1918.

BAI NEMATBU v. BAI NEMATUL-LABU.

With regard to the question as to what the scope of the enquiry which the appellate Court should enter upon is, I am of opinion, that we are entitled to satisfy ourselves under Order XLVII, Rule 4 (2) (*b*), as to whether there was sufficient evidence before the lower Court, and whether such evidence has been properly appreciated by it when it granted the application. If *Ahid Khondkar* v. *Mahendra Lal De*[1] lays down that the duty of the appellate Court is restricted to ascertaining whether the evidence adduced before the Subordinate Judge is properly admissible or not, only I must respectfully beg leave to doubt its correctness. The Subordinate Judge might grant such an application on evidence on the weight and sufficiency of which no appellate Court would agree with him. Nevertheless, the evidence which the plaintiff-respondent now seeks to adduce is not for the purpose of adding to her evidence in the Court below, but for the purpose of correcting a misapprehension into which the Judge was led by a material error in Exhibit 129. I, therefore, think that under these circumstances justice requires its admission and that this appeal should be dismissed with costs.

Order affirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1918.
January 11.

SUBRAYA VENKAPPA HEGDE (ORIGINAL OPPONENT), APPELLANT *v.* SUBRAYA HEGDE (ORIGINAL APPLICANT), RESPONDENT.*

Instalment decree—Penalty clause—Failure to pay two instalments making the whole decree payable at once—First instalment not paid on due date, but paid up before the second one fell due—Second instalment not paid on due date—Penalty clause not becoming operative.

(1) (1915) 42 Cal. 830 at p. 837.

* Second Appeal No. 232 of 1917.

1918.

SUBRAYA VENKAPPA v. SUBRAYA.

A decree payable by instalments provided that the instalments were to be paid on certain fixed dates; and that on failure to pay any two instalments at the period fixed, the whole amount of the decree remaining unsatisfied was to be paid up at once. The first instalment was not paid on the date fixed, but was paid sometime afterwards and before the second instalment fell due. On failure to pay the second instalment on the due date, the decree-holder applied for execution of the whole amount of the decree which remained unsatisfied :—

Held, dismissing the application, that the real intention of the parties was that before the penalty could be enforced two instalments must be in arrears together, whereas in the present case only one instalment was in arrears.

SECOND appeal from the decision of E. H. Leggatt, District Judge of Kanara, reversing the order passed by V. R. Guttikar, Subordinate Judge at Sirsi.

Execution proceedings.

On the 25th February 1915, the decree under execution was passed by consent, providing that the amount found due was to be paid in instalments. The first instalment was to be paid on the 14th April 1915. The second one was to be paid on the 5th March 1916 and so on. The decree further provided that on failure to pay any two instalments on the dates fixed, the whole amount of the decree remaining unsatisfied was to be paid up at once.

The first instalment was not paid till the 16th January 1916. The second instalment was not paid on due date.

The decree-holder thereupon applied for execution of the whole decree, as according to him there had been failure to pay two instalments on due dates.

The Subordinate Judge was of opinion that acceptance of the overdue instalment by the decree-holder amounted to waiver; that there was only default in payment of the second instalment only; and that the decree-holder was therefore not entitled to apply.

1918.

SUBRAYA VENKAPPA v. SUBRAYA.

On appeal, this order was reversed by the District Judge on the following grounds:—

The Subordinate Judge considers that under the ruling in *Kashiram* v. *Pandu*[1] plaintiff has, by his acceptance of his first over-due instalment, waived his right to recover the whole amount due under the decree. I do not think that this is the correct view to take of the ruling on which the Subordinate Judge relies. The ruling does not state that in all circumstances the acceptance of an overdue instalment will amount to a waiver. On the contrary, the Chief Justice points out that the question whether there has been a waiver can only be determined by reference to the circumstances of each case. In that case, after acceptance of the two overdue instalments several instalments were paid and accepted at proper times, and it was therefore obvious that the decree-holder intended to waive his right. Here, on the contrary, he took the very first opportunity of insisting on the right given to him by the decree. As the decree itself says that an overdue instalment can be paid later with interest, it was not really open to plaintiff to refuse to accept that payment; but in any case the decree lays down that if two instalments are not paid on the proper dates, the whole amount should be recoverable at once. This has been the case here, and, as there is nothing to show any intention on the part of the plaintiff, to waive his right to recover the whole amount, he is entitled to do so.

The opponent appealed to the High Court.

G. P. Murdeshwar, for the appellant.

S. N. Karnad, for the respondent.

BEAMAN, J.:—The consent decree runs in the following terms:—

"Plaintiff do recover from defendant Rs. 253-10-5 out of Rs. 753-10-5 alleged by plaintiff (to be due to him) and admitted by defendant, on the 30th day of Chaitra of the next cyclical year Rakshasa (14th April 1915). As to the balance of Rs. 500 on deducting the said amount (of Rs. 253-10-5) plaintiff do pay the same to defendant by five instalments of Rs. 100 each payable on the 30th day of the Magh of each year beginning from the 30th of Magh of the next year, that is, of the cyclical year Rakshasa. In this way defendant do pay (the whole amount) by six instalments.

[1] (1902) 27 Bom. 1.

In case of failure to pay the amount of any one instalment, he should pay the amount of instalment he has failed to pay with interest at the rate of Rs. 12-8-0 per cent. per annum from the date of failure to pay the instalments up to the date of payment. In case of failure to pay the amount of any two instalments at the period fixed, defendant do pay to plaintiff all the amount of instalments remaining unpaid on deducting the amount of instalments paid at that time, together with interest thereon at the above rate, that may accrue from the date of default up to the date of payment; in this manner the amount should be paid in one lump sum."

Upon this decree a dispute has arisen in the following circumstances. The first instalment of Rs. 253-10-5 was to be paid on or before the 14th April, 1915. The second instalment of Rs. 100 was to be paid on or before the 30th March, 1916. The first instalment was not paid on the date fixed, but in January 1916, before the due date of the second instalment, it was paid in full with interest at the agreed rate. There was a further default in paying the second instalment due on the 30th March 1916. The decree-holder thereupon claimed that there was a failure to pay the amount of two instalments at the period fixed, and, therefore, that he was entitled to claim the whole amount of his debt at that time remaining unpaid. The lower appellate Court has acceded to that contention and held upon a construction of the decree that on the 30th March 1916 there had been a failure to pay the amounts of two instalments at the period fixed. We are of a different opinion. We think it unnecessary to go into the questions raised and discussed in the judgment of Jenkins C. J. in the Full Bench Case of *Kashiram* v. *Pandu*[1]. That and the cases out of which it arose had special

(1) (1902) 27 Bom. 1.

1918.

SUBRAYA VENKAPPA v. SUBRAYA.

reference to the points at which limitation began to run on breach of conditions in instalment bonds very similar in their terms to those we are considering. All that I would say is that if the view taken by the learned Chief Justice be correct that the acceptance of an overdue instalment before the next succeeding instalment becomes due amounts to estoppel and precludes the creditor from alleging that there was a prior default, then the position here would admit of no argument. It is, however, contended on behalf of the respondent that he had no option in the matter; that there was in no real sense a waiver when he accepted the amount of the first instalment with interest in January 1916 and therefore that there is no room for the introduction of the principle of estoppel. It appears to us, however, that the decision can be put upon a much simpler and more satisfactory ground. Upon our reading of the decree itself, we entertain no doubt but that the real intention of the parties was that before the penalty could be enforced two instalments must be in arrears together. Adopting that construction, it is clear that the condition had not been fulfilled in this case, for before the default of the 30th March 1916 the first instalment had been paid in January 1916. There was, therefore, at the time the decree-holder claimed to call in the whole debt, only one instalment in arrears. We think, therefore, that the view taken by the learned District Judge was wrong and that there has been no such failure to pay the amounts of two instalments at the period fixed as would entitle the decree-holder to the order he obtained in the lower appellate Court.

We think that the decree of the learned Judge must be reversed and this appeal allowed with all costs.

HEATON, J.:—I concur.

Decree reversed.

R. R.