

[APPELLATE CIVIL JURISDICTION.]

1874.
August 18.*Civil Referred Case.*

NAVALMAL GAMBHIRMAL Plaintiff.

DHONDIBA' BIN BHAGVANTRA'V and another..Defendants.

*Limitation Act IX. of 1871, Schedule II., Article 75, and Section 23—
Bond payable by instalments—Waiver of default.*

A bond dated the 23rd August 1870, stipulated payment of Rs. 39 for principal and Rs. 9-12-0 for interest, making in all Rs. 48-12, by monthly instalments of Rs. 1-8-0, with the conditions, 1st, that in default of payment of a monthly instalment interest should be paid at 1½ per cent. per mensem till the whole amount was paid, and 2nd, that in default of payment of any two of the monthly instalments, the whole of the principal should become payable at once, exclusive of interest, from the date of the bond. Two instalments being overdue on the 24th October 1870, the whole principal became payable at once. In an action brought by the obligee on the 4th June 1874 for the recovery of the money :

Held that the claim was wholly barred, as the first condition amounted only to a proviso that the obligee might exercise a right of waiver and accept payment by instalments instead of suing for the whole, and there was nothing to show that he had exercised such right of waiver.

CURSETJI MANICKJI, Judge of the Small Cause Court at Ahmednagar, referred this case for the opinion of the High Court with the following statement :—

“ On the 4th June last the plaintiff in this suit presented to this Court a plaint for the sum of Rs. 40-0-0, alleged to be due on a bond passed to him by the defendants on the 23rd of August 1870.

“ The wording of this bond is peculiar, though by no means uncommon in this part of the country, and as a diversity of opinion seems to have prevailed among the former Judges of this Court, as to the right construction of the same, I think it desirable that the question be finally settled by the High Court.

“ After mentioning the names of the parties and the date, the bond proceeds in the following words :—

‘ That we have borrowed from you Rs. 39-0-0 as principal, and allowed Rs. 9-12-0 as *savdi* (or interest), in all Rs.

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'1st Condition.—In default of the payment of a monthly instalment we agree to pay interest at Rs. 1-8 per cent. per mensem till the whole amount is paid.

'2nd Condition.—Or in the course of payment of the whole debt, if we fail to pay any two monthly instalments, we promise to pay the whole amount, viz., Rs. 39-0-0, exclusive of (*savái*) interest, at the rate above stated from the date of the bond then and there.

'We will not raise objection for *savái*, or payment by monthly instalments, but whatever payment is made will be deducted according to receipts.' Then follow two important clauses :—

'For the satisfaction of the bond we bind ourselves by the aforesaid two conditions.

'Satisfaction will be made in accordance with any one of the aforesaid two conditions in which way you may prefer to have the bond satisfied.'

" Thus your Lordships will perceive that the bond is made payable in a two-fold manner at the option of the creditor. He may either, on defendants' failing to pay any two instalments, proceed against them for the whole amount at once under condition No. 2, or he may proceed against them for the instalments, under condition No. 1.

" The defendants have made a default in paying any of the instalments. Consequently, as the bond is dated the 23rd August 1870, the plaintiff's right to sue on the whole amount accrued on the 24th October 1870. But as he has not presented his plaint till the 4th of this month, his right to sue the defendants under condition No. 2 of the bond is barred by the Law of the Limitation of Suits : *Naráyanáppá bin Appá Hegde v. Bháskar Parmayá (a)* and No. 75, Schedule II., Act IX. of 1871.

“ The question now arises whether the plaintiff, being time-barred from suing the defendants under condition No. 2 of the bond, can bring a suit against them under condition No. 1 of the same.

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“ I am of opinion that he can do so for such of the instalments as are due and not barred by the Law of Limitation (Bourke's Law of Limitation, 3rd Edition, page 28), and I have accordingly accepted his plaint subject, however, to the opinion of the High Court on this reference.

“ I do not see that the bond, as set forth above, and which is clear and express in its terms, restrains the creditor to any one mode of recovering his debt, by clause (f) of the said bond the defendants bind themselves to satisfy the plaintiff's claim in whichever way it is made. Bonds of this nature are common and well-known in this part of the country. Every creditor is at liberty to protect himself in any legitimate manner, and to propose such terms as would ensure his recovering the money he advances. Bonds of the description under consideration appear to me to be reasonable and not likely to work any undue hardship on the debtors.

“ I am, therefore, of opinion that the plaintiff in this suit, being barred from proceeding under condition No. 2 of the said bond, is not prevented from proceeding to recover, under condition No. 1, such of the instalments as are not already barred by the Indian Limitation Act of 1871.

“ The question, therefore, for your Lordships' decision is, whether, under the circumstances above stated, the plaint in this suit is to be accepted or rejected.”

The reference was considered by WESTROPP, C.J., and KEMBALL, J., on the 18th August 1874.

WESTROPP, C.J. :—The High Court is of opinion that, by reason of there being two instalments overdue on the 24th

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October 1870, upon the bond dated the 23rd August 1870, the whole of the principal moneys, Rs. 39, became due under the terms of the bond upon that day. Nothing amounting to a waiver of the right to sue on that day for the whole of the principal appears to have since taken place, as for instance an acceptance by the obligee of payment of one or more instalments so as to bring the case within the exception in item 75 of the 2nd Schedule to Act IX. of 1871. In *Hemp v. Garland (b)*, LORD DENMAN, C.J., said—"If he (the plaintiff) chose to wait till all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it" (see also 7 Bom. H. C. R. 125 A. C. J.). The second portion of Section 23 of Act IX. of 1871 deserves attention. The first part of that section provides that in the case of fresh breaches of contract, there shall be a fresh period of limitation for each breach, but the second part of that section enacts "That nothing in the former part of this section applies to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole becomes due." This is followed up by item 75 in the second Schedule to the Act, which expressly lays down that "on a promissory note or bond payable by instalments, which provides that, if default be made in payment of one instalment, the whole shall be due," the time when the period of limitation begins to run shall be "the time of the first default, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made." The condition in the contract here being that, in default of payment of any two monthly instalments, the whole of the principal, Rs. 39, should become due, and there being no waiver of that condition, this Court is of opinion that time began to run against the plaintiff on the 24th October 1870, and that his suit, not having been instituted until the 4th of June 1874,

is wholly barred. There is, it is true, a proviso in the bond here that the obligee might waive the right to sue for the whole, and, instead, accept payment by instalments, but that proviso gave him nothing more than the right of waiver which the law gave him, which right, as has been above observed, there is nothing here to show that he exercised.

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Special Appeal No. 133 of 1874.

August 24.

BA'LA'JI RA'MCHANDRA.....*Defendant and Appellant.*
GAJA'NAN BA'BA'JI.....*Plaintiff and Respondent.*

*Rights of prior and puisne attaching creditors—Alienation—Attachment—
Act VIII. of 1859, Sections 240, 270, 271.*

A private alienation of property, while under attachment, is null and void only as regards the attaching creditor and those who claim under or through the attachment. *Anand Lall Doss v. Jullodkur Shaw* (17 Calc. W. R. Civ. Rul. 313) followed (a).

The fact that a puisne attaching creditor mentioned, in his application for attachment and sale of certain property of his judgment-debtor, that the same property had already been attached at the instance of another execution-creditor, does not render the puisne creditor a claimant through the first attaching creditor.

A puisne attaching creditor cannot be regarded as claiming through a prior attaching creditor, though the assignee of an attaching creditor's rights, or the next of kin of a deceased attaching creditor, may be said to claim under or through him.

Act VIII. of 1859, Section 240, is for the benefit of an attaching creditor (subsequent to, and in defiance of, whose attachment, the private alienation, thereby declared void, has been made), and of those claiming under or through him, and not for the benefit of puisne attaching creditors, whose attachment is laid later than such private alienation.

Sections 270 and 271 of the Civil Procedure Code apply only to cases where there has been a sale under the first attachment.

THIS was a special appeal from the decision of E. Hosking, Acting Assistant Judge at Satara, in Appeal No. 13 of 1873, reversing the decree of Amrit Shripat, Subordinate Judge of Karad.

(a) See 11 Calc. W. R. App. from O. J. 1.