Privy Council Appeal No. 63 *of* 1931.
Oudh Appeal No. 18 *of* 1929.

Lasa Din - - - - - - - - - - *Appellant*

v.

Musammat Gulab Kunwar and others - - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JUNE, 1932.

Present at the Hearing:
LORD THANKERTON.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The only question in this appeal is as to the date upon which the principal money became due under a mortgage of certain immovable property in the Lucknow District. Upon this hangs an important question of limitation, and the issue of the appeal.

The mortgage is dated the 26th July, 1912, and purports to be for six years from that date. Apart, therefore, from the provisions of a particular clause in the deed, to be presently referred to, the mortgage money would have become due on the 26th July, 1918, and under Art. 132 of the first schedule to the Limitation Act, 1908, the mortgagee would have a further 12 years in which to bring his suit. The article runs as follows :—

Description of suit.	Period of limitation.	Time from which period begins to run.
132.—To enforce payment of money charged upon immovable property.	Twelve years	When the money sued for becomes due.

The appellant is the mortgagee. He brought a suit praying for a mortgage decree in the usual form on the 28th February, 1928, *i.e.*, within 12 years from the 26th July, 1918. He joined as defendants the widow of the mortgagor, who was then dead, and certain puisne encumbrancers, who alone defended the suit. They are respondents to this appeal, but have not been represented before the Board.

The main defence was limitation. The Subordinate Judge of Lucknow, in whose Court the suit was instituted, held that it was out of time, and this decision was affirmed on appeal, first by the District Judge and then by the Chief Court of Oudh. The appellant comes before the Board upon special leave. Other issues raised at the hearing of the suit in the Court of the Subordinate Judge have not been tried.

By the mortgage deed the mortgagor covenanted to pay interest yearly at 12 per cent., and that if the interest for any year was not paid, it should be added to the principal and carry interest at the same rate. Then followed the clause upon which the defence was founded :—

> "In case of default, the said creditor shall, at all times, within and after the expiry of the stipulated period of six years aforesaid, have the power to realise the entire mortgage money and the remaining interest and compound interest due to him, in a lump sum, through Court, by attachment and sale of the said mortgaged share, as well as from my person and all other kind of my property, both movable and immovable, together with costs of Court, and I, my heirs, relations and representatives shall have no occasion for objection and refusal; that the aforesaid rate of interest, fixed by me, shall stand within and after the stipulated period and after the decree till payment of the entire demand hereunder and that I shall at no time demand reduction in interest."

The mortgagor defaulted in the payment of interest for the first year, and it was contended for the defendants that immediately upon this default the principal moneys became due within the meaning of the article of the Limitation Act set out above, and consequently that the statutory period of 12 years had expired before the institution of the suit. The question their Lordships have to determine is whether this view, upon which the judgments under appeal are all based, is correct.

Clauses of this nature in mortgage deeds have been before the Indian Courts in many cases, and there has been a considerable divergence of judicial opinion as to their effect upon limitation. The Chief Court of Oudh, following a majority decision of the Allahabad Full Bench in 1915, had more than once held that in such cases time ran against the mortgagee from the date of the first default, and the judgments in the present case add little to the elucidation of this problem. The Subordinate Judge thought it clear that the clause gave the mortgagee an option either to sue at once or to wait till the expiry of the mortgage term, but he held himself concluded by authority on the question of limitation. The District Judge thought there was no option, and that the mortgagee "was bound to sue" immediately upon default.

In the Chief Court, Srivastava J. noted the conflict of authority, and certain observations of this Board in a recent case, which seemed to throw doubt upon the soundness of the Allahabad decision, but thought it his duty to adhere to the decisions of his own Court so long as they were not definitely overruled. Wazir Hasan J. agreed, but expressed himself rather more confidently on the principle involved. In his opinion, the right of the mortgagee to enforce payment on default made the principal money immediately payable within the meaning of Section 60 of the Transfer of Property Act, 1882, and therefore entitled the mortgagor to redeem regardless of the six years' term.

The principal authority in favour of the view taken by the Chief Court is the Full Bench case already referred to, *Gaya Din* v. *Jhumman Lal*, I.L.R. 37 All. 400, in which the opinions of Richards C.J. and Tudball J. prevailed over that of Banerji J. The gist of the majority judgments was that the money became "due" as soon as it could be legally demanded, *i.e.*, upon the first default. The Chief Justice fortified himself by extracts from the judgments of the Court of Appeal in this country in *Reeves* v. *Butcher*, [1891] 2 Q.B. 509, which he seems to have regarded as decisive. Banerji J. took the opposite view. He thought the clause in question was clearly inserted for the benefit of the creditor, and that it was at his option to treat the money as being immediately due or not. He referred to previous Allahabad decisions which seem to support his argument, and in particular to a dictum of this Board in a case decided under the Limitation Act XIV of 1859, which will be noted presently.

Gaya Din's case seems to have been doubted in subsequent cases in the Allahabad Court, but was affirmed by another Full Bench in 1922, *Shib Dayal* v. *Meharban*, I.L.R. 45 All. 27.

The authority of these cases is, however, in their Lordships' opinion, weakened by a more recent decision of the same High Court, *Ashiq Husain* v. *Chatar Bhuj*, I.L.R. 50 All. 328, in which Sir Grimwood Mears C.J. and Sen. J. refused to extend the principle beyond the limits of the decided cases. Their Lordships think that if, under a clause of this nature, the principal money "becomes due" within the meaning of Art. 132 immediately upon default by the mortgagor in payment of interest or of an instalment, it must equally become due upon the breach of any other condition to which a similar provision is attached.

Turning now to the other High Courts, their Lordships find a Calcutta decision of 1896, which adopts the same line of reasoning as Allahabad: *Sitab Chand Nahar* v. *Hyder Malla*, I.L.R. 24 Calc. 281. It has been suggested that the same Court ten years later in *Rup Narain* v. *Gopi Nath*, 11 Calc. W.N. 903, followed a different principle, which would favour the appellant, but this decision was given with reference to another article of the Limitation Act, and is, their Lordships think, of no assistance in the present case. *Sitab Chand's* case was no doubt decided under

Act XV of 1877, but the wording of the article in that Act was the same as in the Act of 1908.

No authority has been cited from Bombay*, but the High Court of Madras (*Narna* v. *Ammani Amma*, I.L.R. 39 Madr. 981), following the judgment of Banerji J. in the first of the Allahabad Full Bench cases, and the High Court of Patna (*Ganga Bishun* v. *Lala Raghunath*, I.L.R. 10 Patna 173) have taken the opposite view.

Similar questions have been discussed on two occasions before this Board, but in neither case was it necessary to decide the point, though fairly definite indications were given in each of the view the Board was inclined to take.

In *Juneswar Dass* v. *Mahabeer Singh*, L.R. 3 I.A. 1, a case falling under Act XIV of 1859, a similar argument was put forward for the appellant to that which has prevailed in the Oudh Courts and Allahabad, though it was based upon the application of a six years' period of limitation. The decision was against the appellant on the ground that the period was twelve years and not six. But Sir Montague Smith, who delivered the judgment of the Board, after expressing himself to this effect, continued :—

> "Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon† [for the appellant] that this suit would have been barred if the limitation of six years under cl. 16 had been applicable to it. They think upon the construction of this bond that there would be good reason for holding that the cause of action arose within six years before the commencement of the suit."

It is, their Lordships think, worth noticing that this case was not referred to in *Sitab Chand Nahar* v. *Hyder Malla* (*supra*). The dictum cited was, however, much relied upon by Banerji J. in his dissenting judgment in *Gaya Din* v. *Jhumman Lal*.

The question came up for consideration again before the Board, half a century later: *Pancham* v. *Ansar Husain*, L.R. 53 I.A. 187. In this case the Allahabad High Court had, following the decision in *Gaya Din's* case, dismissed a mortgagees' suit as out of time, it not having been brought within twelve years of the mortgagor's default in payment of an instalment, which gave the mortgagees the right (as in the present case), without waiting for the expiry of the stipulated period, to enforce their security.

The judgment of the Board was delivered by Lord Blanesburgh, and the material portion of it runs as follows :—

> "Applying certain previous decisions of that Court, and in particular a Full Bench decision in *Gaya Din* v. *Jhumman Lal*, I.L.R. 37 A. 400, the High Court held that under a clause in the above form a single default on the part of the mortgagors, without any act of election, cancellation or other form of response or acceptance on the part of the mortgagees, and even, it would appear, against their desire, operates, *eo instanti*, to make the money secured by the mortgage 'become due,' so that all right of action in respect of the security is finally barred twelve years later, that is,

* There appears to have been a case in Bombay, not in the authorised reports, in which the High Court followed *Gaya Din's* case but the judgment adds nothing to the reasoning: *See :—Shrinivas Laxman Naik v. Chanbasapagowda* All Ind. Rep. 1923, (Bom.).

† Note.—A fuller report of the arguments appears in the Calcutta Report, I.L.R. 1 Calc. 163.

in the present case, on February 21st, 1906. All this the High Court held, notwithstanding that the mortgage is for a term certain, a provision which may be as much for the benefit of the mortgagees as of the mortgagors, and notwithstanding that the proviso is exclusively for the benefit of the mortgagees. The decision also apparently proceeds upon the view that the words of the English Limitation Act and the English decisions thereon apply without question to the words of Art. 132 of schedule to the Indian Act—a conclusion which, as it seems to their Lordships, may involve, and, on the critical point when applied to such a proviso as the present, a large assumption.

"Their Lordships are fully alive to the seriousness of the view so taken by the High Court, emphasised and perhaps extended as it has been by a later Full Bench decision to the same effect: see *Shib Dayal* v. *Meharban*, I.L.R. 45 A. 27. Moreover, upon the correctness of it there has been in different High Courts of India a sharp conflict of judicial opinion. It is accordingly manifestly desirable that, so soon as may be, this Board should finally pronounce not only upon the question whether the principle of the two Allahabad decisions above referred to is correct, but also upon the further question whether, even if it is, these decisions have any application to a proviso framed as is that now in suit. Their Lordships would be reluctant, however, to pronounce on either question in the absence of full argument, and it is accordingly a satisfaction to them to find that the present case, in which they have had no assistance from the respondents can, as they think, regardless of the general question, be decided on its own special circumstances, which, apparently, the High Court was not concerned to note."

The judgment then proceeds to deal with the "special circumstances" upon which the actual decision turned; they have no relevance to the present case.

It is no doubt true that the question now before the Board was advisedly left open for future discussion, but the considerations referred to by Lord Blanesburgh are of great weight, and it is difficult to find an answer to them. They clearly affected the decision in the latest Allahabad case, but though the judgment in *Pancham's* case was cited in the Chief Court of Oudh, the learned Judges of that Court would make no further attempt at the solution of the problem.

Under these circumstances, it is a matter of great regret to their Lordships that they should now have to pronounce upon these important and difficult questions without the assistance of Counsel for the respondents. But the case has been placed before them very fully and with conspicuous fairness by Mr. Parikh, who appeared for the appellant, and they have given their most anxious consideration to all the judgments which have been referred to.

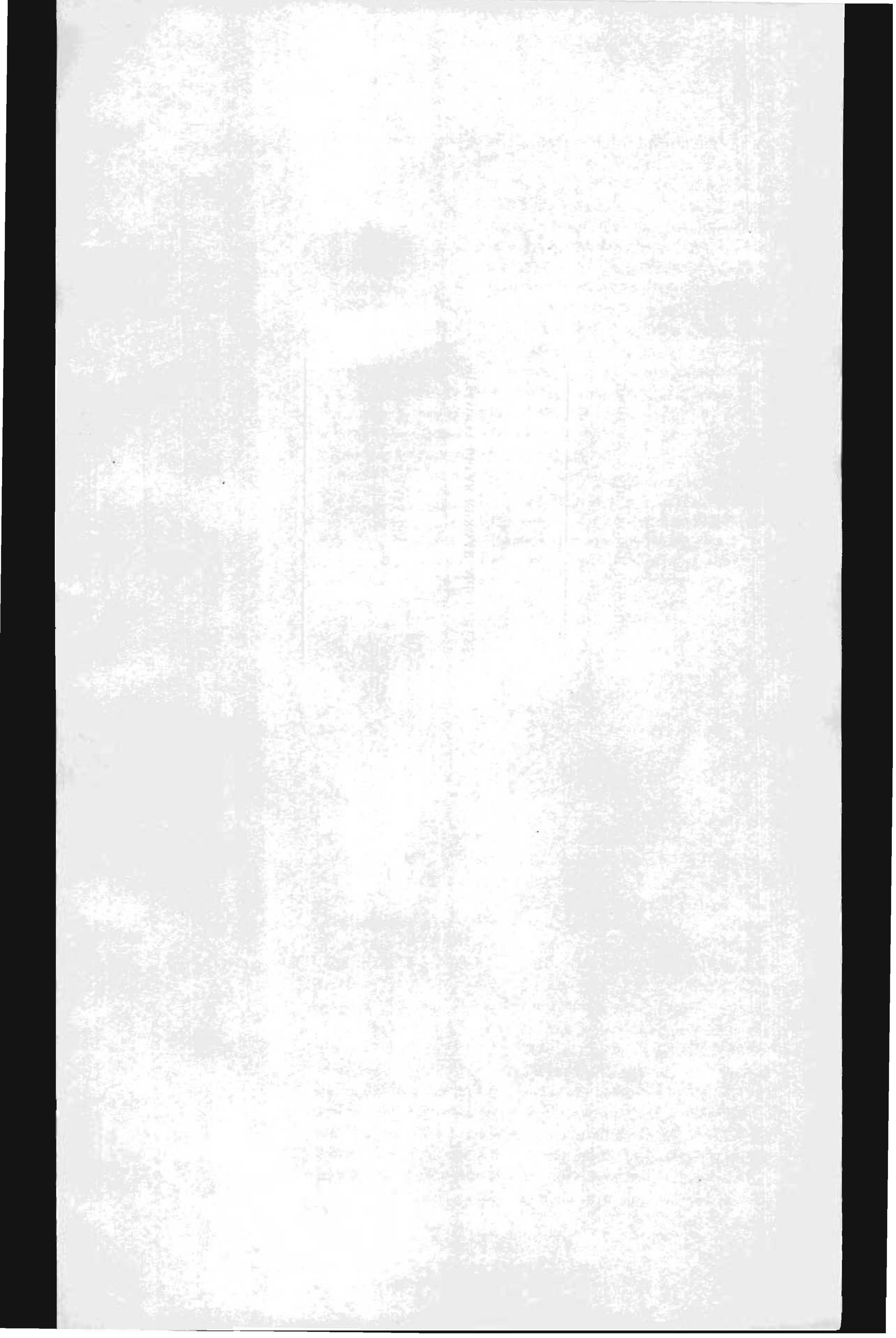
Their Lordships think that no valid distinction can be drawn between the material provisions of the deed in the present case and those upon which the judgments in the Allahabad cases were founded, and that the question to be decided is one of principle.

There can be no doubt that, as pointed out by Lord Blanesburgh, 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. For if the latter, after the deed has been duly executed and registered, finds that he can make a better bargain elsewhere, he has only to break his contract by refusing to pay the interest, and " *eo instanti*," as Lord Blanesburgh says, he is entitled to redeem. If the principal money is " due," and the stipulated term has gone out of the contract, it follows, in their Lordships' opinion, that the mortgagor can claim to repay it, as was recognised by Wazir Hasan J. in his judgment in the Chief Court. Their Lordships think that this is an impossible result. They are not prepared to hold that the mortgagor could in this way take advantage of his own default: they do not think that upon such default he would have the right to redeem, and in their opinion the mortgage money does not " become due " within the meaning of Art. 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would, of course, also be the position if the mortgagee exercised the option reserved to him.

Their Lordships are not greatly oppressed by the authority of *Reeves* v. *Butcher* (*supra*). It is, they think, always dangerous to apply English decisions to the construction of an Indian Act. The clause there under consideration differed widely from that now before their Lordships, and indeed from the clauses with which the Allahabad Court had to deal; the question for decision would have fallen in India, not under Art. 132, but under Art. 75, which is in very special terms; and Section 3 of the statute of James, with which the Court was concerned, made the time to run, not from the date when the money became due, but from the date when the cause of action arose. If in the Indian cases the question were " When did the mortgagee's cause of action arise ? "—*i.e.*, when did he first become entitled to sue for the relief claimed by his suit—their Lordships think that there might be much to be said in support of the Allahabad decisions. Judged by the Indian criterion, " when the money sued for became due," upon the best consideration their Lordships have been able to give to this difficult question, they think that the decision of the Chief Court of Oudh was wrong, and that they should have held that the appellant's suit was within time.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed; that the decrees of all the Oudh Courts should be set aside; and that the suit should be remitted to the Court of the Subordinate Judge for trial of the other issues which have not been decided. The respondents 2–6 must pay the costs of the appellant in both the District Court and the Chief Court, and before this Board. All other costs of the suit will be dealt with upon the further trial.



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DELIVERED BY SIR GEORGE LOWNDES.

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