APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1920.
January 6.

AMRIT KHANDERAO KANGO (ORIGINAL PLAINTIFF), APPELLANT *v.* GOVIND RAMCHANDRA CHITNIS, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Decree—Instalment decree—Decree directing interest to be paid annually and principal after twenty-five years and in default of payment of interest, interest and principal to be recovered at once—Defaults made in payment of interest—Proceedings taken from time to time for recovery of interest—Defaults mutually condoned—Subsequent application for execution for arrears of interest and principal amount—Execution not barred.

A decree was passed in favour of the plaintiff on the 12th February 1894. It provided for the payment of a certain sum by way of interest every year, and for the payment of the principal on the expiration of twenty-five years; but if the interest was not paid in any year then the principal and interest in one sum was to be recovered at once. The judgment-debtor made default in payment of annual instalments of interest. Execution-proceedings were, therefore, taken from time to time for a series of years till 1914 in order to get payment of the instalments of interest due under the decree. In 1916, the judgment-creditor issued a darkhast praying for execution for the whole amount, principal and interest. The judgment-debtors contended that the execution was entirely barred because the judgment-creditor had not taken advantage of the default clause. The trial Court dismissed the Darkhast on the ground that the principal had not become due, that only three years' interest was recoverable, but that had not been claimed.

On appeal to the High Court,

Held, that the judgment-creditor and judgment-debtor having mutually condoned all previous defaults, it was open to the judgment-creditor after 1914 when continued default in payment of interest was made to take advantage of the decree and to apply in execution for that instalment which was in arrears and for the principal amount.

Raichand Motichand v. *Dhondo Laxuman*[1], referred to.

FIRST appeal against the decision of H. V. Kane, First Class Subordinate Judge of Nasik, in Darkhast No. 264 of 1916.

* First Appeal No. 256 of 1918.

(1) (1918) 42 Bom. 728.

Execution proceedings.

On the 12th February 1894, the plaintiff obtained a decree on a mortgage bond, mortgaging certain *mokasa* cash allowance payable by Government. The decree directed that Rs. 262-8-0 for interest should be recovered before the 31st May every year from 1892 May, and that the principal amount Rs. 7,001 should be recovered in twenty-five years. It further directed that if the judgment-debtors obstructed the judgment-creditor in attaching the cash allowance till his principal was paid or obstructed the judgment-creditor in getting his interest every year till his principal was paid, or obstructed him in any other way or if the judgment-creditor did not get the interest every year from the judgment-debtors, the judgment-creditor should recover the whole amount, principal and interest, with interest at three and three-fourths per cent. by sale of the mortgaged cash allowance.

The judgment-debtor made default in payment of annual instalments of interest.

The judgment-creditor gave darkhast from time to time for the recovery of the amount of interest and recovered Rs. 171-2-6 in 1903 and Rs. 165-0-3 in 1908.

In 1914, the judgment-creditor gave a Darkhast No. 202 of 1914. That Darkhast was held to be in time and was proceeded with but on the 17th July 1914, the judgment-debtor's pleader gave an application stating that no money was lying in the office of the Mamlatdar of Niphad. The Darkhast was, therefore, dismissed.

The judgment-creditor, therefore, filed the present Darkhast No. 264 of 1916 for the recovery of arrears of interest and the whole of the decretal amount by sale of the mortgaged property.

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The Subordinate Judge dismissed the Darkhast on the ground that the principal had not become due, that only three years' interest was recoverable, but that had not been claimed.

The plaintiff judgment-creditor appealed to the High Court.

S. R. Bakhale, for the appellant.

G. S. Rao, for *W. B. Pradhan*, for respondents Nos. 1 to 3.

J. R. Deshmukh, for respondent No. 4.

MACLEOD, C. J. :—In this case a decree was passed in favour of the plaintiff on the 12th February 1894. It directed that interest should be recovered at the rate of Rs. 262-8-0 per annum before the 31st of May every year from 1892, and that the principal amount Rs. 7,001 should be recovered in twenty-five years. It further directed that if the judgment-debtors obstructed the judgment-creditor in attaching the cash allowance till his principal was paid or obstructed the judgment-creditor in getting his interest every year till the principal was paid or obstructed him in any other way or if the judgment-creditor did not get the interest every year from the judgment-debtors, the judgment-creditor should recover the whole amount, principal and interest, with interest at 3¾ per cent. by sale of the mortgaged cash allowance. The judgment-debtors made default in payment of annual instalments of interest. Execution was taken out, and it appears that Rs. 171-2-6 had been recovered in 1903, and Rs. 165-0-3 in 1908. A Darkhast was issued in 1909, but that was struck off without anything being paid. Again in 1914, the decree having been transferred to the Nasik Court for execution, a Darkhast was issued, but as no money was lying in the office of the Mamlatdar of Niphad the Darkhast

was dismissed on the 17th July 1914. It was never up-to that time suggested that the judgment-creditor was barred from executing his decree because he had not taken advantage of the default clause. The present Darkhast was issued in 1916 praying for execution for the whole amount, principal and interest.

The Darkhast was dismissed by the trial Judge on the ground that the principal had not become due, that only 3 years' interest was recoverable, but that had not been claimed. The Judge said that the parties were at liberty to open the whole contentions again if the judgment-creditor filed a new Darkhast, and if it was filed, in the Court's opinion, for a proper amount. The judgment does not appear to be consistent, nor does it appear whether it proceeded on the same argument as found favour with this Court in the case of *Raichand Motichand* v. *Dhondo Laxuman*[1]. It does not seem that the Judge was of the opinion that the judgment-creditor was barred entirely from executing the decree because he had not taken advantage of the default clause. He merely said that the principal had not become due, and it was open to the judgment-creditor to execute for the interest so far as the law of limitation allowed him.

Now it is quite possible that on the facts of a particular case the judgment-creditor may be barred, if it is considered by the Court that he was barred from executing his decree because on a default being made in the payment of an instalment under the decree, he had not executed for the whole amount within three years under the power given to him by the decree. But I think there may be cases, and I think this is one, where the parties may agree either directly or indirectly that although default has been made in the payment of an instalment, still the judgment-creditor would not be

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bound to execute for the whole amount within the time allowed by the law of limitation. Instead of that it is open to the parties to agree that the instalment should be taken as having been paid, and if future default were made execution should issue for the instalments from the date of such default in arrears. Now this is what appears to have been done by the parties in this case. Execution proceedings were taken from time to time in order to get payment of the instalments of interest directed to be paid by the decree. It was never suggested, although defaults appear to have been made from the very commencement, that after three years from the date of the first default, as no execution proceedings had been taken for the whole amount, the judgment-creditor was absolutely barred from executing his decree, and until 1914 the parties proceeded on this footing that the judgment-creditor was executing as far as possible for the instalments, and was not attempting to take advantage of the clause which enabled him to execute for the whole amount, and that was agreed to by the judgment-debtor. Clearly in 1914 it was open to him to take the point that execution was barred absolutely. Instead of doing that, he only took the objection that execution could not proceed because there were no assets in the Nasik Court which could be paid out under the Darkhast. Therefore I think it was open in this case to the judgment-creditor to treat all the instalments previous to the last one, before the Darkhast of 1916 was issued, as having been paid, and then to consider that the default in payment of the last instalment entitled him to proceed to execute for the whole amount, that is to say, the principal amount and the last instalment of interest which had not been paid. It would then be open to the judgment-debtor to say, "you have agreed in the past to waive the default clause, and only to execute for the instalments until the

twenty-five years are up when the principal amount of Rs. 7,001 becomes due." But that contention has not been raised. All that I can gather from the previous conduct of the parties is that it was conceded that the judgment-creditor should not be barred absolutely from executing the decree merely because he had sought to execute the decree for the instalments in arrears. It seems to me that it was open to him after 1914 when continued default in the payment of interest was made to take advantage of the decree and execute for that instalment which was in arrears and for the principal amount. To that extent I should allow the appeal with costs in proportion. The cross-objections are dismissed with costs.

HEATON, J. :—I need not recapitulate the facts which have been stated by my Lord the Chief Justice. I propose to follow in this case the principle which I set out in my judgment in the case of *Raichand Motichand* v. *Dhondo' Laxuman*[1], that where you have, as in this decree, a provision for the benefit of the judgment-debtor, and where the judgment-debtor fails to take advantage of the benefit which is provided for him, then he loses that benefit, and the decree automatically becomes a decree of the ordinary type which does not offer that benefit. This is not a case of an instalment decree of the usual kind. It provides for the payment of a certain sum by way of interest every year, and for the payment of the principal on the expiration of twenty-five years; but if the interest is not paid in any year, then the principal and interest in one sum are to be at once recovered. So any failure to pay interest for one year would automatically convert the decree into one under which the principal was immediately recoverable. Now in this case there has been year after year for a long series of years a failure to pay the interest, and,

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therefore, it is urged that many years ago the decree automatically became one of the ordinary type. The principal, it is urged, was then recoverable and limitation has by this time made it quite impossible to recover it.

But it does not follow that because the decree-holder is entitled to interest every year, that therefore he is bound to take it. He may be a generous man and he may forego it. He may let year after year go by without troubling his debtor about the interest. That would not automatically convert the decree into a decree of the ordinary type. That, however, is not what has happened in this case. But just as you may have a judgment-creditor generously refraining from taking his yearly interest, so you may have the judgment-creditor and the debtor both agreeing that a default shall be condoned, and that the decree shall continue as an instalment decree, or a decree of the kind that we have here. My Lord the Chief Justice has pointed out circumstances in this case which enable us to arrive at this position. We regard the judgment-creditor and the judgment-debtor as having mutually condoned all defaults prior to the one which is the subject of this particular Darkhast. In other words we take it that both agreed, as undoubtedly they both believed, that the decree which still existed between them was the original decree. As I began by saying, I need not detail the facts. No doubt both parties have totally misunderstood the true legal effect of the decree between them. But equally undoubtedly they have both treated it as a decree still subsisting in the shape of a decree which requires interest to be paid for twenty-five years, and thereafter the principal. And although their conduct has been no doubt influenced by mutual misunderstanding of the true legal nature of the decree, yet still we can accept this: that they both believed

the decree to be still in force between them, and I think we may also take it that we may accept it as establishing a position equivalent to what would be the true legal position, had they acted similarly with full knowledge of the true nature of the decree. The legal effect is this: that there has been in effect no default at all except the one which is the subject of the Darkhast. Every previous default is wiped out. You cannot take it that there has been a default previously which enables the judgment-creditor to claim interest for the previous years, but that this default has not had the effect of automatically converting the decree into one of the ordinary type. If there has been an uncondoned default, then the legal consequences of that default must ensue. Therefore, in order that the present Darkhast may be acceded to, we must take it that there has been no default whatever except the one which is the subject matter of this Darkhast, and although as a matter of fact many previous defaults have occurred, they are all to be regarded as condoned or wiped out, and we are to deal with this decree as if it had been fulfilled in every particular until the failure to pay that item of interest which led to the present Darkhast. That being so, what the judgment-creditor is entitled to is one year's interest and the principal. Therefore I agree to the order proposed by my Lord the Chief Justice.

Decree reversed.

J. G. R.