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Nothing more was done until December, 1894. The petitioner says he did not until then attain majority. He also says that the pecuniary circumstances of his father and himself were such that it was impossible for either of them to take steps in the matter. In that month, however, with the assistance of a friend, the petitioner applied to Farran, J., for a review of judgment, but his application was refused, and now the petitioner comes to this Court for leave to appeal.

We think that up to December, 1894, the special circumstances amount to "sufficient cause" and excuse the delay in proceeding. That being so, we think that nothing since then has occurred which should lead us to refuse the petitioner leave to appeal. If the delay until then is held excused, we ought to excuse the delay since that time.

Under the circumstances, we think the petitioner may appeal. We consider that his interests (he being then a minor) were not sufficiently consulted in deciding the question as to whether or not to appeal from the decree of the Division Court, and that he ought now to be allowed to take his case to appeal.

Rule made absolute.

Attorneys for the petitioner:—Messrs. *Little and Co.*

Attorneys for the respondent:—Messrs. *Nanu and Hormasji.*

ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

KANKUCHAND SHIVCHAND AND ANOTHER, PLAINTIFFS, *v.* RUSTOMJI HORMUSJI, DEFENDANT.*

1895. *July* 23.

Limitation Act (XV of 1877), Sch. II, Art. 75—Instalments—Payment of debt by instalments—Right to sue for whole debt on default of payment of any instalment—Default in payment—Waiver of right to sue—Proof of waiver—Nature of proof.

On 15th August, 1891, the defendant executed a document admitting that he was indebted to the plaintiffs in the sum of Rs. 2,125 and agreeing to pay the amount in seven instalments, the first (Rs. 401) to be paid in August, 1891, the

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second on the 28th April, 1892, and the remainder at intervals of six months. The document contained the following clause:—"If any of the instalments is not duly paid, I am to pay the whole amount with interest at eight annas per cent. per annum." The defendant failed to pay the first instalment, which the plaintiffs admitted was now barred, but on the 10th June, 1895, the plaintiffs filed this suit to recover the remainder of the debt and interest. The defendant pleaded that under the above clause the whole sum became due on the failure to pay the first instalment; that he right to sue which then accrued was never waived, and that the suit was now barred by limitation.

Held, that the plaintiffs having failed to prove a waiver of the right of suit which accrued to them in August, 1891, the suit was barred by limitation.

The waiver contemplated by article 75 of Schedule II of the Limitation Act (XV of 1877) must be either an agreement between the parties, or such conduct as will itself afford clear evidence of a legal waiver.

SUIT to recover Rs. 1,724 principal and Rs. 349-13-3 as interest.

The plaint stated that the plaintiffs had acted as commission agents for the defendant. The accounts between them were adjusted on the 15th July, 1891, and a sum of Rs. 2,125 was found due to the plaintiffs by the defendant. On that day he signed a document admitting the debt and agreeing to pay them the amount in seven instalments, the first (Rs. 401) to be paid in August, 1891, the second (Rs. 300) on the 28th April, 1892, and the remainder (four of Rs. 300 and one of Rs. 224) at intervals of six months. In default of payment of any instalment, the plaintiff was to be at liberty to recover the whole sum then due.

The plaint further stated that the defendant had failed to pay the first instalment of Rs. 401, but the claim in respect of it was now barred, and the plaintiffs now sued for the remainder of the debt, *viz.*, Rs. 1,724 and interest Rs. 349-13-3, making a total of Rs. 2,073-13-3.

The clause relating to the plaintiffs' remedy in case of default in payment of the instalments was as follows:—

"The said instalments will be paid by me as each of them will fall due. If any of the instalments is not duly paid, I am to pay the whole amount with interest at eight annas per cent. per annum."

The suit was filed on the 10th June, 1895. At the hearing the only issue raised was whether the claim was not barred by limitation.

Inverarity for plaintiffs:—The second instalment became due on the 28th April, 1892. On the 28th April, 1895, the Court was closed for vacation. The plaint was lodged on the 10th June, 1895, on which day the Court re-opened after the vacation—Civil Procedure Code (Act XIV of 1882), section 48. All the other instalments have fallen due in the three years before suit. The question is, whether the whole amount became due on failure to pay the first instalment, and were we bound to sue then for it. We say we had an option and might sue or not, and the suit now brought is not barred. Counsel referred to section 5 of the Limitation Act (XV of 1877), Rule 48, High Court Rules.

Macpherson, Acting Advocate General, for defendant:—The whole sum became due on the failure to pay the first instalment. The right to sue which then accrued to the plaintiff was never waived, and the suit now brought is too late—article 75 of the Limitation Act (XV of 1877). He referred to section 63 of the Contract Act; *Mumford* v. *Peal* [1]; *In the matter of Cheni Bash Shaha* [2]; *Sethu* v. *Nayana* [3]; *Gopála* v. *Paramma* [4]; *Hirálál Bachanji* v. *Budho valad Bahiru* [5]; *Nobodip Chunder Shaha* v. *Ram Krishna Roy Chowdhry* [6].

Inverarity in reply as to waiver cited *Selwyn* v. *Garfit* [7].

BADRUDIN TYABJI, J.:—The plaint in this suit, which was lodged on the 10th June, 1895, and was admitted as a short cause on the 11th June, 1895, states that the accounts between the plaintiffs and the defendant were finally adjusted on 15th February, 1891, when a sum of Rs. 2,125 was found due by the defendant to the plaintiffs, and that the defendant executed the Gujárati writing or bond, dated the same day, whereby he agreed to pay to the plaintiffs that sum by six instalments, the first being for Rs. 401, which became due on the 2nd Shrávan Sud, 1947, corresponding with 6th August, 1891; and the second of Rs. 300, which became due on Vaishákh Sud 2nd, 1948, corresponding with 28th April,

(1) I. L. R., 2 All., 857.
(2) I. L. R., 5 Calc., 97.
(3) I. L. R., 7 Mad., 577.
(4) I. L. R., 7 Mad., 583.
(5) P. J. for 1883, p. 172.
I. L. R., 14 Calc., 397.
(7) 38 Ch. D., 273, at p. 234.

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1892. The bond provides that, "if perchance any default be made in the payment of (one) instalment, I am duly to pay the moneys in respect of the instalments with interest thereon at the rate of eight annas." The construction put on the third paragraph of the plaint upon this proviso is, "that, if the defendant fail to pay any one of the instalments, the plaintiffs were at liberty to recover at once the whole amount then due with interest at the rate of six per cent. per annum;" and it was contended by Mr. Inverarity in his argument for the plaintiffs that the proviso was optional and not absolute, and that, unless the plaintiffs elected to claim the whole amount at once, the defendant was not bound to pay anything more than the amounts of the instalments as they became due from time to time. I may at once say that that is not the construction I put upon the document, and that in my view the elements necessary to make the proviso optional are entirely absent here: see *Asmutullah* v. *Kally Churn*(1); *Nilmadhub* v. *Ramsodoy*(2); *Hanmantram* v. *A. Bowles*(3).

The question then arises whether the whole claim which under the terms of the document became due in default of the payment of the first instalment, namely, on 6th August, 1891, is not now barred under article 75 of the Indian Limitation Act (XV of 1877). It was admitted on behalf of the plaintiffs that the first instalment of Rs. 401 was barred under any circumstances, and the plaint accordingly seeks to recover the amounts of the remaining instalments only, with interest. It was also admitted by Mr. Macpherson, on behalf of the defendant, that, by the combined operation of section 48 of the Civil Procedure Code and Rule 48 of the High Court Rules, the second instalment was not barred, and that all the other instalments were within the time provided by the law of limitation. It was, however, argued for the defendant that as the whole sum became due in default of the payment of the first instalment,—that is, on the 6th August, 1891,—and as the suit was not brought within three years from that date, therefore it is entirely barred. In reply to this the plaintiffs' counsel relied on the proviso of article 75 of the Indian Limitation Act, which runs as follows:—"On a promissory note or bond payable by instalments

(1) I. L. R., 7 Calc., 56. (3) I. L. R., 9 Calc., 857.
(3) I. L. R., 8 Bom., 561.

which provides that if default be made in payment of one instalment, the whole shall be due:—three years from the time when the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver." The plaintiffs claim the benefit of this proviso, and have given evidence to prove that they waived their right of claiming the whole amount when the first instalment became due, and that, therefore, their claim as to the rest of the instalments is still alive.

Before considering the evidence on this point, I must observe that no reference is made to any such waiver in the plaint, which seeks to save the suit from limitation rather on the ground of the proviso in the bond being optional than on the ground of its having been waived by the plaintiffs. Now I take it to be settled law that mere inaction or delay or even the receipt of an overdue instalment does not, *per se*, amount to a waiver (see the cases collected in Starling's Limitation Act under article 75 and also *Cheni Bash* v. *Kadum Mondul* (1); *Nobodip* v. *Rám Krishna* (2); *Sethu* v. *Nayana* (3); *Gopála* v. *Paramma* (4). I take it, therefore, that there must be either an agreement between the parties, or such conduct as will itself afford clear evidence of a legal waiver; and I conceive that the nature of proof must be the same, whether the waiver is pleaded by the plaintiffs to avoid limitation or by the defendant to escape from the liability to pay the whole, if a suit is filed by the creditor within the proper time on the ground of default in the payment of any one of the instalments. Now Mr. Justice Straight in *Mumford* v. *Peal* (5) lays down the nature of the evidence necessary to prove the waiver in the following words:—"I think," said that learned Judge (p. 863) "that the most cogent and conclusive proof must be demanded to establish that a party to a contract has abandoned a right accruing to him under its provisions on breach, and has entered into some fresh parol arrangement condoning such breach and creating new relations with the party in default."

(1) I. L. R., 5 Cal., 97.
(2) I. L. R., 14 Cal., 397.
(3) I. L. R., 7 Mad., 577.
(4) I. L. R., 7 Mad., 583.
(5) I. L. R., 2 All., 857

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I will now proceed to examine the evidence in this case with a view to see how far it satisfies the conditions above laid down. There was no documentary evidence given, but three witnesses were examined on behalf of the plaintiffs on this point :—

The first of these, Chunilál Nahálchand, who is the munim of the plaintiffs, said :—

"The defendant did not pay the first instalment. Subsequently to that I had an interview with defendant—about five or seven days after the first instalment became due. Defendant said he expected to get the money in a few days and would pay. He did not pay. He said he was willing to pay. What objection was there when the interest was running? I saw him on several occasions. I did not sue him for the whole debt, because he said he expected to get the money ; as soon as he got money he would pay us, and that interest was running on our money. When the subsequent instalment became due, he did not pay. I did not sue him before all instalments became due, because we had promised that we would not sue him before all instalments had become due. Two persons were present—Bhikárám and Chunilál Bechardás. This conversation took place seven or eight days after the first instalment became due. I never sent him any attorney's notice ; but we did make demands every time I saw him. I demanded the whole money, namely, Rs. 2,125. I demanded that when all the instalments had become due. After the first instalment became due, I demanded the whole amount. I demanded the amount of the instalments for Rs. 2,125. He said he would bring money and pay the Rs. 2,125 immediatly on receiving money. We began to demand after the first instalment became due. I made the demand, both before and after my promise."

This is the whole of the munim's evidence, and it seems to me to be clear that, in spite of the great skill and ingenuity of the learned counsel for the plaintiffs and of his repeated efforts to get any definite evidence from this witness as to the alleged agreement for waiver, he has completely failed to extract it. If this evidence proves anything, it rather proves that so far from waiving the benefit of the proviso, the plaintiffs insisted on being paid the full amount of Rs. 2,125 and that they were put off by the defendant from time to time on vague promises of payment when he should get money. I may add that this witness was not cross-examined.

The next witness was Chunilál Bechardás, whose evidence was as follows :—

"I am a mehta in plaintiffs' firm, was present at the interview between defendant and last witness. I was there after the interview had begun. Bhikárám was present also. The munim and Bhikárám demanded the instalment that had become due.

The defendant said, 'I will pay you money by small sums. You need not be impatient. We have been friends for a long time. I am bound to pay you instalments with interest.' The munim and Bhikárám did not agree, and demanded money then and there. Still defendant went on saying that interest was running, and they should not be anxious, and, therefore, the money remained unpaid. The reason why we did not sue him was that we had dealings with him for a long time."

This witness also, I think, fails to prove any definite agreement for waiver. On the contrary he rather confirms the evidence of the munim that the plaintiffs continued to insist on the payment of the whole amount. The reason he gives for not suing the defendant earlier was not that an agreement had been come to between the parties, but simply because "they had dealings with the defendant for a long time."

The third and the last witness was Bhikárám Aditrám, who was formerly in plaintiffs' service. He says:—

"I know why defendant was not sued when the first instalment became due. When we demanded money from defendant, he said he expected money and would pay, and that we had been on good terms for a long time; that he would receive money within two months. He asked me to tell the munim that he would pay the interest for all the money. The munim refused to wait. Munim told me to take the defendant to him. I did so. We all three went into the adjoining room. Defendant was told to pay the money. He said he would pay in two or three months, and asked us not to sue him. My chet then said, 'Look here, we will wait till all the instalments become due, and then we shall pay you interest'."

In cross-examination he said: "After the interview and before this suit I used to go to defendant to demand this money. I also went to him after the first instalment became due." In answer to a question by me the witness said, "I only demanded the instalments and never demanded the whole amount." Taking this man's evidence as a whole, I do not think it proves any definite legal arrangement for a waiver of the plaintiffs' right to demand the whole amount on non-payment of the first instalment. His statement that he never demanded anything more than the instalments, is contradicted by the munim, who distinctly says that the whole sum of Rs. 2,125 was demanded. But, even if I accept it as literally true, the mere demand of an instalment has never, so far as I know, been held to amount to a waiver of the right to demand the whole sum; although the receipt and acceptance of an instalment as such has been held to amount to a

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, waiver (see *Mumford* v. *Peal* (1), *Cheni Bash* v *Kadum Mondul* (2), *Papamma Row* v. *Toleti Venkaiya* (3), *Nagappa* v. *Ismail* (4), *Buddhulál* v. *Rekkhab Dás* (5)). It is true that the defendant has not been examined as a witness to contradict the evidence given by any of the plaintiffs' witnesses, and the plaintiffs are, therefore, entitled to treat such evidence as substantially and admittedly correct; but it is going too far to ask the Court to hold that the inherent defect and insufficiency of the plaintiffs' evidence is cured by the mere fact that the defendant has not been called to contradict it.

On the whole, therefore, I have come to the conclusion that the waiver contemplated by article 75 of the Limitation Act has not been proved in this case, and I am confirmed in this opinion by the fact that no such waiver is alleged in the plaint. I, therefore, find the issue "whether the plaintiffs' claim is barred by limitation" in the affirmative and for the defendant, and dismiss the suit.

I cannot, however, award any costs to the defendant, as his defence is a purely technical one, and is not only opposed to all principles of honesty and fair dealing, but is a very ungrateful return for the kindness and consideration shown to him by the plaintiffs. The parties must bear their own costs respectively.

Attorneys for plaintiffs:—Messrs. *Mathubhai and Jamietrám*.

Defendant in person.

(1) I. L. R., 2 All., 857.
(2) I. L. R., 5 Cal., 397.
(3) 5 Mad. H. C. R., 198.
(4) I. L. R., 12 Mad., 192.
(5) I. L. R., 11 All., 482.

ORIGINAL CIVIL.

Before the Hon. Mr. Farran, Chief Justice, and Mr. Justice Starling.

1895. *August* 3.

HURBA'I AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* HIRA'JI BYRAMJI SHANJA (ORIGINAL DEFENDANT), RESPONDENT.*

Mahomedan law—Minors—Mortgage by widow—Widow—Right to mortgage shares of minors.

In 1884 one Ismáil Ebráhim, a Mahomedan, died intestate, leaving a widow, two sons and two daughters. At the time of his death he was the owner of a certain house in Bombay. After his death his widow and his eldest son Ebráhim (without the consent

*Suit No. 69 of 1894; Appeal No. 853.