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health." I set aside the Magistrate's proceedings, and I direct that he take the evidence of the petitioner and her witnesses and otherwise dispose of the case in accordance with law and the above remarks, after having recorded a finding whether or not Lala Peare Lal has habitually treated his wife, the petitioner, with cruelty.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Straight.*

BUDDHU LAL (DECREE-HOLDER) v. REKKHAB DAS (JUDGMENT-DEBTOR).\*

*Execution of decree—Decree payable by instalments—Default—Waiver—Limitation.*

A decree was made for payment of the decretal amount by monthly instalments running over a period of twelve years; and it was provided that on default the decree-holder might execute the decree as a whole for the balance then due. In 1883 a default was made, and in 1884 the decree-holder filed an application for execution in respect thereof, but did not proceed with it, and continued to receive the monthly instalments. In 1887, he made another application for execution, in which he relied on the same default.

*Held* that the default if it was one had been waived by the decree-holder, and that such waiver was a good defence to the present application. *Mumford v. Peal* (1) and *Asmutullah Dalal v. Kally Churn Mitter* (2) distinguished.

THIS was an appeal under s. 10 of the Letters Patent from the following judgment of Tyrrell, J. :—

TYRRELL, J.—This is a very simple case. The parties agreed, and an order of Court was made, that the judgment-debtor should satisfy the decree-holder's claim against him by monthly payments of two rupees to be followed by the payment of such a sum in the twelfth year after the decree as would clear off the entire claim of the decree-holder. The decretal order to this effect was made on the 16th May, 1881, and this decretal order did not state from what date to what date each instalment was to be reckoned: that is to say, it was not recorded whether the months were to be counted from the 16th May, 1881, to the 16th June, 1881, and so on for future time, or, whe-

\* Appeal under s. 10 of the Letters Patent.

(1) I. L. R., 2 All., 857. (2) I. L. R., 7 Calc., 56.

ther the word "monthly" meant from the 1st of each month to the last day of each month subsequent to the 16th May aforesaid. The effect was that the judgment-debtor regularly on the 16th of each month paid his two rupees to the decree-holder down to the month of December, 1884. That instalment of two rupees for November-December, 1884, was not taken into his possession by the decree-holder until the 18th or 19th December, 1884. Subsequent to that month it is found by the lower appellate Court that the decree-holder continued to take his two rupees a month regularly from his judgment-debtor. Under the circumstances the lower appellate Court, agreeing with the Court of first instance, has found that the decretal order was ambiguous in respect of the precise date for the payment of the instalments, so that the Courts were unable to say with certainty whether the 16th of each month was the only date upon which the payment could be made in conformity with the decretal order; and the lower appellate Court further found that if there had been any irregularity in the payment for December, 1884, it would not disentitle the judgment-debtor to the advantages of the instalment arrangement, inasmuch as the decree-holder waived his right to execute the entire decree, and obtained a new agreement from his judgment-debtor, whereunder he continued to take monthly instalments from him as before the month of December, 1884.

The learned Judge in first appeal, therefore, decided that the application made by the decree-holder now long after the condoned irregularity of December, 1884, to execute the entire decree because of the judgment-debtor's default to pay his instalments, should not be allowed. I entirely concur with the Court below. In the first place, I agree that there is no evidence that the 16th of each successive month was the only legal date for the payment of the instalment. In the second place, I cannot disturb the finding of the lower appellate Court on the fact of waiver. It is true that a question of law is involved in the finding of waiver, but that is no reason for thinking that the lower appellate Court has erred in arriving on the evidence before it at the finding it has come to. Thirdly, there is another reason for upholding the decision of the lower Court,

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which is to be found in the circumstance that the Court executing the decree ascertained from the evidence before it that the payment of two rupees for December, 1884, was tendered by the judgment-debtor to the decree-holder, who designedly delayed acceptance of the same in order to build up for himself the materials for the pretension he now puts forward to break up the instalment arrangement and enforce the execution of his decree as a whole. I dismiss the appeal with costs.

From this decision the decree-holder appealed under s. 10 of the Letters Patent.

Pandit *Sundar Lal*, for the appellant.

Mr. *J. Simeon*, for the respondent.

EDGE, C.J.,—In this case a decree by consent was made for payment of the decreed amount by monthly instalments running over twelve years. It was provided that on default the creditor might execute the decree as a whole, that is, for the balance then due. In 1883, what the appellant here, who was the creditor, calls a default was made.

Apparently he prevented the payment being made on the stipulated day. He subsequently received instalments on the day fixed, assuming that that day was the 16th of the month, or if not on some other day, at any rate he received the instalments which were paid down to the date of the filing of the present application for execution on the 30th of January, 1887. The date of the default on which he relied was, we are informed, the 16th December, 1883. He had filed an application in 1884 for execution in respect of that default, but did not proceed with it. It is contended here that he can now rely on the default of the 16th December, 1883. In my opinion he waived that default if it was one. It is contended on his behalf that there could be no waiver. The case of *Mumford v. Peal* (1) has been cited, and also the case of *Asmutullah Dalal v. Kally Churn Mitter* (2). The case in this Court turned on the somewhat peculiar facts of the case, and does not, I think, apply. The case in the Calcutta Court was a question of limitation, and

(1) I. L. R., 2 All., 857.

(2) I. L. R., 7 Calc., 56.

looking to the judgment of the Judges there, I do not think that they would have held there could be no such waiver as has been contended for here. I think that at page 59 can be gathered an indication of what those Judges would possibly have said in this case. In dealing with cl. (6) of art. 179. sch. ii, Limitation Act (XV of 1877), they drew the distinction between the execution of a decree as a whole and the case of certain sums to be paid at dates certain. They say, "But the decree nowhere directs that the payment of the whole amount outstanding shall be made at a certain date. It only gives the decree-holder the option of applying for execution of the whole decree still unsatisfied, upon the occurrence of default in three of the prescribed instalments. Under the decree, therefore, the decree-holder had several courses open to him, subject, of course, to the rules of limitation." In cases of this kind I am of opinion that where there has been a default which would entitle the decree-holder to execute the decree as a whole, he must do so within three years of the default. But if he does not choose to execute the decree as a whole, he can go on receiving the instalments at the time fixed for the receiving of the instalments, and if any of those instalments are not paid he can, within three years, execute the decree for that instalment. I do not think that the Calcutta Court in the case to which I have referred is against the view of the law which I hold. I am clearly of opinion there was a waiver here, and that that waiver is an answer to the application to execute the decree as a whole, and that this appeal should be dismissed with costs.

STRAIGHT, J.—I am of the same opinion. My brother Tyrrell, before whom this appeal came from the decision of the Judge of Mainpuri, was of opinion that the decisions of the two lower Courts were right in holding that after the month of December, 1833, when the decree-holder said the default was made by the judgment-debtor, the decree-holder had received from his judgment-debtor no less than three years' monthly instalments, and that while he had in fact, on the 2nd of January, 1887, accepted the last monthly instalment of two rupees, he nevertheless came into Court on the 3rd of the

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same month with this application treating the matter as if nothing had been paid in the interim, and going back to the month of December, 1883, as the date of the default which had been the ground of the original application for the execution of the whole decree. If the argument of the learned pleader for the decree-holder were carried to its logical conclusion, he might, by merely filing an application every three years, have gone on receiving instalments till the eleventh year, and then have come in and asked for the execution of the whole decree, which seems to me absurd. There is enough stated in the judgments of the two first Courts to satisfy me, as it satisfied my brother Tyrrell, and satisfies the learned Chief Justice, that there was a waiver by the decree-holder of his right to execute his whole decree in respect of the alleged default in December, 1883. I may, however, add that the two first Courts on the evidence came to the conclusion that there never was any real default at all. On that finding alone my brother Tyrrell was right. The appeal is dismissed with costs.

*Appeal dismissed.*

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 August 5.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

RAJ SINGH AND ANOTHER (JUDGMENT-DEBTORS) v. PARMANAND (DECREE-HOLDER).\*

*Mortgage—Decree for sale of mortgaged property—Decree not satisfied by sale—Recovery of balance due on mortgage—Act IV of 1882 (Transfer of Property Act), ss. 88, 89, 90.*

The decree contemplated by s. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree.

THIS was an appeal from a decree of the District Judge of Aligarh reversing a decree of the Munsif of Haveli. The judgment of the District Judge was as follows:—

“In this case the appellant had obtained a decree against the respondents as legal representatives and heirs of a mortgagor under the terms of s. 88 of the Transfer of Property Act. The mortgaged

\* Second Appeal No. 1099 of 1888 from a decree of H. F. Evans, Esq., District Judge of Aligarh, dated the 4th July, 1888, reversing a decree of Maulvi Saiyid Akbar Husain, Munsif of Haveli, dated the 21st March, 1880.