

1922.

Present: Ennis and Schneider JJ.

ROBERT *v.* SILVA *et al.*

75—D. C. Galle, 18,949.

*Mortgage bond—Usufructuary mortgage as to part of the amount lent—
Agreement to pay interest for the balance—No interest paid—
Prescription.*

Defendant granted a mortgage bond to the plaintiff for Rs. 400; for the purpose of interest the mortgage was made a usufructuary one in respect of Rs. 300, and for the remaining Rs. 100 there was a promise to pay interest at 15 per cent. No interest was paid.

Held, that as the bond was one and indivisible, prescription did not run as to the Rs. 100 as long as plaintiff had possession.

THE plaintiff-respondent sued the first defendant, appellant, upon a mortgage bond for Rs. 400, by which it was agreed

that second defendant should possess the mortgaged property in lieu of interest on Rs. 300 out of the principal amount, and pay the balance principal of Rs. 100 with interest at 15 per cent. per annum.

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The first defendant, appellant, pleaded by his answer that no demand was made before action. He paid into Court Rs. 300, and pleaded that the claim to balance principal of Rs. 100 and interest was prescribed by lapse of time. The second defendant has filed no answer. The District Judge (T. B. Russell, Esq.) held that the claim was not prescribed.

J. S. Jayawardene, for first defendant, appellant.

Sosrtsz, for plaintiff, respondent.

September 11, 1922. ENNIS J.—

This was an action over the principal and interest on a mortgage bond. The plaintiff claimed a principal sum of Rs. 400 on the bond, and the sum of Rs. 100 as interest. It appears that the bond is to secure the payment of a sum of Rs. 400, and a certain land was mortgaged as security for this sum. For the purpose of interest the mortgage was made a usufructuary one in respect of Rs. 300 out of the Rs. 400, and for the remaining Rs. 100 there was a promise to pay interest at 15 per cent. The only issue in the case was whether the plaintiff's claim was prescribed as to the interest and the Rs. 100 upon which interest had to be paid in cash. The learned Judge held that the bond was one and indivisible, and that, therefore, prescription did not run. I am in accord with that contention.

On appeal it was argued that inasmuch as the plaintiff in his plaint had set out his claim for interest at Rs. 100, the plaintiff had thereby acknowledged that the Rs. 100 was a separate and divided matter from the Rs. 300. I do not think this point can be urged against the plaintiff, as it was open to him to correct the mistake at any time, and the plaintiff might have claimed interest within the limits of the bond amount, viz., Rs. 400. The possession in lieu of interest year by year amounted to a payment of interest on some portion of the Rs. 400 every year, and therefore the last payment of interest was at the date of action.

I see no reason to interfere with the finding of the learned Judge, and dismiss the appeal, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed