art. 15 of the Limitation Act. Our judgment will not have the effect of *setting aside the order* in the former suit. It will only be binding on the defendants personally; it will prevent them from unjustly and inequitably availing themselves of an order which was to some extent the result of their own mistake, and certainly of error on the part of the Court who made it.

The appeal will, therefore, be dismissed, and the appellants will pay to the respondents the costs of both hearings.

Appeal dismissed.

Before Mr. Justice Jackson and Mr. Justice McDonell.

IN THE MATTER OF CHENI BASH SHAHA (PLAINTIFF) *v.* KADUM MUNDUL (DEFENDANT).*

1879 *May* 19.

Limitation—Contract to pay by Instalments—Default in paying an Instalment of a Debt payable by Instalments—Act IX of 1871—*Act XV of* 1877, *sched. ii, art.* 75.

When a debt is made payable by instalments, with a proviso that, on default of payment of any one instalment the whole debt, or so much of it as may then remain unpaid, shall become due, limitation runs, under Act IX of 1871 or Act XV of 1877, from the time of the first default. A subsequent acceptance of the instalment in arrear operates as a waiver, and suspends the operation of the law of limitation; but merely allowing the default to pass unnoticed does not.

THIS was a reference to the High Court from the Judge of the Small Cause Court at Kooshtea, and the facts appear from the order of reference, which was as follows:—

A plaintiff sues the defendant for recovery of certain moneys due upon an instalment-bond purporting to have been executed by the latter. The bond is dated the 28th Pous 1281 (11th January 1875), and it contains a provision that, on default of payment of one of the instalments the whole of the money secured would become exigible. The two first instalments were respectively due in Cheyt 1281 (March 1875) and Bhadro 1282 (August

* Small Cause Court Reference, No. 600 of 1879, from an order made by Baboo Bulloram Mullick, Officiating Judge of Small Cause Court at Kooshtea, dated the 17th April 1879.

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1875), and in respect to them plaintiff states in his plaint that they have been paid. The present action is instituted for the recovery of the subsequent kists.

The defence is, that no payments were ever made on account of the kistibandi in suit, and plaintiff's case is barred by limitation, it not having been instituted within three years of the date of the first kist. Article 75, sched. ii of the Limitation Act of 1877 is relied upon.

I have found as a fact upon the evidence adduced by plaintiff, that the two first kists set out in the instrument have not been paid; so that, if plaintiff had sued for their recovery, his suit would have been held as wholly barred by lapse of time.

The question to be determined is, whether the subsequent kists which, according to the terms of the instrument, became payable on the date the first kist was defaulted, are or are not barred by limitation?

It should be observed that, while Act XIV of 1859 was in force, there was no distinct statutory provision applicable to a case like the present. The reported decisions of the highest Courts of Appeal ranged themselves under two heads, *viz.*, those which threw out the claim of the obligee altogether on the ground of limitation, and those which left him to avail himself of the benefit of the doctrine of waiver.

In the case of *Hurronath Roy* v. *Maheroollah Mollah* (1), it was held, that limitation ran from the date of the default of the first instalment if the whole amount was payable on the happening of that contingency.

This view was adopted by the Madras High Court in *Karuppanna Nayak* v. *Nallamma Nayak* (2), and the Bombay High Court in the Full Bench case of *Gumna Dambershet* v. *Bhiku Hariba and another* (3).

Such was the state of the law prior to the passing of Act IX of 1871. In enacting art. 75, sched. ii of this Act, and also of the Limitation Act now in force, the legislature apparently made a sort of compromise between the absolute extinction of

(1) B. L. R., Sup. Vol., 618. (2) 1 Mad. H. C. Rep., 209.
(3) I. L. R., 1 Bomb., 125.

the obligee's right to recover on the ground of limitation, and the resuscitation of that right by reason of the principle of legal waiver. That article runs as follows :—

"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, limitation runs from the date 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 meaning of this is, that where the whole amount secured by the instrument becomes payable on default of payment of the first instalment, and the payee, instead of taking measures for the whole amount, accepts payment of the instalment defaulted, he must wait till there is a fresh default in the matter of recovery of the remainder. It would not do if the obligee, after accepting payment of the instalment defaulted, were to turn round and date the accrual of his cause of action, in regard to the whole amount, from the time of the first default. Such a procedure would certainly be anomalous in the extreme.

Now the question is, whether the non-receipt of a particular instalment, upon which the right of plaintiff to sue for the whole amount hinges, or suffering it to fall through by operation of the Statute of Limitation, is such an act of waiver on plaintiff's part as justifies him in counting the period of limitation differently. I think not. If this were so, waiver and laches would be convertible terms, and the object of the limitation law would be frustrated. The written instrument forming the basis of the plaintiff's claim is an instrument *inter partes*, and if the defendant is bound by its terms and covenants, plaintiff is bound no less. If then the plaintiff were to say, it is my instrument and my money, I do not care whether a particular instalment is paid or becomes barred, he thereby assumes an attitude hostile to the terms of the contract which he has accepted and which he has promised to abide by. I cannot believe that it was ever the intention of the legislature in enacting art. 75 to view *laches* as a particular form of waiver, far less as sustaining a right in the obligee, which, under any other circumstances, limitation would extinguish. If that was

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so, they would not have made it imperative on him to count limitation in the first instance from the date of the first default.

I think that the present action should have been instituted within three years of the date when the first instalment was payable and defendant committed default in payment. But as the question of law involved in the casedoes not appear to be free from doubt, I have thought it expedient to lay it respectfully before the Hon'ble Judges of the High Court for an expression of opinion.

I would, however, dismiss plaintiff's claim, with costs, contingent on the opinion of the Hon'ble Court.

The opinion of the High Court was given by

JACKSON, J.—We think this a very clear case; it must be determined with reference to the 75th article of the Limitation Act of 1877. At the time when the contract was entered into, the Act of 1871 was in force, of which, so far as concerns this case, the provisions were identical with those of the Act now in force.

By waiver in this case, we think, is meant a waiver of the condition by which in default in payment of any one instalment the whole amount unpaid became immediately payable. A waiver of that stipulation consists in the receipt of an instalment after due date, instead of insisting on payment in full. That is quite a different thing from an absolute sleeping on his rights. The creditor here has not waived the stipulation, but has simply allowed time to go on.

The time, therefore, began to run from the first default.