

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1918.
March 5.

RAICHAND MOTICHAND GUJAR (ORIGINAL PLAINTIFF), APPELLANT v.
DHONDO LAXUMAN BHURE AND ANOTHER (ORIGINAL DEFENDANTS),
RESPONDENTS*.

Decree—Instalment decree—Entire decretal debt to become payable on failure to pay any one instalment—Application to execute the decree three years after default—Limitation.—

An instalment decree was made on June 28, 1909. It provided that the debt be paid in eight annual instalments and that on failure to pay any one of the instalments before the next had become due, the creditor could call in the whole amount of debt with interest at the agreed rate. It was found that no instalment was ever paid. In September 1915 the creditor presented the Dakhast but the lower Courts held it time-barred. On appeal to the High Court it was contended that it was optional with the creditor to waive all breaches on the part of the debtor to fulfil his obligations under the instalment decree and so at the end of eight years, the creditor could sue for at least three instalments in arrears then due.

Held, that on the terms of the decree a complete legally enforceable right had accrued to the judgment creditor on failure to pay the first annual instalment in June 1910, and the period of limitation allowed to him within which to enforce it was three years and no longer. The Dakhast was, therefore, barred by limitation.

SECOND appeal against the decision of S. R. Koppikar, First Class Subordinate Judge, A. P., at Belgaum, confirming the decree passed by C. G. Kharkar, Subordinate Judge at Chikodi.

Proceedings in execution.

The decree under execution was passed by consent on June 28, 1909.

The decree provided :—

“The (principal) amount and the interest (thereon) at the agreed rate of Re. 0-8-0 per cent. per month found payable by defendant to plaintiff are Rs. 860 in all. Therefore, that amount of Rs. 860 and future interest on the said

* Second Appeal No. 523 of 1917.

amount or on the amount that may go on remaining due out of it, at the rate of Re. 0 6-0 per cent. per month from this day until the amount is paid off, should be paid to plaintiff according to the following amount (of instalment): That is instalment of Rs. 100 for principal and interest should be paid every year. The first instalment should be paid in the month of Vaishakh of the Shaka year 1832 (1910 A. D.) and in future also the instalments should be paid in the same month every year and the whole amount should be paid off. In case of failure to pay any one instalment within the period fixed or until the period of next instalment, plaintiff should recover in one sum the whole amount due at that time together with interest by the sale of the above mentioned mortgaged property."

The plaintiff, judgment-creditor, presented the Darkhast on September 6, 1915. He alleged that in consequence of, certain payments made by the defendant, judgment-debtor, the Darkhast was in time.

The defendant did not admit the payments and pleaded that the Darkhast was barred by limitation.

The Subordinate Judge held that the payments alleged by the plaintiff were not proved; that there was default in payment of the instalments due and the Darkhast was, therefore, barred by limitation.

On appeal, the First Class Subordinate Judge, A. P., confirmed the decree.

The plaintiff appealed to the High Court.

Nilkant Atmaram, for the appellant:—The condition that in default of payment of one instalment the whole decretal debt should be recoverable was for the benefit of the decree-holder and not enforceable against him. It was optional with him to recover the whole amount at once or to wait till the time allowed by the law of limitation for each instalment expired: see *Shankar Prasad v. Jalpa Prasad*⁽¹⁾.

K. N. Koyaji, for the respondent not called upon.

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BEAMAN, J.:—The point raised here is one of considerable interest and must, I think, have been one of frequent occurrence. We are not referred to any decision of our High Court upon it. The appellant, however, relies upon a decision of the Allahabad High Court in the case of *Shankar Prasad v. Jalpa Prasad*⁽¹⁾, which would appear to be conclusive in his favour. With great respect, I am doubtful whether the reasoning of that judgment will stand critical analysis and I will briefly give my reasons for being of a different opinion.

The point arises in this way upon an instalment decree in a very common form. A debt of roughly Rs. 800 had to be paid off by eight annual instalments of Rs. 100 each, and there was a term in the decree that on failure to pay any one of these instalments before the next had become due, the creditor could call in the whole amount of debt with interest at the agreed rate. It is found as a fact that no instalment was ever paid. The decree was made on the 28th June 1909. In September 1915, the creditor presented this Darkhast, and the question decided in the Court below was one of limitation. It was decided against the judgment-creditor. The ground of appeal is that it was optional with him to waive all breaches on the part of the debtor to fulfil his obligations under the instalment decree and so at the very end of the eight years, sue for at least three instalments in arrears then due. If this view be correct, it follows that the creditor would likewise be entitled to sue, within three years of failure to pay the last instalment, for the total amount of debt with interest. But that right had accrued to him as a complete legally enforceable right before the end of 1910 and the period of limitation allowed to him within which to enforce it, would have been three years, no

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longer. I am entirely unable to accede to the argument that that right assumes the nature of a recurring right under an agreement such as this. For the effect would be that no matter how complete the right to call in a definite sum of money had become, the judgment-creditor might ignore it and extend the period of limitation, perhaps to the extent of some twenty instead of three years, as for example, if the instalment decree had provided for the repayment of the capital sum over a period of twenty years. Such decrees are by no means infrequent. Now, let me carry the analysis a little further. In all decrees of this kind the provisions for the payment of instalments are provisions in favour of the debtor, not the creditor. The very form of an instalment decree presupposes that the creditor's rights to that extent are curtailed and the debtor's rights enlarged. The right to pay by instalments, subject to conditions, is the debtor's not the creditor's right. The creditor's right is to enforce the payment of the full amount upon breach of condition, thus putting an end to the instalment decree as an instalment decree.

This analysis will, I think, at once reveal what seems to me, with great respect, the basic fallacy of the Allahabad decision. Nor do I think that the correct principle is in any way impaired by what is after all rather a sentimental consideration veiled in a specious argument, that construing decrees of this kind, as I would construe them, would be to compel the creditor to act harshly towards the debtor. When we remember that in any event the creditor has three years in which to consider his position after breach of condition, I confess, it appears to me, almost absurd to say that by dealing on principles of strict reasoning and logic with these decrees we should offer inducements to creditors to press too hardly upon their debtors. For after failure on the part of the debtor to pay one year's instalment

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and in the absence of any intention on his part to pay any further instalment in the future, it ceases to become a question of indulgence at all. What the creditor would do on the principle permitted by the Allahabad Court, would be no more than to balance the pecuniary advantages and disadvantages of enforcing the decree at once or waiting for the last instalment. If I am to accede to the view pressed upon me by the learned pleader for the appellant, it would always be open to the judgment-creditor under a decree of this kind, allowing him ample interest, to sit quiet for a lengthy period and then call in the capital, with the accumulated interest, as though no right had been conferred upon him perhaps ten years earlier to the sum then due, a right governed by the ordinary law of limitation.

In my view, this and all similar cases fall to be decided on some such principle as I have endeavoured, perhaps roughly, to outline. If I am so far right, on the finding of fact by the lower Court, this Darkhast is not in time, and this appeal ought to be dismissed with all costs.

HEATON, J. :—I agree.

In this particular case, which is the case of a decree payable by instalments, the first instalment was payable on the 6th of June 1910, and it was provided that in case of default in paying an instalment within the time fixed for the payment of the next instalment thereafter, the plaintiff should recover in one sum the whole amount due at that time, together with interest, by the sale of the mortgaged property. Ordinarily the mortgagee would, of course, have been entitled to recover the mortgage debt in one lump sum after the expiration of the period of six months fixed by the decree. In this particular case he is not entitled to

recover the entire sum unless the judgment-debtor fails to pay one of the instalments of Rs. 100, which is less than one-eighth of the entire sum. That is in itself a very great privilege to the judgment-debtor, a great disadvantage to the creditor. But supposing that the debtor fails to take advantage of this valuable privilege, what follows? One would suppose, at least I should suppose, that what followed, naturally would be that the privilege would be cancelled and that the judgment-creditor would, thereupon, become entitled to recover the whole debt in the usual way. And this result would be in consonance, it seems to me, with ordinary legal and equitable principles and is exactly what would be expected from the application of common sense and fair dealing. And as a matter of fact it is generally understood, in this Presidency, by our Judges, that what I have just described, is the principle which underlies the framing of instalment decrees. We have here a case in point. The trial Judge and the Judge of first appeal, both of them unhesitatingly accepted the principle which I have indicated, a principle which leads to the conclusion that where the privilege is not taken advantage of by the judgment-debtor, the decree ceases to be an instalment decree and becomes enforceable as an ordinary decree for the payment of a lump sum. This, of course, is a view which for all ordinary purposes is beneficial to the creditor. It enables him immediately to get in the whole of the debt instead of waiting for the prolonged period covered by payment of instalments. But it happens here, and it has often happened before, that the judgment-creditor is negligent of his own interests. He allows time to elapse, and when he finds that more than three years have passed without his enforcing the right to get in the judgment-debt as a whole and finds himself faced by a point of limitation, then he turns

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his back on the arguments, which one would expect from him at ordinary times and takes to those which would for ordinary purposes be appropriate to the judgment-debtor. This revolutionary method of argument is of course not of a kind which appeals to a Court, for Courts prefer consistency of principle.

I have said what I consider to be the ordinary principle, and all that remains is to consider whether, in this particular decree, there are to be found indications that it is based on that principle or whether it is intended by this particular decree to provide for some different solution of the question, what is to happen on failure to pay an instalment. I have quoted the passage pertinent to the point from the decree and it seems, to me, to be one of an ordinary kind, one which we must interpret by the principle which I have indicated. Therefore, I think that the lower Courts were quite right in dismissing this Darkhast as time-barred, and that the decree of the lower Court ought to be confirmed.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

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March 14.

GOPAL JAYVANT SHIRGAONKAR (ORIGINAL PLAINTIFF), APPELLANT v. SHRINIWAS VITHAL PAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Lease—Assignment of a lease—Repudiation of lessor's title by the original lessee—Forfeiture.

A mere repudiation by the original lessee of the lessor's title will not work a forfeiture against the assignee of the lease.

* Second Appeal No. 206 of 1917.