We must accept the declaration made by the Subordinate Judge that extensions of the period for the submission of the award were from time to time granted, though we may observe that applications for such extensions should ordinarily be in writing, and that most certainly orders thereon should be.

If the plaintiff has been prejudiced by the action of the Court below insisting on the delivery by him of his objections in a period less than that allowed by law, the Court below should, on application, review its proceedings.

The appeal is dismissed with costs.

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[61] APPELLATE CIVIL.

The 23rd February, 1880.

PRESENT:

MR. JUSTICE KERNAN AND MR. JUSTICE MUTTUSAMI AYYAR.

Sri Raja Satracherla Jogi Razu Bahadur Garu.....(Plaintiff) Appellant,

versus

Sri Raja Setarama Razu Pedda Bhalyar Simhulu Garu and another.....(Defendants) Respondents.*

Bond payable by instalments—Provision that if default be made in payment of one instalment, the whole should become due —Waiver—Act IX of 1871, Schedule II, Article 75.

Where a bond is payable by instalments with a provision that upon default of payment of any instalment the whole sum then unpaid shall become due with interest, the creditor, though he can elect but once to enforce this provision, may waive the benefit of it not only on the first but on any subsequent default.

THIS was an appeal against the decree of *B. Horsbrugh*, Acting District Judge of *Vizagapatam*, in Original Suit No. 6 of 1876.

The facts of the case and the arguments of Counsel are fully set forth in the **Judgments**.

The Advocate-General (Hon. *P. O'Sullivan*) for the Appellant.

Mr. *Gould* for the Respondent.

Kernan, J.—The question in this case is whether plaintiff's cause of action is barred by *Limitation*, Act IX of 1871.

The defendant executed a bond, dated the 6th of April 1867, for Rs. 6,000 payable by eight equal yearly instalments of Rs. 750 each, the first instalment to be paid on the 18th of February 1868, and the other instalments to fall due on the 18th of February in each succeeding year until the 18th of February 1875. The bond recited that the Rs. 6,000, debt was made up thus: Principal sum Rs. 4,000, interest calculated in advance Rs. 2,000. There was a provision in it that, in default of payment of any instalment, the whole sum then remaining unpaid should become due with one per cent. per month interest. The bond was executed to *Nishankuni Ramchandra Patrudugaru* Dewan, the *Merangi* Dewan, but he was only a trustee for plaintiff.

[62] Default was made in payment of the first instalment due on the 18th February 1868, and on the 26th of May 1868 the defendant paid Rs. 750, the first

* Appeal No. 98 of 1879, against the decree of B. Horsbrugh, Acting District Judge of Vizagapatam, in O. S. No. 6 of 1876, dated 29th April 1879.

instalment, and such payment was endorsed on the back of the bond and signed by the defendant. Defendant at the same time paid interest on that instalment from 18th February to 26th May 1868, *viz.*, Rs. 22-8-0.

The second instalment fell due on the 18th of February 1869, also the third instalment fell due on the 18th of February 1870, and the fourth instalment on the 18th of February 1871. Default was made in payment of each and all of these instalments.

On the 21st October 1871 the first defendant paid, through second defendant, into the Treasury of the Collector of *Vizagapatam*, who was then acting as Agent for the Court of Wards (who were in possession of the estate of the plaintiff), the sum of Rs. 937-8-0 towards the amount of the bond.

That sum was put to the credit of the bond, but it does not appear whether it was allocated to the payment of principal, or interest, or of both. It was, however, accepted by the Collector, and no proceedings to collect the amount of the bond were taken until this suit was filed on the 15th of February 1876. In the meantime, the defendant wrote three letters containing acknowledgments of the debt being due, and promises to pay the same, *viz*:—

(1) A letter E, 1st June 1873, to *Nishankuni Ramchandra Patrudugaru*, which contains a clear promise to pay the balance.

(2) A letter from same to same, 16th November 1873, also containing a clear promise to pay.

(3) A letter to the Collector acting as Agent of the Court of Wards, dated the 18th January 1875, from the defendant, stating that Rs. 1,700 was paid towards the sum of Rs. 4,000.

If the debt was not barred by *Limitation* at the time of the writing by defendant of any of those letters, then it was not barred when this suit was filed. There is no doubt that the payment of the Rs. 750 on the 26th of May 1868, and the endorsement by defendant in his writing of the payment, created a new starting-point for three years from the 18th February 1869, Section 21, Act IX of 1871. If within three years after that date **[63]** nothing had taken place to create a new starting-point for three years, then the debt should have been barred on the 19th February 1872.

The payment of Rs. 937-8-0 on the 21st of October 1871 was not made (so far as it appears) at the time either on account of principal or of interest *expressly*, nor does the plaintiff appear to have appropriated it to either. It must be taken, therefore, as a payment on account of both. The letter of the 18th of January 1875 must refer to it and the first payment, when referring to the payment of Rs. 1,700 on account of the debt of Rs. 4,000. This letter was more than three years after the payment of the Rs. 1,700, and could not (if the debt was then barred) be relied on to save the statute. But it is used as evidence of an admission in writing by the defendant of part payment of the principal at the time it was made. We think, however, that as it was outside the three years from the payment, it cannot be taken as evidence of the fact of payment as the writing of the defendant to save the statute under section 21, Act IX of 1871.

The plaintiff, however, contends that by accepting the payment of the Rs. 937-8-0 at the time when he was entitled to enforce the provision making the whole unpaid sum recoverable in default, he thereby waived the benefit of that provision. He contends (and in this he is of course right) that it was open to him to waive his right to enforce that provision. Further, he says he did so waive the benefit of the provision. He contends that by his conduct in accepting the sum of Rs. 937-8-0, without any reservation of his

right to sue at once for the whole residue, he had precluded himself from suing the defendant at that time for the whole residue; and he argues that if he did immediately on such receipt, and before a next default, sue for such residue, the defendant could rely on plaintiff's conduct to defend the suit. Certainly plaintiff's receipt of the moneys and his conduct in not suing within a period of three years from February 1869 when not opposed by any circumstances to show that such conduct was *not* intended as a waiver, appear to afford evidence that the plaintiff did waive the benefit of the provision.

This question of waiver has not been tried, and we cannot say that the evidence in the case is such as to enable us to form **[64]** a satisfactory opinion on the fact of waiver, either actual or by implication. Plaintiff's conduct might perhaps be held to amount only to an acceptance of so much on account of the whole residue then due by reason of the default.

We do not offer any opinion on the evidence as to whether the plaintiff did waive the benefit of the provision, as the evidence was not directed to this point, there being no issue thereon; nor do we suggest any views either way, which occur to us on the evidence. Defendant, however, contends that as the plaintiff had (by accepting the first instalment after default) waived at that time the benefit of the provision, he cannot, on the construction of Article 75, Act IX of 1871, waive a second or subsequent default. The language of that article is somewhat ambiguous. But as the plain intention of it is that the creditor may, on the one hand, waive the benefit of the provision (which made the whole residue payable on any default), so, on the other hand, the debtor may, by the conduct of the creditor, have the advantage of such waiver by getting the extended time for payment, and be relieved from such provision. There seems no reason on principle why such waiver should be confined to a first default, and we think we do no violence to the language of Article 75 if we give effect to the intention of the Legislature in holding that there may be a waiver by the creditor not only of the first default, but of any subsequent default.

Article 75, Act IX of 1871, introduced for the first time into the Statute Law of *Limitation* the principle of waiver on default of a provision such as in this case.

However, this Court at 5 Mad. H. C., pp. 198-9, applied the principle thus:—

"We are of opinion that when a sum of money is payable under a bond by instalments, with a condition that in default in paying one instalment the whole amount should then become due, and default is made, but the obligee subsequently accepts payment of one or more sums as an instalment or instalments due under the bond, such acceptance amounts to a waiver of the condition of forfeiture and puts an end to the cause of action which had accrued, so that the bond is set up again as a bond payable by instalments, and no cause of action under the condition arises until some fresh default is made in payment of a subsequent instalment."

[65] That decision was published in February 1870, and was followed by Act IX of 1871. Act XV of 1877, in the Article 75, is the same as Article 75 of the Act IX of 1871, but adds the words "in respect of which there is no such waiver," thus making it clear that waiver may be repeated.

We shall direct the following issue to be tried upon such further evidence as the parties may adduce; the finding thereon, together with the evidence, to be returned to this Court within two months from the date of receiving this order:—

"Whether the plaintiff, or those acting for him, waived the benefit of the provision (that the whole amount of the bond should be payable in default of payment of any instalment) at

any time after default in payment of the instalment which fell due on the 18th of February 1869, and, if so, when ?"

We shall ask the District Judge to call for the orders, accounts, and letters, if any, from the defendants, or either of them, to the Collector or to the plaintiff regarding the second payment.

Muttusami Ayyar, J.—I am also of the same opinion. Upon the true construction of the documents sued upon, the provision that the remainder of the debt shall become payable on default in the payment of any instalments creates a case of election for the benefit of the creditor both on the first and every subsequent default. I do not think there can be only one waiver, though no doubt the creditor can elect but once to *enforce* the alternative provision in the document. On comparing Section 75, Act XV of 1877, with Section 75, Act IX of 1871, which governs this case, we do not find in the latter enactment the words "in respect of which there is no waiver" ; but the intention seems to have been to recognise the provision in the document as creating a case of election, and there is, therefore, no reason why, if the provision can be waived once, it cannot be waived again.

There is no doubt, as observed by the District Judge, that unless the second payment was really made on the 21st October 1871—and it is sufficient to give a fresh starting-point—acknowledgments of the debt on the 1st June 1873, 20th July 1874, and the 18th February 1875 cannot save the statute, inasmuch as the second default was made on the 18th February 1869. Though there is but one witness who speaks to this payment, his evidence **[66]** is corroborated by the recital in C that Rupees 1,700 had been paid on account of the debt.

Before deciding whether the second payment is sufficient to save the statute, I desire to ascertain whether, in the circumstances in which it was made, it was accepted in satisfaction of any specific instalment, and whether the alternative stipulation in the document A was intended to be waived. As to the contention that the acceptance of a part of the debt is necessarily a waiver of the right to the immediate payment of the whole, I have to observe that the question is not whether time was given for payment of the residue, but whether the specific provision for payment by instalments was intended to be continued after the fresh default. The question whether the alternative condition was waived or not is one of fact, and the bare part payment consists alike with an intention to grant time for payment of the residue or to waive the benefit of the particular condition.

I would also ask the District Judge to call for the Collector's order, and the accounts and the letter, if any, from the defendants, or either of them, regarding the second payment. *

NOTES.

[INSTALMENT BOND—WAIVER—

i. If an overdue instalment is accepted, it may be evidence of waiver of the forfeiture provided in the bond :—(1889) 12 Mad. 192 ; (1902) 31 Cal. 297 ; (1904) 27 Bom. 1 ; (1909) 19 M. L. J. 372=32 Mad. 284.

ii. Though mere abstinence from suing on forfeiture will not amount to waiver :—(1884) 7 Mad. 577 ; (1884) 7 Mad. 583 ; (1902) 31 Cal. 297 ; (1909) 32 Mad. 284=19 M. L. J. 372.]

*NOTE.—*See* I. L. R., 1 Bom., 131 ; I. L. R., 2 All. 326 ; 1 M. H. C. R., 209 ; 7 M. H. C. R., 293 ; 5 M. H. C. R., 198 ; 5 Bo. R. A. C., 35; 11 Bo. R., 155 ; 2 N. W. P. 83 ; 5 N. W. P. 35 ; 6 N. W. P. 88 ; 2 B. L. R. A. C., 345 ; 3 B. L. R. A. C., 16.