cash even subsequently. But the admitted facts are that, in respect of interest due up to 1937, sarkhats were executed by the mortgagor in favour of the mortgagees. Suits were also brought on the basis of these sarkhats and the amounts due under them were realised through Courts. These two suits were brought in January 1945 for recovery of possession. They were contested in both the lower Courts on the ground that they were time barred because both of them were brought more than twelve years after the first default had been made in payment of interest under each of the two mortgagees. On behalf of the plaintiff-respondents this question of limitation was met on the argument that interest was paid until 1937 and hence limitation should be computed from that year and not from the first default made in 1928 and 1932.

2. In these cases there is no doubt that, in respect of the first mortgage of 10th October 1927, a default was made in payment of the very first instalment and thereupon the right to sue for possession accrued to the mortgagee at once. Subsequently, however, the interest due was paid by execution of sarkhats and later still these sarkhats were converted into mortgage bonds of 19th July 1931. Thereafter again, there were defaults but these defaults were followed by execution of sarkhats and the payment of interest by such execution. The question to be considered is as to the effect that the payment by execution of sarkhats had on the question of cause of action and limitation. It is argued on behalf of the appellant in both the appeals that under Section 9, Lim. Act, when once time

has began to run, no subsequent disability or inability to sue stops it. It is, therefore, argued that, in respect of the first mortgage, when time began to run from the first Asarh in the year 1928 and, in respect of second mortgage, from the first of Asarh in the year 1932, limitation expired in 1940 and 1944. The suits which were brought in 1945 were, therefore, time-barred. The principle laid down under Section 9 cannot be disputed but this principle is subject to certain exceptions. Even where time has begun to run, it can be stopped provided the cause of action which had given the right to sue is discharged or in any way disappears. If the cause of action is discharged, the right to sue no longer exists and consequently the time will no longer continue to run.

3. In the present cases, after the defaults had been made, payments were accepted by the mortgagee in respect of the amounts defaulted. Before these payments were accepted, the mortgagee had the right to bring suits and ask for possession. With the acceptance of these payments, the right of bringing the suits which had arisen on default disappeared. The acceptance of the payments amounted to a contract between the two parties by which the default made by the mortgagor in not making the payments on the due dates was condoned. Once the mortgagee had accepted the payments, he could no longer bring the suits for possession on the ground of defaults which were condoned by such acceptance. Consequently, though the right to sue had accrued at one stage, that right was subsequently discharged. The cause of action having been discharged, the time for limitation could no longer continue to run. The limitation would again have to be computed from the date of fresh defaults. It has been shown in this case that up to 1937 all defaults made in payment in accordance with the terms of the two mortgages were condoned by acceptance of the defaulted amounts by the mortgagee from the mortgagor. Consequently any causes of action that arose before 1937, were all discharged and the present suits have to be deemed to have been brought on the causes of action that arose sub-sequent to these last payments in 1937. The payments in this case were made by execution of sarkhats which converted the interest payable into separate debts of a different nature. It made no difference whether the payments were made in cash or by execution of sarkhats. Consequently, it is clear that in both these suits the time for limitation has to be computed from the year 1937 and they are, therefore, both within time. This view expressed by me was also the view taken by the Lahore High Court in *Abdullah v. Ishaq Mohammad*, A. I. R. (26) 1939 Lah. 212 : (41 P. L. R. 629). The facts of that case were very similar to the facts of the two cases before me. In that case also the mortgagee had a right to take possession on default of payment of the interest due upto a prescribed date. The interest was not paid by that date, But later on sarkhats were executed in respect of interest. It was held that the time for limitation would be computed from the date of the fresh default made after the defaults which were covered by the sarkhats executed. This case followed the principle laid down by the Privy Council in *Lasa Din v. Gulab Kunwar*, 7 Luck. 442 : (A. I. R. (19) 1932 P. C. 207). It was mentioned that the circumstances of the case before the Lahore High Court were different from the case which was dealt with by their Lordships of the Privy Council in *Lasa Din v. Gulab Kunwar*, 7 Luck. 442 : (A. I. R. (19) 1932 P. C. 207), inasmuch as in the latter the mortgage was for a fixed period and the mortgagee had the option to sue earlier provided there was a default in payment of the instalments prescribed under the mortgage. Their Lordships of the Privy Council, however, in that case-observed that "a proviso of this nature is inserted in a mortgage-deed 'exclusively for the benefit of the mortgagees' and that it purports to give them an option either to enforce their security at once, or, if the security is ample, to stand by their investment for the full term, of the mortgage. If on the default of the mortgagor--in other words, by

the breach of his contract--the mortgage money becomes immediately 'due,' it is clear that the intention of the parties is defeated, and that what was agreed to by them as an option in the mortgagees is, in effect, converted into an option in the mortgagor."

They further observed that: "they were not prepared to hold that the mortgagor could in this way take advantage of his own default." That case, dealt with the applicability of Article 132, Limitation Act. The article which applies in the present two cases before me is Article 135. But on application of the principles laid down by their Lordships in that case, the view expressed by me above would find support.

4. On behalf of the appellant reliance was placed in two cases of this Court--in *Ramcharan, Sahu v. Goga*, 49 ALL, 565 : (A. I. R. (14) 1927 ALL. 446) and *Ubaidullah Khan v. Abdul Jalil Khan*, 1937 A. L. J. 979 : (A. I. R. (24) 1937 ALL. 481). Both these cases merely reiterated the principle laid down in Section 9 that once time has begun to run it cannot be stopped unless such suspension is provided for expressly under the law. These were both cases in which the right to sue for mesne profits was under consideration. Neither of these two cases is applicable to the facts of the present cases before me because in neither of these two cases was there any question of discharge of cause of action on account of condonation of the default. Similarly, the case of *Modun Mohan v. Ashad Ali*, 10 Cal. 68: (13 C. L. R. 51) also does not support the argument advanced on behalf of the appellant. This case also only laid down that a mortgagee has a right to bring a suit for possession within twelve years from the date at which his right to possession commenced. This proposition is not disputed in the present appeals. The question that has to be decided is as to when the right to possession which is the basis of these two suits, arose and, as mentioned by me above, this right in the present cases arose in 1937, the previous right which had arisen earlier having been extinguished because of the condonation of the defaults which had given rise to that right. The only case which, to a certain extent, supports the arguments advanced on behalf of the appellant is *Bishanlal v. Kaushali*, 4 I. C. 921 : (91 P. R. 1908). This is also a single Judge's decision of the Punjab Chief Court and the view expressed later by the Lahore High Court in *Abdullah v. Ishaq Mohammad*, A. I. R. (26) 1939 Lah. 212 : 41 P. L. R. 529) directly goes against the view taken in this case. Farther, in this case, the various aspects that have been discussed by me above, or which were discussed in the subsequent Lahore case were not considered at all. With due respect, therefore, I would differ from the view taken in the case of *Bishanlal v. Kausliali*, 4 I. C. 921 : (91 P. R. 1908).

5. As a result, I hold that in both these suits the limitation has to be computed from the year 1937 so that both the suits are within time. There is no force in these appeals. The appeals are dismissed.