

VENKATA-
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authority. The course of decisions therefore does not support the opinion of the Judge.

We set aside his order and direct him to readmit the plaintiff and deal with it in accordance with law. The costs of this appeal will be costs in the cause.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

NAGAPPA (PLAINTIFF),

v.

ISMAIL (DEFENDANT).*

1889.
Jan. 28,
Feb. 6.

Limitation Act—Act XV of 1877, sch. II, art. 75—Bond payable by instalments—Default in payment of an instalment—Waiver of a condition of forfeiture on default in payment of one instalment—Acceptance of an instalment overdue.

A bond, payable by instalments, provided that if default was made in paying one instalment the whole debt should become due. The amount of the third instalment was paid five days after it became due. The Lower Court found that this payment was accepted by the obligee as a payment made on account or in satisfaction of the third instalment, and not as a mere part payment in reduction of the whole debt, and that the circumstances indicated an intention to waive the forfeiture though there was no express waiver :

Held, that the acceptance of the amount of the third instalment constituted a waiver within the meaning of art. 75, of sch. II, of the Limitation Act, 1877.

CASE stated for the decision of the High Court under s. 617 of the Code of Civil Procedure by V. Subramanyam, District Munsif of Penukonda, in small cause suit No. 122 of 1888.

The case stated is recited sufficiently for the purpose of this report in the judgment of the High Court.

The bond executed by the defendant to the plaintiff upon which the case arose ran as follows:—

“ Bond dated 15th Makasudda of the year Vikrama, executed and given to Tadimari Mallappa, guardian of Namagundha Nagappa, by Gudhudi Fakir Saheb’s son, Pedda Ismail Saheb, residing in Jadala.

“ The whole of the interest up to date in the matter of former account and bonds being deducted, the sum due in the matter of

* Referred Case No. 15 of 1888.

principalis Rs. 55-14-0, in letters rupees fifty-five and annas fourteen. Particulars of instalments which were arranged :—

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- “ Rs. 9-5-0, 15th Makasudda of Vishu.
 „ 9-5-0, 15th Makasudda of Chitrabhanu.
 „ 9-5-0, 15th Makasudda of Swabhanu.
 „ 9-5-0, 15th Makasudda of Tarana.
 „ 9-5-0, 15th Makasudda of Parthiva.
 „ 9-5-0, 15th Makasudda of Vyaya.

“I bind myself to pay according to these instalments. If I fail to pay in that manner, and should I fail as regards any instalment, I bind myself to pay, without having reference to subsequent instalments, with interest at Rs. 1-8-0 per cent. per month from the date of the execution of the bond. I bind myself to get the payment entered only below this bond. The payments which are not entered in this bond shall not be accepted. To this effect is the bond executed and given with my consent.

“ Mark of PEDDA ISMAIL.

“ Witnesses to this—

“(Signed) KARNAM CHANNAPPA, witness.

“(Signed) MOVURAPPA, witness.”

The bond bore the following endorsements, each being signed for the debtor :—

“ Paid towards (the amount of) this bond on the 12th Makasudda of Vishu Rs. 9-5-0.

“ Paid on 10th Makasudda of Chitrabhanu Rs. 9-5-0.

“ Paid on the 5th Magha Bahula of Swabhanu towards this bond Rs. 9-5-0.”

Act XV of 1877, sch. II, Art. 75, to which the question referred related, enacts that for a suit “on a promissory note or bond payable by instalments, which provides that, if default be made in payment of one instalment, the whole shall be due,” the period of limitation is three years; and, that the period begins to run “when the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made, in respect of which there is no such waiver.”

The parties were not represented.

The Court (Muttusami Ayyar and Wilkinson, JJ.) delivered the following

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JUDGMENT:—This is a reference made by the District Munsif of Penukonda under s. 617 of the Code of Civil Procedure. The defendant executed in plaintiff's favor a bond for Rs. 55-14-0, payable in six equal annual instalments, commencing on the 15th day of Makasudda of the year Vikrama, corresponding to the 14th February 1881. The bond stipulated that, if default was made in paying any one instalment, the whole debt was recoverable at once with interest at 18 per cent. per annum. Four instalments were paid, and the payments of the first three were endorsed on the document. The third instalment was accepted on the 16th February 1884, five days after it had fallen due. It appears that the fourth instalment was also accepted when it was overdue, but its payment is not endorsed on the bond, nor evidenced by writing. The plaintiff sued to recover the fifth and sixth instalments alleging that fresh default had been made in payment of the fifth instalment. The suit was brought within three years from the date on which the fourth instalment fell due, but it would be barred if the cause of action is taken to have arisen when default was made in payment of the third instalment. Upon these facts, the question referred to us is, whether acceptance of an instalment in arrear amounts to a waiver within the meaning of Limitation Act, sch. II, art. 75.

It is provided by art. 75 that time begins to run when the first default is made, unless where the payee or obligee waives the benefit of the provision (under which the whole debt becomes due), and then when fresh default is made, in respect of which there is no such waiver. It was held in *Papamma Row v. Toleti Venkaiya*(1) that if the obligee accepted one or more sums as an instalment or instalments due under the bond, such acceptance amounted to a waiver of the condition of forfeiture, and put an end to the cause of action which accrued, so that the bond was set up again as a bond payable by instalments. In *Satracherla v Setarama*(2) it was observed that the clause providing for forfeiture of the right to pay the debt by instalments creates a case of election for the benefit of the creditor at each default, that the creditor may waive the benefit of the provision on each occasion, and that the question whether there is a waiver on any particular occasion is one of fact. It was also pointed out there that it must be ascertained whether

(1) 5 Mad. H.C.R., 198.

(2) I.L.R., 3 Mad., 65.

the payment was accepted on account of a specific instalment, so that an intention to waive the forfeiture might be inferred, or as a mere part payment of the balance due. According to the decisions, therefore, in this Presidency the acceptance of a payment as the instalment in arrear under the bond and in its satisfaction is a waiver. It was similarly held in *Cheni Bash Shaha v. Kadum Mundul*(1) that a waiver consists in the receipt of an instalment after due date instead of insisting on payment in full. The decision in *Gumna Dambershet v. Bhiku Hariba*(2) was passed with reference to Limitation Act XIV of 1859. It was no doubt observed in *Mumford v. Peal*(3) that the abandonment of a right accruing on default and the revival of the right to pay the debt by instalments must be established by cogent evidence. In that case it was held that mere acceptance of a payment after a default had been made in the payment of an instalment was not sufficient proof of a waiver, because the acceptance of the payment was an act consistent, as explained in *Satracherva v. Setarama*(4) with an intention to treat it as a part payment on account of the balance due. The mere acceptance of a payment after default in the payment of an instalment may not be sufficient, but when the payment is accepted on account of the specific instalment in arrear as contradistinguished from a part payment on account of the whole debt, there may be sufficient evidence of a waiver. Hence it was that this Court observed in *Papamma Row v. Toleti Venkaiya*(5), that the payment must be accepted as a payment on account of an instalment or instalments due under the bond. It is not necessary that the creditor should say expressly that he waives the forfeiture, but it is sufficient if from the amount paid and accepted and the circumstances attending the payment, and the conduct of the parties, an intention to set up the bond notwithstanding the default as one payable by instalments is unequivocally indicated. In the case before us, the District Munsif finds that the payment made after the third instalment had fallen due was accepted as a payment made on account and in satisfaction of the third instalment, and that an intention to waive the forfeiture is sufficiently indicated.

Our answer, therefore, to the question referred to us is that the

(1) I.L.R., 5 Cal., 100.

(2) I.L.R., 1 Bom., 125.

(3) I.L.R., 2 All., 863.

(4) I.L.R., 3 Mad., 65.

(5) 5 M.H.C.R., 198.

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acceptance of the amount of an instalment in arrear on account or in satisfaction of such instalment and not as a mere part payment in reduction of the whole debt amounts to a waiver within the meaning of Act XV of 1877, sch. II, art. 75.

APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Muttusami Ayyar.*

QUEEN-EMPRESS

v.

ARUMUGA AND OTHERS.*

*Criminal Procedure Code, s. 297—Evidence of accomplice—Corroboration—
Misdirection to Jury.*

A Judge should caution a Jury not to accept the evidence of an approver unless it is corroborated: the omission to do so amounts to misdirection.

APPEAL against convictions by W. F. Grahame, Acting Sessions Judge of Tinnevely, and a Jury, in sessions case No. 30 of 1888 on charges of dacoity, house-breaking by night, and theft in a building.

The Sessions Judge said to the Jury in the course of his charge :—

“Witnesses, 1 *Gangan Pujari*, 2 *Virasinnu*, 3 *Gurusami*, and 4 *Solai Nadan*, are the only witnesses for the prosecution whose evidence is of importance. Of those witnesses, the fourth, *Solai Nadan*, is an approver. According to the evidence of those witnesses, a band of twelve or thirteen men, among whom were the prisoners and witness 4, *Solai*, made their way into the inclosure of the temple of *Gangai Amman* near *Vepalapati*, tied the hands of witnesses 1, 2 and 3, unlocked the door of the temple with a key which first witness, *Gangan Pujari*, had, and stole from the temple cloths, money and other articles worth about Rs. 300.

“The men also took some ornaments which had been worn by *Gangan Pujari* and his mother and sister, who slept at the temple that night. They then fastened up in the temple witnesses 1, 2