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of the Rescue Home, as that would facilitate their subordination. This suggestion is not fanciful and the likelihood of influence, being brought to bear on the girls, cannot be ruled out. After carefully taking into consideration all the circumstances of this case and the past conduct of the petitioner, the safety and the welfare of the girls require that they should stay in the Rescue Home where they are living at present. Ordinarily, the Courts are reluctant to supersede or interfere with the rights of a parent over his minor children, but in the extraordinary and unusual circumstances of this case the petitioner cannot be trusted for the safety and the well-being of his daughters. He has given ample proof of his incompetence and unfitness to take care of them. This is a case in which the petitioner has shown his unsuitability to remain a guardian of his refractory and way-ward daughters, whose own interests require that they should continue to stay in the Rescue Home. This petition ought not to succeed and it is, therefore, dismissed.

R.S.

APPELLATE CIVIL

Before Mehar Singh, J.

DES RAJ AND OTHERS,—*Appellants*

versus

HARGURDIAL SINGH AND OTHERS,—*Respondents*

Regular Second Appeal No. 237 of 1954.

1958

Sept. 23rd

Limitation Act (IX of 1908)—Article 132—Mortgage deed prescribing no time for redemption and stating that the interest will be payable for a whole year and year by year—Starting point of limitation for a suit by the mortgagee to recover the mortgage amount—Whether the date

of the mortgage or a year after that date—Transfer of Property Act (IV of 1882)—Sections 60 and 67—Rights of the mortgagor and mortgagee—Accrual of—Whether contemporaneous.

Held, that the right of mortgagor to redeem and the right of the mortgagee to enforce his security accrue at one and the same time when the mortgage money becomes due. It cannot be that the right of redemption of the mortgagor arises at a time different than the right of the mortgagee to enforce his security. The right of the mortgagor to redeem and that of the mortgagee to enforce his security being contemporaneous the start of limitation for the enforcement of either right must necessarily be the same time.

Held, that where all that is certain from the terms of the mortgage is that the mortgagee was not entitled to interest until a year had elapsed after the date of the mortgage, the said terms do not preclude the mortgagor from redeeming the mortgage immediately after the date of that mortgage. The fact that it was agreed between the parties that the mortgagee's claim to interest will accrue only after the expiry of the year does not mean that the right of redemption of the mortgagor was deferred for a year. No period having been provided in the mortgage deed, the mortgage money became due immediately on the date of the mortgage.

Held, that the starting point of limitation, after the true meanings of an instrument have been ascertained and after the contingencies provided by the law of limitation have been taken into consideration, begins of its own without reference to what one or other of the parties may or may not do. The starting point of limitation is not left at the whim of a party. So the expression 'money sued for becomes due' must also be read with reference to the same time as under sections 60 and 67 of the Transfer of Property Act which provide for the accrual of the right of the mortgagor to redeem and that of the mortgagee to enforce his security. In this view in the present case limitation would start under article 132 from the date of the mortgage. The acknowledgment by defendant No. 1 was some time after the lapse of 12 years from that date and will not avail the plaintiff.

Regular Second Appeal from the decree of Shri J. N. Kapur, District Judge, Hoshiarpur, dated the 30th November, 1953, by which the decree of Shri Mohinder Singh, Senior Sub-Judge, Hoshiarpur, dated the 27th January, 1953, granting the plaintiff preliminary decree under Order 34, Rule 4 of the Civil Procedure Code for Rs. 4,000, with proportionate costs by the sale of half of the mortgaged property, against the defendant Des Raj and defendant No. 4 and granting the mortgagor three months' time, i.e., till the 27th April, 1953, for the payment of the decretal amount and the costs of the suit as ordered above and directing that in case of payment the property would be retransferred free from encumbrance, otherwise sold as directed above and ordering that no personal decree could be passed against Des Raj, defendant No. 1, because the limitation for that had expired and further ordering that the principal amount of Rs. 2,000, would carry future interest at the rate of Rs. 3 per cent per annum and dismissing the plaintiff's suit with regard to the other half of the mortgaged property, was modified to the extent of increasing the decretal amount from Rs. 4,000 to Rs. 4,581 only by partly accepting the cross-objections filed by the plaintiff and dismissing the appeal filed by the defendants Nos. 1 and 4 with costs and further directing that the decree of the Senior Sub-Judge would be deemed to be decree for Rs. 4,581 and proportionate costs.

J. N. SETH, for Appellants.

SHAMAIR CHAND, for Respondent.

JUDGMENT

Mehar Singh, J. MEHAR SINGH, J.—The suit is to enforce the mortgage of 2nd June, 1926, by Lachhman Das, father of Des Raj, defendant No. 1, in favour of Ganda Ram. The consideration for the mortgage was Rs. 3,500 as stated in the mortgage deed. Ganda Ram mortgaged his mortgagee rights with the Peoples Bank of Northern India, Limited. That Bank had the mortgagee rights of Ganda Ram put to sale in execution of its mortgage decree against him on 10th June, 1936 and those

rights were purchased by Hargurdial Singh plaintiff for Rs. 450. The sale certificate was issued on 21st July, 1936. Thereafter the plaintiff has been shown as mortgagee of the land in the revenue records.

One Gujar Mal obtained a decree against Lachhman Das, the original mortgagor, and in execution of his decree he had the equity of redemption of the property in suit sold on 27th February, 1940, and the same was purchased by Ram Lal, defendant No. 3. The sale certificate of it was issued on 1st March, 1940. Defendant No. 3 made a gift of that equity of redemption on 4th July, 1940, in favour of Vidya Vati defendant No. 4, who is the wife of Des Raj, defendant No. 1. Thus defendant No. 4 now holds the equity of redemption of the property and the mortgagee is the plaintiff.

The plaintiff sued to enforce the mortgage against the two sons of Lachhman Das, namely, Des Raj, defendant No. 1 and Maharaj Kishan defendant No. 2, and also defendant No. 4, by the sale of the mortgaged property.

There were a number of defences taken by the defendants in the Courts below but this appeal is concerned with only two aspects of the case (a) the amount of consideration, and (b) whether the suit is within limitation.

The trial Judge has found that consideration of the mortgage has been proved only to the extent of Rs. 2,000 and in view of the rule of *damdupat* the plaintiff is entitled to no more than the double of that amount. He has further found that the claim is barred as against defendant No. 2, but is within time as regards defendants

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No. 1 and 4 because of a subsequent acknowledgment of the mortgage, to the extent of his share in the mortgaged property, by defendant No. 1 in a schedule filed by him with a petition for insolvency on 22nd May, 1939, in which under his own signature he admitted the existence of that mortgage to the amount of Rs. 1,750. On appeal the first appellate Court has found that defendant No. 1 has admitted the total of the original consideration of his half share amounting to Rs. 1,750 and that the plaintiff is entitled to that amount plus half of the interest, being interest at the stipulated rate on that half amount of the consideration. That amount comes to Rs. 2,831. So the first appellate Court has enhanced the amount of the decree from Rs. 4,000 to Rs. 4,581. It has agreed with the trial Court on the question of limitation.

This is a second appeal by defendants Nos. 1 and 4, husband and wife, and it is urged on their behalf that in the plaint the plaintiff has claimed the principal mortgage amount of Rs. 3,500 plus only part of the interest due amounting to Rs. 1,500, giving up the rest of the amount of interest due. It is said that the total amount of the interest due really was Rs. 5,662-8-0. The learned counsel says that the first appellate Court has found the liability of the defendants up to the half of the consideration admitted or acknowledged by defendant No. 1, amounting to Rs. 1,750 and that, therefore, no more interest should be allowed to the plaintiff than half of the actual interest claimed by him, in other words, the plaintiff should be only allowed half of Rs. 1,500 that he has claimed as interest. The learned counsel for the plaintiff points out that although the plaintiff has lost his remedy against half of the property of the share of defendant No. 2, because of the statute of limitation, he has a right to enforce the total security

against the remaining property with defendants Nos. 1 and 4 against whom he can proceed in the present suit. In fact the first appellate Court has allowed the plaintiff half of the principal amount of the mortgage coming to Rs. 1,750 and half of the interest actually due to the plaintiff. The total of the two amounts comes to Rs. 4,581, for which amount the decree is against defendants Nos. 1 and 4. This is an amount less than the amount actually claimed by the plaintiff and although how this amount is made up is not in the manner in which the plaintiff has done so in the plaint, yet, I think, the Court, in view of the development in the suit in that with regard to the share of defendant No. 2 it has been found barred, was justified in calculating the amount in the manner in which it has done to give relief to the plaintiff. The learned counsel for the defendants then urges that the trial Court found that the mortgage was without consideration to the amount of Rs. 1,500 and this aspect of the case has been ignored by the first appellate Court. There was before the first appellate Court the admission of defendant No. 1 that he signed the schedule and stated therein the amount due from him under the mortgage in question when he filed the schedule with his petition for insolvency. It was open to the first appellate Court to accept this statement of defendant No. 1 and to proceed to a conclusion upon that evidence, even though it was not satisfied with the other evidence on the record. The mere fact that, if I were reviewing evidence, I might take a different view in this matter, will not justify interference upon this aspect of the case in second appeal. So that as regards the quantum of the claim, as decreed by the first appellate Court, nothing has been shown which would justify interference with the conclusion arrived at by it.

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The most important aspect of the case is that of limitation. It is a suit to enforce a mortgage. Article 132 of the Limitation Act admittedly applies. It provides a limitation of 12 years to enforce payment of money charged upon immovable property from the date when the money sued for becomes due. The date of the mortgage is 2nd June, 1926. The terms of the mortgage are that the mortgagor was to remain in possesion of the property but was to pay to the mortgagee interest at the rate of 9 per cent per annum, but the same was payable for a whole year and year by year. There is a default clause that in the event of default in the payment of interest for one year or more years (the word used is *chand*) the mortgagee will have the option of either realising the interest due alone or realising the principal amount of the mortgage plus the interest due by proceeding against the mortgaged property. There is no more in the terms agreed to between the parties. One thing is clear and that is that expressly no term for redemption is stated to have been agreed to between the parties. Counting 12 years from the date of mortgage, the last date for the enforcement of the mortgage security would have been 1st June, 1938. In the meantime and before that Lachhman Das, the original mortgagor, seems to have died, and he had been succeeded by his two sons, defendants Nos. 1 and 2. Defendant No. 1 filed an insolvency petition and with it he filed the schedule of his debts on 22nd May, 1939. Obviously even this acknowledgment of defendant No. 1, as such counting the period from the date of the mortgage does not save limitation in favour of the plaintiff as it was made 12 years after that date. It was urged before the Courts below, and a position that has been accepted by them, that the condition in the mortgage was that it was not redeemable for one year nor was any interest

payable to the mortgagee until it had accumulated for a year, so the starting point of limitation is not the date of the mortgage deed but a year after which means 2nd June, 1927. Looked at in this manner the acknowledgment by defendant No. 1 obviously saves limitation with regard to his half share of the mortgaged property. It has already been pointed out that the deed itself does not in so many words and expressly provide a term for redemption in the mortgage. The learned counsel for the plaintiff urges that the only possible construction of the terms between the parties is that the mortgage was not redeemable before a year was out from its date for otherwise the mortgagee would not be entitled to any interest, since no interest was due to him until the lapse of a year from the date of the mortgage. But the terms of the mortgage as set out above do not debar redemption by the mortgagor immediately after the date of the mortgage. Now, it cannot be that the starting point of limitation is different (a) where the mortgage provides for no period for redemption and thus the limitation starts running under article 132 from the date of the mortgage, and (b) where the mortgage provides no period for redemption and yet the interest, according to the terms of the contract, does not accrue until after the lapse of some time. It is said that in the latter case the starting point is the time when the interest becomes due. The right of the mortgagor to redeem and the right of the mortgagee to enforce his security accrue at one and the same time when the mortgage money becomes due. It cannot be that the right of redemption of the mortgagor arises at a time different than the right of the mortgagee to enforce his security. It is bound to be one and the same time. Under section 60 of the Transfer of Property Act the right of the mortgagor to redeem accrues after 'the principal

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money has become due' and the redemption takes place on payment or tender of the mortgage money to the mortgagee followed by certain other formalities referred to in that section. According to section 58 of the same Act, mortgage money is both principal money and interest of a mortgage. It will be seen that section 60 clearly provides that the right of the mortgagor to redeem starts from the time the principal money becomes due, though redemption can only take place on tender or payment of mortgage money, which is both principal money and interest accumulated on the mortgage. For the start of the right to sue no interest need be due. If only principal money of the mortgage has become due, there is immediate right of redemption. Section 67 of the same Act refers to the rights of the mortgagee, among other matters, and it is clear from its provisions that a mortgagee, in the absence of a contract to the contrary, has a right to enforce his mortgage security at any time after the mortgage money has become due to him. As the term 'mortgage-money' includes both principal money and interest, where no interest is due or can be claimed, the only meaning of the expression 'mortgage-money' can be what is actually due under the mortgage and in that event it is no more than the principal money. The right of the mortgagor to redeem and that of the mortgagee to enforce his security being contemporaneous the start of limitation for the enforcement of either right must necessarily be the same time. In the present case all that is certain from the terms of the mortgage is that the mortgagee was not entitled to interest until a year had elapsed after the date of the mortgage. The learned counsel for the plaintiff says that it could never have been intended by the parties that the mortgagee should proceed to enforce his security before the year was out ignoring the interest part of the contract between the parties. This may well be in the mind of the

mortgagee. But the terms of the mortgage, as they are, do not preclude the mortgagor from redeeming the mortgage immediately after the date of the mortgage. The fact that it was agreed between the parties that the mortgagee's claim to interest will accrue only after the expiry of the year does not mean that the right of redemption of the mortgagor was deferred for a year. No period having been provided in the mortgage deed, the mortgage money became due immediately on the date of the mortgage.

The learned counsel for the plaintiff says that this is not quite the correct approach to the case. He says that it is not necessary to have recourse to the provisions of the Transfer of Property Act for any conclusion when the right of the mortgagee to enforce his security and that of the mortgagor to redeem the mortgage accrue or arise. His position is that his case is confined only to the terms and scope of article 132. The starting point of limitation under that article is—"When the money sued for becomes due". The learned counsel then furthers his argument in this way that in the present case the plaintiff has sued for the mortgage money, made up of the principal amount of the mortgage and interest due under the mortgage, and the principal amount and the interest were not due under the mortgage until a year after the date of the mortgage, for in the terms of the mortgage the mortgagee could not claim interest earlier. This, to my mind, obviously means that the expression 'money sued for becomes due', thus interpreted, would leave the starting point of limitation in a mortgage suit at the sweet will and whim of a mortgagee. It will happen in this way, if the mortgagee merely sues for the principal amount of the mortgage, he having sued for that amount only, it obviously becomes due on the very date of the mort-

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gage and for that amount security can be immediately enforced and redemption can also take place immediately. For the moment a mortgage for a term of years is not being considered and for obvious reasons. If then instead of suing for the principal amount of the mortgage, the mortgagee proceeds to sue for that amount and interest due, then he defers the starting point of limitation by a year in a case as the present for the interest does not become due until after the lapse of a year from the date of the mortgage. The starting point of limitation, after the true meanings of an instrument have been ascertained and after the contingencies provided by the law of limitation have been taken into consideration, begins of its own without reference to what one or other of the parties may or may not do. The starting point of limitation, to my mind, is not left at the whim of a party. So that the expression 'money sued for becomes due' must also be read with reference to the same time as under sections 60 and 67 of the Transfer of Property Act which provide for the accrual of the right of the mortgagor to redeem and that of the mortgagee to enforce his security. In this view in the present case limitation would start under article 132 from the date of the mortgage. The acknowledgment by defendant No. 1 was some time after the lapse of 12 years from that date and will not avail the plaintiff.

The learned counsel for the plaintiff then urges that the Courts below have taken one view in interpreting the mortgage deed and they have agreed in holding that the term of the mortgage was for one year at least and he then says that if that interpretation is balanced with the interpretation that I am putting on the deed, in second appeal I have no right to interfere with the interpretation of the Courts below. I agree, if the balance is there.

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But, in my opinion, this is not a case of a balance. There is no period for redemption stated in the mortgage and I am quite clear that such a period cannot be spelled out from the mere fact that right to interest in the mortgagee was deferred by a year after the date of the mortgage. The learned counsel has further referred to *Lakhu Ram and others* v. *Wali* (1) and contends on the basis of that case that where more inferences than one are legally open, the High Court cannot in second appeal refuse to be bound by the inference drawn by the lower appellate Court. This is the same argument as before only put in a somewhat different language. What has been reproduced above is the head-note of the report and there is nothing like it in the report itself. The case proceeds on the authority of *Madho Rao Bhan Jamindar* v. *Govindbhat Brahmin* (2) and *Raja Ram* v. *Ganesh Hari* (3). In both the cases the inference was of fact on appraisal of evidence and neither was a case of the reading and interpretation of a document. Actually the head-note is a copy of a head-note in the first of those two cases. In that case the learned Judges found that they had not enough material before them to read the meaning of the word '*shamilat*' as '*shamilat deh*' or '*shamilat patti*'. It was in these circumstances, not being able to form their own opinion decisively one way or the other, that the learned Judges said that they were not prepared to say that the view taken by the first appellate Court was wrong. On facts, therefore, that case has really no application in the present case.

The last position taken by the learned counsel for the plaintiff is that onus lies heavily on defendants Nos. 1 and 4, being the appellants, to

(1) 27 P.L.R. 693
(2) 46 I.C. 794
(3) I.L.R. 21 Bom. 91

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show that the reading and interpretation of the mortgage deed by the Courts below is not correct. This is so. But it has already been shown that the terms of the mortgage deed are more than clear enough to support the position that has been urged on behalf of those defendants. In a case like this such an onus can only be discharged by the force of argument and in no other way. Here is a document and there are the contents of the document and they are to be read and interpreted. There is no other evidence which goes to support the conclusion one way or the other. So that in a case like this all that the appellants can do is to urge arguments in support of their case and show that the document has been not properly interpreted and read in the Courts below. To my mind, in this they have succeeded.

The result is that the start of limitation under article 132 in this case is the date of mortgage deed and the acknowledgment of the mortgage made by defendant No. 1. was some time after the period of limitation had expired. The plaintiff cannot have benefit of that acknowledgment. The suit is thus barred by time.

The appeal is accepted and the suit of the plaintiff is dismissed, but, in the circumstances of the case, the parties are left to their own costs throughout.

B.R.T.

APPELLATE CIVIL

Before Bhandari, C. J. and Dulat, J.

FIRM GULAB RAI-GIRDHARI LAL AND OTHERS,—*Appellants*

versus

FIRM BANSI LAL-HANS RAJ,—*Respondents*

First Appeal From Order No. 71 of 1953.

1958

Sept. 29th

Arbitration Act (X of 1940)—Section 19—Order setting aside an award—Whether must be deemed to be the order