

## APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting) and Mr. Justice Candy.

BALAJI GANESH (Original Plaintiff), Appellant v. SAKHARAM  
PARASHRAM ANGAL AND ANOTHER (Original Defendants),  
Respondents.\* [18th August, 1892.]

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*Instalments—Decree on mortgage for payment of Rs. 1,600 by instalments, and in default execution for whole amount to issue—Default in payment of instalments—Waiver by plaintiff of right to execute decree—Receipt by plaintiff of overdue instalments is no waiver—Practice—Procedure—Different rulings of different High Courts—Judge to follow the ruling of the High Court to which he is subordinate.*

By a consent decree passed in a mortgage suit the defendant was ordered to pay to the plaintiff the sum of Rs. 1,800 by yearly instalments of Rs. 50 payable on the 30th April in each year, and in case of default in payment of any instalment the plaintiff was to be at liberty to execute the decree by sale of the mortgaged property. The defendants failed to pay the first instalment, which fell due on the 30th April, 1888, and the plaintiff applied for execution and obtained an order for the sale of the property. In order to prevent the sale the defendants on the 13th November, 1888, paid Rs. 60 out of Court, and the application for execution thereupon was allowed to drop. The defendants subsequently made the following payments, *viz.*, Rs. 15 on the 5th June, 1889, Rs. 25 on the 12th June, 1889, Rs. 15 on the 1st January, 1890, and Rs. 50 in the Nazir's office on the 2nd June, 1890, which was the day on which the Court opened after the summer vacation, which had begun on the 30th April, 1890. On the 6th June, 1890, the plaintiff again applied for execution of the decree, which was granted by the Subordinate Judge. On appeal, the District Judge reversed the order, holding that the plaintiff by accepting the above payments had waived his right to execute the decree. On appeal to the High Court.

[556] Held that the plaintiff was entitled to execution. The acceptance of the payments did not prove a waiver. They were not accepted on account of the specific instalments in arrears, but on account of the whole decree; and even if they were taken as payments of overdue instalments, they could not by themselves prove a waiver.

A Judge should follow the ruling of the High Court of his own Presidency.

[R., 31 C. 83=8 C.W.N. 66 (68); 12 Ind. Cas. 741 (743)=7 N.L.R. 147; Cons., 27 B. 1 (12).]

THIS was a second appeal from an order passed by J. W. Walker, District Judge of Satara, in an execution proceeding.

By a consent decree for Rs. 1,800 passed in a mortgage suit it was ordered (*inter alia*) that the defendants should pay off the amount by annual instalments of Rs. 50, to be paid on the 30th April every year, and on their failure to pay any of the instalments within the stipulated period, the plaintiff should recover the balance of the decretal amount by the sale of the mortgaged property and from the defendants personally.

The first instalment of Rs. 50 became due on the 30th April 1888, and the defendants having made default in payment, the plaintiff applied for the execution of the decree, and obtained an order for the sale of the property and payment of the whole amount. In order to prevent the sale, the defendant on the 13th November 1888 paid Rs. 60 out of Court, and the application for execution thereupon dropped. The defendants made several subsequent payments, *viz.*, Rs. 15 on the 5th June 1889, Rs. 25 on the 12th June 1889, Rs. 15 on the 1st January 1890, and Rs. 50 in the Nazir's office on the 2nd June 1890, which was the day on which the

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Court re-opened after the summer vacation which had begun on the 30th April, 1890.

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On the 6th June 1890 the plaintiff again applied for the execution of the decree and to recover the balance due under it by the sale of the mortgaged property and from the defendants personally.

The Subordinate Judge granted the application.

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The defendants appealed, and the District Judge reversed the order. In his judgment he said:—

"This was a consent decree under which the judgment-debtor was required to pay instalments of Rs. 50 annually on the 30th [557] April, the first instalment being due on the 30th April, 1888, and on failure to pay any instalment the whole amount became due. The first instalment was not paid on the due date, and the decree-holder applied for execution of the whole decree, and a sale of the property was ordered, but that order was set aside on an endorsement of the decree-holder that he had received Rs. 60. It is clear that the decree-holder has waived his right, and cannot claim to execute the whole decree as to the first default.

"The second instalment was also not paid on the proper date, but before the date of the third instalment the decree-holder received Rs. 55, or Rs. 5 more than the amount of the overdue instalment, and gave a receipt. He did not make an application to execute the whole decree till after the date of the third instalment. According to the decision in *Hiralal v. Budho* (1), the receipt of the overdue instalment did not constitute a waiver; but the contrary has been held by the Calcutta High Court in a more recent case—*Ram Culpo v. Ram Chunder* (2), and for the reasons there given, I think it must be held that there has been a waiver, as the decree-holder did, in fact, receive payment and did not apply for payment of the whole amount due.

"As to the third instalment, the Court was closed on the proper date for payment, and the judgment-debtor paid in the amount on the first day the Court re-opened. There has, therefore, been no default. As the judgment-debtor could not, as a fact, pay into Court the amount on the due date, he cannot be said to have made default in payment."

The plaintiff filed a second appeal.

*Shamrav Vithal*, for the appellant (plaintiff).—It is admitted that there was default made in the payment of the first two instalments. The terms of the decree are peremptory, and empowers the plaintiff to recover the whole of the amount due under the decree if default be made in the payment of any instalment. There was no waiver by the plaintiff. When he made the first application for execution an order was passed directing execution of the decree by the sale of the mortgaged property. The defendants then [558] paid him Rs. 60 and suggested a compromise. The plaintiff thereupon acknowledged the receipt of Rs. 60, and applied to the Court to postpone the proceedings; but the Court, instead of postponing the proceedings, passed an order disposing of the *darkhast*. That was not a waiver—*Firm at Ravor v. Sadashiv* (3). The payment of Rs. 60 was made, not on account of the first instalment, but on account of the whole decree. This appears from the receipt given by the plaintiff. So also with regard to the other payments.

*Mahadeo Chimnaji Apte*, for the respondents (defendants).—The very fact that the appellant received Rs. 60,—that is Rs. 50 the amount of the first instalment plus Rs. 10,—and allowed the *darkhast* to be struck

(1) P. J. 1883, p. 172.

(2) 14 C. 352.

(3) P.J. 1883, p. 381.

off, shows that there was a waiver on his part. A man who does not enforce his right must be considered to have waived it—*Buddhu Lal v. Rekkab Das* (1); *Nagappa v. Ismail* (2). There would have been no waiver on the appellant's part if he had declined to accept Rs. 60 and asked the Court to continue the proceedings. Waiver is an indulgence shown to the debtor, and having once shown it, the judgment-creditor cannot insist upon his right to have the whole decree executed. Although default was made in the payment of the first two instalments, the third instalment was paid into Court in time. The time for the payment of that instalment, no doubt, expired during the vacation, but as the plaintiff made the payment on the day the Court reopened, it was in time.

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#### JUDGMENT.

CANDY, J.—The District Judge was not justified in preferring the ruling of the Calcutta High Court to that of the High Court of his own Presidency. Where they differ he should follow the latter (see *Swamirao v. Kashinath* (3)). He was also in error in remarking that the order for execution obtained by the decree-holder was set aside. The sum of Rs. 50 due as the first instalment was not paid, and so the decree-holder applied to execute the whole decree by the sale of defendant's property. To prevent that sale defendant paid Rs. 60, and the application for execution dropped, and was thus disposed of. The payment of [559] Rs. 60 was apparently on account of the whole decree, for at that time Rs. 50 only were due on account of the instalment. So, too, with the payments in 1889-90: long after the instalment of Rs. 50 was due (30th April, 1889) defendant paid small sums amounting altogether to Rs. 55, which, as the receipts show, were paid on account of the sums due under the decree. There is no mention in these receipts of the word instalment, which would have amounted to Rs. 50 only. The payment into Court by defendant of Rs. 50 on 2nd June, 1890, could not affect plaintiff, who on 6th June, 1890, applied to execute the balance of the whole sum due under the decree, after giving credit for part-payments.

It is admitted that there are no other facts but the above payments showing waiver on the part of the decree-holder. These, on the face of them, were not accepted on account of the specific instalments in arrears, as contradistinguished from part-payments on account of the whole debt; so they could not be sufficient evidence of a waiver—*Nagappa v. Ismail* (2). And even if they be taken as payments of over-due instalments, they cannot by themselves prove waiver. This is the principle laid down in *Hiralal v. Budho* (4), which has been followed in subsequent cases—see *Firm at Raver v. Sadashiv* (5). As there are admittedly no other facts on which we could ask the District Judge to consider whether he found waiver or not, we must reverse his order and restore that of the Subordinate Judge. All costs on defendant.

Order reversed.

(1) 11 A. 482.

(2) 12 M. 192.

(3) 15 B. 419.

(4) P.J. for 1883, p. 172. (5) P.J. for 1888, p. 381.