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FULL BENCH.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Crowe, Mr. Justice Batty, and Mr. Justice Aston.

KASHIRAM AND ANOTHER (ORIGINAL APPLICANTS), APPELLANTS, *v.* PANDU AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS.*

1902. *August* 21.

Limitation Act (XV of 1877), schedule II, article 179—Instalments—Instalment decree—Default in payment of instalments—Subsequent payment and acceptance of overdue instalments—Waiver.

A decree obtained on the 27th June, 1887, by a mortgagee against his mortgagor directed that the sum of Rs. 1,050 should be paid by yearly instalments of Rs. 55, the instalments to be paid in the month of April in each year. It further provided that, in case of default being made in the payment of any two consecutive instalments, the plaintiff should recover possession of the mortgaged property. The defendant did not pay in April, 1891, or April, 1892, the instalments due in those months as ordered by the decree, but he paid them, and they were accepted by the plaintiff, in the months of May, 1891, and May, 1892, respectively. He also paid subsequent instalments, and up to 1895 no single instalment remained unpaid at the date at which that immediately succeeding it became due. But he again failed to pay two consecutive instalments, viz., those due in 1896 and 1897, and he paid nothing subsequently. In July, 1899, the plaintiff applied for execution of the decree, contending that his right to execution arose in 1897 under the terms of the decree. The lower Appeal Court held that the plaintiff's right to execution had arisen in 1892 and that his present application was therefore barred by limitation. On appeal to the High Court,

Held, (by the Full Bench, reversing the decree of the lower Court) that having regard to the payment and acceptance of instalments in this case subse-

* Second Appeal No. 205 of 1902.

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quently to 1892, the parties had been remitted to the same position as they would have been in if no default had then occurred, and that on the subsequent default in 1897 the plaintiff's right to execution arose and that consequently his application in 1899 was in time.

Per Jenkins, C.J.:—The true view appears to me to be that, though there may be a failure to pay punctually under an instalment decree, still the subsequent conduct of the parties may preclude either of them from afterwards asserting that payment was not made regularly and in satisfaction of the obligation under the decree . . . . . This view is not far, if at all, removed from an application of the doctrine of estoppel, for it would be but an elaboration of it to say that if each of the parties has by his acts intentionally caused the other to believe that the payment was a regular satisfaction of the obligation, and the parties have acted on that belief, neither can afterwards deny the regularity.

It is a fundamental proposition of law that payment and acceptance of overdue instalments cannot by themselves prove a waiver. The point is one to be determined on the circumstances of each case.

Dulsook v. *Chugon*[1] and *Balaji* v. *Sakharam*[2] commented on.

SECOND appeal from the decision of Ráo Bahádur G. D. Deshmukh, First Class Subordinate Judge of Sátára with Appellate Powers, reversing the order of Ráo Sáheb G. B. Laghate, Subordinate Judge of Karád, in an execution proceeding.

Application for execution of a decree.

One Gopalji bin Bhagoji obtained a decree (No. 125 of 1887) against his mortgagor, Ramji bin Mankoji. The decree was dated the 27th June, 1887, and directed payment of the mortgage-debt by instalments payable in April of each year as follows:

The plaintiff, that is, the judgment-creditor Gopalji Bhagoji, do recover the sum of Rs. 1,050, including the costs of the suit, by instalments of Rs. 55 a year, the first instalment of Rs. 55 to be recovered in April of 1888; and so on in future Rs. 55 in April of each year until the whole amount of Rs. 1,050 is paid off. That if default be made to pay any two consecutive instalments, the plaintiff do recover possession of the mortgaged property and pay the Government assessment thereof and enjoy the profits in lieu of interest.

The first instalment, which became due in April, 1888, was paid in April, 1889; the second and third instalments were paid together in April, 1890. The next three instalments were paid in May, 1891, 1892 and 1893, and the seventh and eighth instalments were paid together in April, 1895. The instalments

(1) (1877) 2 Bom. 356. (2) (1892) 17 Bom. 555.

due in April, 1896, and April, 1897, were not paid, nor was any subsequent instalment paid.

The plaintiff claimed that under the terms of the decree his right to recover possession in execution of the decree arose on the defendants' failure to pay the instalment due in April, 1897. Under article 178 or clause 6 of article 179 of schedule II of the Limitation Act (XV of 1877) he was bound to apply for execution within three years from the date his right accrued. In October, 1898, accordingly, an application for execution was presented, but nothing further was done. On the 8th July, 1899, the sons and legal representatives of the plaintiff presented a fresh application to the Subordinate Judge, who ordered execution to issue if the amount due under the decree was not paid within four months. The following was his order:

> There appears to be no objection on the ground of limitation as contended by the applicant (judgment-debtor).
>
> As to the prayer of the applicant (judgment-debtor) for instalments, there is no material before the Court to show the condition of the defendants. But as the whole property of the applicant is now to go by this *darkhast* into the possession of the execution creditor, I would as a last resort give to the applicants four months' time for payment of the decretal debt.
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> Execution as prayed for to issue after four months from this date.

On appeal by the defendant Pandu, the Judge reversed this order and rejected the plaintiff's application for execution as barred by limitation. He held on the authority of *Dulsook* v. *Chugon* [1] and *Hati Devchand* v. *Naroji* [2] that the plaintiff's right to execution arose when the defendants for the first time made two consecutive defaults, viz. in 1891 and 1892, and that his present application was, therefore, too late (see article 178 and clause 6 of article 179 of schedule II of the Limitation Act, XV of 1877). In his judgment he said:

> The main question to be decided in this case is whether or not the *darkhast* is barred by the Law of Limitation. In deciding this point it will have to be found when did the cause of executing the decree sought to be executed accrue to the legal representatives of the deceased judgment-creditor, Gopalji bin Bhagoji.
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> The decree sought to be executed is payable by yearly instalments of Rs. 55, with a proviso that, in default of payment of any two consecutive instalments,

(1) (1877) 2 Bom. 356. (2) (1894) P. J. p. 407.

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the judgment-creditor to recover possession of the mortgaged property under certain conditions. The decree has directed that each instalment shall be paid in April of each year. The whole amount of Rs. 1,050 is directed to be paid by instalments of Rs. 55 a year. The decree is dated 27th day of June, 1887. The amount will be paid off by twenty instalments. The first instalment was due under the decree in April, 1888, and the last instalment will be due in April, 1907 A.D. It appears from the decree executed that the first instalment was due in April, 1888, the second in April, 1889, the third in April, 1890, the fourth in April, 1891, and the fifth in April, 1892, and so on until April, 1907.

The legal representative of the deceased judgment-debtor has put in six receipts for the payments made by him and by his father to the deceased judgment-creditor Gopalji. These receipts show that a default was made to pay the instalment for 1891 and that for 1892. The judgment-debtor has, therefore, made two defaults, and this circumstance entitles the judgment-creditor to take possession of the mortgaged property for the remaining debt.

It is evident, therefore, that the cause to present the *darkhast* accrued to the judgment-creditor in April, 1892.

The *darkhast*, therefore, ought to have been made within three years from the dates on which the two instalments fell due and were not made. This shows that *darkhast* if not made in April, 1895, is evidently barred by the Law of Limitation.

The *darkhast* is made in July, 1899, that is, within one year from the previous *darkhast*, which was given in October, 1898, which was also barred by limitation. That time-barred *darkhast* cannot be considered to be a proper and legal step taken in executing a decree so as to allow a second *darkhast* within three years from that date. Article 179, schedule II of the Limitation Act (XV of 1877), clause iv, provides a limitation of three years for an application for the execution of a decree or order of any Civil Court from the date of the decree; but, where the application has been made, from the date of applying in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order. The Bombay High Court have ruled in I. L. R. 15 Bom., page 237, that the application for execution contemplated in clause iv of article 179 of schedule II of the Limitation Act (XV of 1877) must be one made in accordance with law. This evidently means that a time-barred previous application for execution cannot give a fresh point to start for counting the limitation of three years for a subsequent like application.

Relying, therefore, on I. L. R. 2 Bom., page 356, and P. J. for 1894, page 407, I hold that the *darkhast* presented by the legal representatives of the decree-holder on the 8th July, 1899, is evidently barred by the Law of Limitation, and ought to be dismissed on that ground.

The plaintiff preferred a second appeal, which came on for hearing before Jenkins, C.J., and Aston, J. After argument their Lordships referred the case to a Full Bench for decision. The following was the referring judgment:

JENKINS, C.J.:—This second appeal arises out of certain execution proceedings, in which it has been held that the decree-holder is barred by the lapse of time from enforcing his decree. From this he appeals.

The decree was the result of an amicable settlement, and it was thereby ordered "that the plaintiff, that is, the judgment-creditor Gopalji Bhagoji, do recover the sum of Rs. 1,050, including the costs of the suit, by instalments of Rs. 55 a year, the first instalment of Rs. 55 to be recovered in April, 1888, and so on in future Rs. 55 in April of each year, until the whole amount of Rs. 1,050 is paid off. That if default be made to pay any two consecutive instalments, the plaintiff do recover possession of the mortgaged property and pay the Government assessment thereof and enjoy the profits in lieu of interest."

The instalments were paid as follows:

1st instalment	... 22nd April, 1889.
2nd and 3rd instalments	... 17th April, 1890.
4th instalment	... 3rd May, 1891.
5th instalment	... 9th May, 1892.
6th instalment	... 12th May, 1893.
7th and 8th instalments	... 16th April, 1895.

No subsequent instalment has been paid. In October, 1898, the plaintiff presented a *darkhast* praying for execution, but apparently it came to nothing. On the 8th July, 1899, he presented the present *darkhast*, but it has been held by the lower Appellate Court that it is barred by limitation.

There is no doubt there had been failure in punctual payment of two successive instalments more than three years before the presentation of the *darkhast* of 1898, and the question is whether, by the payment and acceptance of the several instalments as above stated, the parties have been remitted to the same position as they would have been in, if no default had occurred. There is a conflict of view as to the possibility in law of such a waiver, and in illustration of this we may (without at this stage exhaustively citing the rival authorities) point to *Dulsook* v. *Ohugon* [1] on the one side and *Balaji* v. *Sakharam*,[2] *Ram*

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Culpo v. *Ram Chunder* (1) and *Mon Mohun* v. *Durga Churn* (2) on the other. Certainty as to instalment decrees is so important for the mofussil Courts, that we refer to a Full Bench the question, whether by reason of the payment and acceptance of instalments in this case the application for execution is within time.

The reference came on for argument before a Full Bench consisting of Jenkins, C.J., and Crowe, Batty and Aston, JJ.

Ganpat S. Rao for the appellants (plaintiffs):—We submit that the plaintiffs' right to execution arose under the terms of the decree on the failure of the defendants to pay the two instalments due in April, 1896, and April, 1897, and that this application is, therefore, not barred by limitation. No doubt the defendants failed in 1891 and 1892 to pay the instalments punctually and the plaintiff might then have obtained execution, but, we submit, he was entitled to waive his right; that he did so by subsequently accepting payment of the overdue instalments, but that on the later default of the defendants the plaintiffs' right to execution again accrued. The provision in the decree is for the benefit of the plaintiff and it is open to him to waive any default, and limitation will only run against him from the date of the last default which he has not waived. For a similar provision on a promissory note or bond see article 75 of schedule II of the Limitation Act (XV of 1877).

A waiver is the abandonment of a right: *Selwyn* v. *Garfit.* (3) Where a debtor pays and the creditor accepts an instalment overdue, then the creditor waives his right as against the debtor in respect of such instalments and the debt still remains payable: *Cheni Bash Shah* v. *Kadum Mundul* (4); *Nilmadhub* v. *Ramsody* (5); *Ram Culpo* v. *Ram Chunder* (1); *Mon Mohun* v. *Durga Churn* (2); *Hurri Pershad* v. *Nasib* (6); *Sri Raja Papamma* v. *Toleti Venkaiya* (7); *Sri Raja Satracherla* v. *Sri Raja Sitarama* (8); *Nagappa* v. *Ismail* (9);

(1) (1887) 14 Cal. 352.
(2) (1888) 15 Cal. 502.
(3) (1888) 38 Ch. D. 273, 284.
(4) (1879) 5 Cal. 97, 100.
(5) (1883) 9 Cal. 857, 860.
(6) (1894) 21 Cal. 542.
(7) (1870) 5 M. H. C. R. 198.
(8) (1880) 3 Mad. 61.
(9) (1889) 12 Mad. 192.

Rajeswara Rau v. *Hari*[1]; *Gyan Chund* v. *Jawahur*[2]; *Radha Prasad* v. *Bhagwan*[3]; *Shankar* v. *Jalpa Prasad*.[4]

The decision in *Navalmal* v. *Dhoṇdiba*[5] is in conflict with the subsequent decision in *Gumna Dambershet* v. *Bhiku Hariba*.[6] The case of *Dulsook* v. *Chugon Narrun*[7] was decided under Act IX of 1871. In *Hanmantram* v. *Arthur Bowles*[8] there is an observation that an acceptance of an overdue instalment amounts to a waiver. The ruling in *Babaji Ganesh* v. *Sakharam Parashram*[9] narrows the effect of the payment and acceptance of an overdue instalment. That case is, however, distinguishable from the present, because there the payment was on account of the whole debt and not on account of an instalment.

The principle laid down in *Ramkrishna* v. *Bayaji*,[10] *Navalmal* v. *Dhondiba*[5] and *Hanmantram* v. *Arthur Bowles*[8] is the correct principle and should be followed.

S. R. Bakhle for the respondents (defendants) :—In execution of a decree there can be no waiver merely by acceptance of an overdue instalment. The principle laid down in *Dulsook* v. *Chugon Narrun*[7] is correct. Article 179 of the Limitation Act does not mention waiver. That Act provides for waiver of contractual debts: see article 75. If the doctrine of waiver be applied to judgment-debts, an addition will have to be made to article 179.

When there is a specific enactment, the Court cannot act on general principles. Whether article 179 or 178 applies, the effect would be the same. The Calcutta rulings are, no doubt, against our contention. The decisions of the Madras High Court prior to *Rajeswara Rau* v. *Hari*,[1] in which there was a decree and which is distinguishable, were in cases based on contract; so also the cases of this High Court, except *Dulsook* v. *Chugon Narrun*[7] which is in our favour. In all the Bombay cases the doctrine of waiver has been applied to contract debts only. In

(1) (1895) 19 Mad. 162.
(2) (1870) 2 N. W. P. H. C. R. 83.
(3) (1883) 5 All. 289.
(4) (1894) 16 All. 371.
(5) (1874) 11 Bom. H. C. R. 155, 157.
(6) (1876) 1 Bom. 125, 130.
(7) (1877) 2 Bom. 356.
(8) (1884) 8 Bom. 561.
(9) (1892) 17 Bom. 555, 558.
(10) (1868) 5 Bom. H. C. R. 35.

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Balaji Ganesh v. *Sakharam Parashram*[1] there is an expression of opinion in favour of the doctrine contended for, but the decision was on other grounds. In *Hati Devchand* v. *Naroji*[2] this Court refused to adopt the doctrine of waiver in the case of judgment-debts. The decisions of this Court have been consistent and should be followed.

JENKINS, C.J. :—From the dates on which the several instalments were paid it appears that, though certain of them were paid after the date on which they were properly due, at no time up to 1895 did any single instalment remain unpaid at the date when that immediately succeeding it accrued due. This might serve to distinguish the present case from the decision in *Dulsook* v. *Chugon Narrun*[3]; but I desire to place my decision on broader grounds, believing that thereby a solution of the difficulty attending instalment decrees will be furnished, which will be more easily apprehended by the mofussil Courts, than if I limited myself to the refinement which the distinction above referred to would involve.

Though the decree is equivocal on the point, I will assume, as most in the defendant's favour, that on two successive defaults the instalments thenceforth ceased, and the plaintiff was relegated to his right to recover the balance of the decretal sum by taking possession. And yet we find that after the default on which the defendant relies, instalments were paid by the judgment-debtor and accepted by the decree-holder; that though the first and second instalments were late, the third was paid within time; and that while the fourth to the seventh were beyond time, the eighth instalment was paid and accepted within the prescribed period.

In April, 1895, therefore, every instalment then due had been paid, and there were no arrears, so that, if limitation be reckoned from defaults after that date, the present application is within time. Must we, notwithstanding this, hold that the plaintiff is barred because his right to recover possession arose on the defendant's previous failures to make punctual payments?

(1) (1892) 17 Bom. 555. (2) P. J. 1894 p. 407.
(3) (1877) 2 Bom. 356.

In Bombay there are two difficulties in the way of our holding that the plaintiff is not barred. First, it has been held that the statute of limitation operates notwithstanding subsequent payment of overdue instalments; and, secondly, that payments of overdue instalments cannot by themselves prove a waiver. It is because of these two difficulties that this case has been referred to a Full Bench of this Court.

The origin of the view that failure to pay in accordance with the terms of an instalment decree is not affected for the purposes of limitation by subsequent payment and acceptance, is to be found in the decision in *Dulsook* v. *Chugon*.[1] Notwithstanding the high respect that must at all times be yielded to the opinion of the learned Judges responsible for that decision, it undoubtedly detracts from its value that the case was unargued, and this disadvantage is, I think, apparent in the somewhat inconclusive reasoning on which the opinion is supported.

In the Courts of the other Presidencies it has been repeatedly recognised, that there are pertinent considerations which were not discussed or alluded to in *Dulsook's case*. It has been said that to the general rule, by which a decree-holder would ordinarily be barred of his rights under an instalment decree, there is an exception where the default has been waived. Thus in *Mon Mohun Roy* v. *Durga Churn*[2] it was said (page 505):

> First, it is a general rule that where a decree or order makes a sum of money payable by instalments on certain dates, and provides that, on default in payment of one of the instalments, the whole of the money shall then become due and payable, and be recoverable in execution, then, under article 179 of the Limitation Act....., limitation commences to run when the first default is made.
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> There has, however, been engrafted upon that general rule an exception in certain cases. That exception I understand to be this, that if the right to enforce payment of the whole sum due upon default being made in the payment of an instalment has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other, then, the penalty having been waived, the parties are remitted to the same position as they would have been in if no default had occurred.

(1) (1877) 2 Bom. 356. (2) (1888) 15 Cal. 502.

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Though it may be no more than a matter of form, I am averse to treating the operation of subsequent payment and acceptance as an exception to a general rule. It creates a doubt whether we have found the true rule. So I would venture to express the position in somewhat different language.

The true view appears to me to be, that, though there may be a failure to pay punctually under an instalment decree, still the subsequent conduct of the parties may preclude either of them from afterwards asserting that payment was not made regularly and in satisfaction of the obligation under the decree. This is illustrated by the case of *Norton* v. *Wood*,(1) where the obligee under a bond bound himself not to call in the principal for a specified period, if interest were regularly paid. On two occasions interest was paid after the due date. In delivering his judgment Lord Lyndhurst said:

> The question whether payment of interest tendered after it is due and accepted by the creditor is or is not a regular payment, is one which, at law, would be left to the jury. As to the construction to be put upon the memorandum, I agree with the Vice-Chancellor, and then the only remaining question will be whether this amounts to a regular payment of the interest. Upon that point I feel myself bound to express a different opinion from that entertained by His Honor. I think, if money is tendered after the period when it became due, and the person to whom it has been paid does not see fit to refuse it, it is a waiver of the objection; it must be taken as a regular payment if the person receives it the day after without making any objection.

Here, then, we have a recognition of the principle involved in the maxim *unusquisque potest renunciare juri pro se introducto*, whose modern application has been asserted by Lord Selborne in the *Great Eastern Railway Company* v. *Goldsmith*,(2) even where the *jus* renounced was the creature of a statute charter. It is true that in *Norton* v. *Wood*(1) the delay in payment was small, but that does not disturb the principle on which the decision rests. Also, no doubt, in that case the rights were contractual and not decretal, but this is a distinction in a circumstance not really material, for the case of *Great Eastern Railway Company* shows that the maxim is not limited in its operation to rights arising from convention.

(1) (1829) 1 R. & M. 178. (2) (1884) 9 App. Ca. 927 at p. 936.

An exposition of the law on the same lines is to be found in the judgment of Lord Hatherlay in *Thompson* v. *Hudson*,[1] where he says (page 17):

> It is simply (as Lord Justice Turner put it) that, upon one of the conditions being broken, a concession is made in respect of that one condition, with regard to which the appellants could never again insist upon their complete rights.

This view is not far, if at all, removed from an application of the doctrine of estoppel, for it would be but an elaboration of it to say that if each of the parties has by his acts intentionally caused the other to believe that the payment was a regular satisfaction of the obligation, and the parties have acted on that belief, neither can afterwards deny the regularity.

The vice of *Dulsook's case*[2], as it seems to me, is that it stands on too narrow a basis: it insists on the default to the exclusion of all else; while the truer view would seem to be that default may, under the influence of after-events, cease, as between the parties, to bear that character. Whether this change has come about in any case is, in the language of Lord Lyndhurst, "to be left to the jury," that is to say, it can only be determined by reference to the circumstances of each case.

Thus to take the facts of this case. Could the decree-holder in May, 1892, have successfully applied for possession? Would he not at once have been met with the objection, "All the instalments due to this date have been paid to you, and accepted by you as such in satisfaction of the obligation created by the decree: you were only entitled to those instalments on the hypothesis that the instalments still continued payable, and could be so paid in satisfaction, and that excludes the idea that the right to take possession exists: you cannot be heard to say that there has been a default which entitles you to take possession?" I think he would: and that the objection would have prevailed. But if he could not have taken possession, he could not be barred of that right, if by default it later arose. There cannot be approbation and reprobation. The soundness of this view may be tested thus: if in this case all instalments save the last two had been punctually paid, would the unpunctual payment of those

(1) (1868) L. R. 4 H. L. 1 at p. 17.

(2) (1877) 2 Bom. 356.

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two, after they had in fact been paid and accepted, have entitled the decree-holder to possession? Surely not. And the reason must be, that he could not after acceptance of those instalments be heard to say, that they had not been paid and accepted as regular instalments in satisfaction of the decree.

I recognise to the full the paramount duty of keeping the decrees of the Court inviolate, but, in my opinion, there is no evasion of that duty in the application of the considerations I have discussed. The terms of the decree are not thereby modified; it is only that, in obedience to a well established principle, a limit is placed on permissible proof, so that it becomes beyond the power of the person affected to lead the evidence requisite to bring into play the particular provision of the decree, and "of things that do not appear and things that do not exist, the reckoning in a Court of law is the same" (per Lord Halsbury in *Seaton* v. *Burnand*[1]).

It is unnecessary to discuss further than they were in argument the decisions of the other Courts, not because they are undeserving of consideration—they have been most fully considered—but because there (so far as I can see) views similar to those I have expressed, though perhaps differently framed, prevail. Indeed, it is because the consensus of opinion elsewhere favours the view that subsequent payment and acceptance of overdue instalments must be taken into consideration for the purpose of applying the rules of limitation to an instalment decree, that this reference has been made; for it is, in my opinion, desirable and in the interest of justice that, so far as possible, there should be unanimity between the several Courts on those matters, where local considerations do not call for different results. It might be said that we should observe the maxim *stare decisis*, but, outside the realm of property law, that rule loses so much of its importance, that it ought not to weigh with us in the present case.

I now proceed to deal with the second of the two difficulties which confronted the referring Bench, viz., the opinion expressed in *Balaji* v. *Sakharam*[2] that payment and acceptance of overdue instalments cannot by themselves prove waiver. This (if

(1) (1900) App. Ca. 135 at p. 139. (2) (1892) 17 Bom. 555 at p. 559.

intended to be a general proposition of law) is opposed to the view expressed in several Calcutta cases (*Ram Culpo* v. *Ram Chunder*[1]; *Mon Mohun* v. *Durga Churn*[2]; *Hurri Pershad* v. *Nasib Singh*[3]), and in its operation conflicts with the decision of Lord Lyndhurst, which I have already cited. In my opinion the point is one to be determined on the circumstances of each case, and unless the proposition in *Balaji* v. *Sakharam*[4] was intended to be limited to the facts of that case, I think it cannot be sustained, and that we should decline to follow it.

The result is that, in my opinion, we should answer the reference by holding that, having regard to the payment and acceptance of instalments in this case, the application is within time. I think we are entitled so to decide, notwithstanding that this is a second appeal, for it is a mixed question of law and fact that is involved.

I am glad that it is open to us to come to this conclusion as to the effect of waiver on instalment decrees; for, though in this case the result is that a judgment-debtor is held to his obligation, to hold otherwise, instead of being beneficial to judgment-debtors generally, would preclude decree-holders under instalment decrees, however favourably inclined, from acting with reasonableness, and would possibly in the result throw debtors (to use the language of Lord Selborne in *Cotterell* v. *Stratton*[5]) "into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions."

At the same time, I think it would be a wise precaution, and possibly would save litigation in the future, if judicial officers in this Presidency, in framing instalment decrees, would make it clear that the rights consequent on defaults are dependent on a positive election by those in whose interests they are intended to be created.

CROWE, J.:—I concur.

BATTY, J.:—I concur. The tender on one side and acceptance on the other of instalments as such appears to me to create an

(1) (1887) 14 Cal. 352.
(2) (1888) 15 Cal. 503.
(3) (1894) 21 Cal. 542 at p. 547.
(4) (1892) 17 Bom. 555 at p. 559.
(5) (1873) L. R. 8 Ch. 295 at p. 302.

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estoppel, which precludes both parties from offering evidence of an alleged default which each party had by his conduct induced the other to believe had not occurred.

The theory of waiver by the plaintiff does not appear to me equally consistent with a strict construction of the decree, as that theory would require to be supplemented by a corollary that plaintiff could not only waive his right to recover in lump, but could also revive a right *ex hypothesi* otherwise extinguished to recover by instalments.

ASTON, J.:—I concur with the judgment of the Chief Justice and would add the following remarks.

On the point, what constitutes waiver, Mr. Rao for the appellant has cited decisions of the Calcutta, Madras and Allahabad High Courts, some with reference to instalment decrees and others with reference to instalment bonds, in some of which, from the fact of payment and acceptance of an overdue instalment, an inference has been deduced that the creditor or the decrée-holder had in fact waived the benefit provided by the bond or the decree, the benefit waived being in those cases a right to recover at once all the instalments remaining due. The principal cases are discussed in *Sitab* v. *Hyder*.[1]

The Calcutta case *Hurri Pershad* v. *Nasib*,[2] an instalment decree case, does not go so far as the case of *Shankar* v. *Jalpa Prasad*[3]; but it was said (p. 547): "We cannot hold that mere abstinence from suing can amount to waiver or that there can be any waiver so as to affect limitation save by payment and acceptance of an overdue instalment. Nor do we think that any distinction can be drawn ..... between a case in which it is provided that, on payment of an instalment, the whole amount *shall become due*, and one in which it is provided that on non-payment of an instalment *the whole amount may be sued for*. There seems no reason why limitation should begin to run in the one case and not in the other." In the same case it was held that an uncertified payment, which cannot be recognised under section 258, Civil Procedure Code (XIV of 1882), may be

(1) (1896) 24 Cal. 281. (2) (1894) 21 Cal. 542.
(3) (1894) 16 All. 371.

proved for the purpose of showing that the period of limitation did not begin to run until the default made in respect of the second instalment.

In the Madras Presidency it was decided in *Nagappa* v. *Ismail*[1] that acceptance of the amount of an instalment in arrear, on account or in satisfaction of such arrear, amounts to a waiver within the meaning of Act XV of 1877, schedule II, article 75, so as to give a fresh starting point in limitation and to revive the right (of the debtor) to pay the debt by instalments. This decision, which is cited in *Balaji* v. *Sakharam*,[2] dealt, it is true, with a bond and not with a decree, but there is nothing in the Madras decision inconsistent with the view that, in the case of an instalment decree also, such acceptance by a decree-holder of an overdue instalment would revive in the judgment-debtor the right to pay the decreed debt by instalments, and thus not only restore the same conditions of the decree as to subsequent instalments, but also start a fresh period of limitation.

Indeed, this is the view which seems to have been accepted by this Court in *Balaji* v. *Sakharam*,[2] where the principle of decision was not that in case of an instalment decree the decree-holder has no option but to execute the decree once and for all for the whole amount due under it as provided in case of a default, but that, on the evidence, it was not proved that the decree-holder had accepted payment of an overdue instalment on account of the specific instalment in arrear so as to constitute waiver.

For the respondent, reliance was specially placed on *Dulsook* v. *Chugon*,[3] which applies to instalment decrees the principle on which *Gumna* v. *Bhiku*[4] was decided as to instalment bonds.

In *Gumna* v. *Bhiku* the plaintiff sued on a promissory note which provided for payment by instalments, with a stipulation that, in default of any one of these instalments not being punctually paid, the whole amount was to become payable at once. The plaintiff alleged that after a default the defendants made and plaintiff accepted payments. It was said in the Full Bench decision in that case: "The creditor is, no doubt, not bound

(1) (1889) 12 Mad. 192.
(2) (1892) 17 Bom. 555.
(3) (1877) 2 Bom. 356.
(4) (1875) 1 Bom. 125.

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immediately to sue for, or insist upon payment of, the whole debt. He may, if he chooses, show forbearance towards his debtor, and accept a part of what is due. But, if he does so, he does not thereby prevent, or change in any way, the operation of the law of limitation, which, notwithstanding any such subsequent wish on his part, begins to run from the time of the first default rendering the whole amount due." This Full Bench case was decided upon the Limitation Act XIV of 1859, which contained neither the provisions in section 20 nor the article 75 of the schedule II in the later Limitation Act, by which it is practically superseded. But in *Dulsook* v. *Chugon*[1] its principles were applied to a decree payable by instalments. In this case it is remarked by Westropp, C.J.: "The principles, however, on which that case (*Gumna* v. *Bhiku*[2]) was decided apply in this case. There is not in the last clause of article 167 of schedule II of the Act IX of 1871, which clause relates to decrees payable by instalments, any provision similar to that in article 75 of the same schedule with respect to promissory notes or bonds payable by instalments; where such notes or bonds provide that if default be made in payment of one instalment the whole shall be due, fixing that the period of limitation shall begin to run from the time of the first default, unless where the obligee waives the benefit of the provision, and then, when fresh default is made. Nor does there appear in the new Limitation Act (XV of 1877), schedule II, article 179, clause 6, relating to decrees payable by instalments, any such provision." Accordingly, it was held that a decree payable by instalments, with a proviso that in default of payment of any one instalment the whole amount of the decree shall become payable at once, is barred if application for execution be not made within three years from the date on which any one instalment fell due and was not paid.

In *Hiralal* v. *Budho*[3] the question considered was what constitutes waiver, and the decision related to an instalment bond, not to a decree payable by instalments. The same remark applies to *Devlal* v. *Sadashiv*[4] and to *Kankuchand* v. *Rustomji*.[5]

(1) (1877) 2 Bom. 356.
(2) (1875) 1 Bom. 125.
(3) (1883) P. J. p. 172.
(4) (1888) P. J. p. 381.
(5) (1895) 20 Bom. 109.

In *Hati Devchand* v. *Naroji*[1] the decision related to a decree payable by instalments. The decree directed payments by annual instalments from November, 1884, and ordered that in default of payment of three instalments the whole amount shall be recovered at once by sale of the mortgaged property. The instalments were not regularly paid, but between August, 1885, and November, 1891, the defendant paid various small sums. In 1893 the decree-holder applied for execution of the decree to recover Rs. 29, being the balance of the instalments which had become due till then, by the attachment and sale of the deceased defendant's moveable property. It was held that the application was time-barred, because it was not made within three years from the default in payment of the first three instalments. It must be observed, however, that the Judges who decided this case expressly stated: "In the present case we do not construe the decree as giving an option."

In the case of *Balaji* v. *Sakharam*[2] already referred to, the dispute was about execution of a consent decree for Rs. 1,800 passed in a mortgage suit, which 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 defendants made default in payment, but paid various sums later on. The plaintiff applied well within time for execution of the decree and to recover the balance due by sale of the mortgaged property and from defendants personally. The defendants pleaded waiver. No question was raised that the plaintiff was left no option under the decree to extend the time for payment of any instalment, and the decision turned merely upon the point whether there was sufficient evidence of a waiver.

If the decision in *Dulsook* v. *Chugon*[3] was intended to rule, that in applying the law of limitation to an application for execution of an instalment decree, the Court executing the

(1) (1894) P. J. p. 407. (2) (1892) 17 Bom. 555.

(3) (1877) 2 Bom. 356.

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decree must confine attention merely to the decree and to what is provided within the four corners of the Limitation Act: that, in fact, the right to apply for execution, which must accrue before limitation can begin to run, cannot be affected by the conduct or agreement of the parties to the decree, and the executing Court is therefore precluded from giving effect to legal or equitable principles derived from authority outside the sections and schedules of the Limitation Act in determining whether the rights of the parties to such a decree have been so modified by the conduct or agreement after the decree as to affect the law of limitation applicable to an application for its execution: then I think, with great deference to the authority by which *Dulsook's case*(1) was decided, that we may, for reasons advanced by the Chief Justice, well hesitate to accept such a proposition. It has not been expressly adopted by any subsequent decision of this Court cited during the course of the argument, and such a proposition is opposed to the principle upon which, as already shown, subsequent cases in this Court have been decided.

Now the decree of which execution is sought in the present case contains no stipulation that the whole balance of the decreed debt is to become recoverable at once in execution proceedings on the occurrence of the default mentioned in the decree. The decree is a consent decree passed in a mortgage suit. It decrees payment of a sum specified by specified instalments and it converts the mortgagee's rights to possession of his security into a conditional right, the condition precedent to the recovery of possession being default by the judgment-debtor in paying any two consecutive instalments of the debt decreed. The position of a judgment-debtor, who is in default under such a decree, though not exactly the same as that of a lease-holder whose lease of immoveable property has become determined by forfeiture under clause (*g*), section III of the Transfer of Property Act (IV of 1882), is sufficiently analogous to make it pertinent to observe that such a forfeiture is waived by acceptance of rent which has become due since the forfeiture, or by any other act on the part of the lessor showing an intention to treat the lease

(1) (1877) 2 Bom. 356.

as subsisting unless such acceptance is subsequent to a suit in ejectment: see section 12 of the Transfer of Property Act. The guiding principle applicable to the question appears to me to have been laid down in *Ramkrishna* v. *Bayaji*,[1] where it was said by Couch, C.J., and Newton, J.: "Although the instalments were not paid by the defendant at the time fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered as regards both the parties as if made at the time fixed, and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment, or the defendant rely upon it as making the whole debt due and fixing the period from which the time of limitation ran." That view was accepted by the Legislature as regards instalment bonds after a contrary opinion was expressed in the Full Bench decision *Gumna* v. *Bhiku*, and the Limitation Act (XV of 1877) does not appear to contain any provision which prevents the application of the same principle to instalment decrees. But it is a view, which, in my opinion, is not based solely upon the doctrine of waiver. Where there exists no right, there, I apprehend, can be no waiver. The learned Chief Justice has already pointed out that under a decree framed in the same words as the one under consideration, there might conceivably be no default except as to the last two instalments, which the decree-holder might accept when overdue. If such a decree-holder, after such acceptance, were, nevertheless, to apply for possession of the land, because the decree awards such possession on default of payment of any two instalments, the plea of the judgment-debtor would presumably be satisfaction, not waiver; there being no right left to be waived if the conditional right to possession of the land as security has ceased to exist as soon as the debt decreed itself is fully discharged, and the security is extinguished.

To take another illustration. Suppose the decree had ordered payment of the whole decreed debt on a specified date and had provided that the creditor was to take possession in default of such payment. If such a decree-holder were to accept the whole

(1) (1868) 5 B. H. C. R. 35. (2) (1876) 1 Bom. 125.

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sum due under the decree after due date and were nevertheless to apply for possession, the defence to such a claim would again presumably be satisfaction and not waiver, when the decreed debt is discharged and the security is extinguished.

The question thus arises whether any essential difference exists when the decreed debt is divided into instalments payable at stated intervals with the same provision as to recovering possession in execution when there is default in paying any two consecutive instalments. Such a decree would be satisfied for the time being by payment of the instalments on the dates specified, and if it would not be straining the interpretation of such a decree to treat it as satisfied for the time being if the decree-holder accepts all the instalments which have fallen due, though overdue at the time of acceptance, then in such cases alone there would be no right to possession and no scope therefore for waiver, if such right is lost by acceptance whether intended to be waived or not. On the other hand, if the decree made all the remaining instalments payable on the occurrence of a default specified (which the decree under consideration does not do), then, too, if we accept the principle laid down in *Ramchandra* v. *Bayaji*,[1] the Court to which application for further execution of the decree is made may well say to the decree-holder: "The judgment-debtor is not in default, the payments you have chosen to accept before making your application must be treated as if made at the time fixed in the decree, and the decree is therefore satisfied for the present and not capable for the present of further execution."

Under this view, which appears to me to be both reasonable and sound in principle, it would be immaterial whether the decree awarded possession or made all remaining instalments at once recoverable on the occurrence of the default specified.

I therefore fully agree with the reasons given by the learned Chief Justice for answering the reference in the terms proposed.

(1) (1868) 5 Bom. H. C. R. (A. C. J.) 35.