APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

NOBODIP CHUNDER SHAHA (PLAINTIFF) *v.* RAM KRISHNA ROY CHOWDHRY AND ANOTHER (DEFENDANTS).* 1887 *April* 13.

Instalment bond—Default in one instalment the whole amount to fall due—Waiver—Limitation Act (XV of 1877), Sch. II, Art. 75.

The mere fact that a creditor has done nothing to enforce a condition in an instrument, under which the whole debt became due on failure in the payment of one instalment, is no evidence of waiver within the meaning of Art. 75 of the Limitation Act.

THE plaintiff sued to recover Rs. 1,500 on a *kistibundi* (instalment bond) executed by the defendant in favor of one Modhu Sudun Chowdhry on the 9th January, 1882, Modhu Sudun Chowdhry having sold his rights under the *kistibundi* to the plaintiff on the 5th December, 1882.

Under this *kistibundi* the defendant had stipulated to pay the sum of Rs. 2,350 with interest in 23 fixed instalments, the first of such instalments falling due in Joisto 1289 (from 14th May to 14th June, 1882) and the last in Aughran 1294 (from 14th November to 14th December, 1887); further, having stipulated that, on default of any instalment, the whole amount recoverable under the *kistibundi* should then become due.

The first instalment was duly paid within the time fixed; the second of such instalments due in Bhadro 1289 (from 16th August to 15th September, 1882) was accepted by the plaintiff's vendor after the due date in Assin 1289 (from 16th September to 17th October, 1882); the third instalment due in Aughran 1289 (from 16th November to 14th December, 1882), was not paid; and the plaintiff on the 11th February, 1886, sued the defendant (Modhu Sudun Chowdhry being made a *pro-formâ* defendant) to recover the instalments due from Falgun 1289 (12th February to 13th March, 1883) to Aughran 1292 (15th November to 14th

* Appeal from Appellate Decree No. 2070 of 1886, against the decree of H. Peterson, Esq., Judge of Dinagepore, dated the 2nd of August, 1886, affirming the decree of Baboo Juggobundhoo Gangooly, Subordinate Judge of that district, dated the 22nd of March, 1886.

1887

NOBODIP CHUNDER SHAHA v. RAM KRISHNA ROY CHOWDHRY.

December, 1885), not including in his claim the remainder of the instalments falling due from 1292 to 1294 (1885—1887); and stating that the third instalment was not included in his claim inasmuch as that instalment was, at the time of suit, barred by limitation.

The chief defendant (who alone appeared in the suit) contended that the plaintiff not having claimed the total amount due under the *kistibundi* the suit was bad, and pleaded limitation.

The Subordinate Judge found the facts to be as above stated; and held that the plaintiff's cause of action arose on the 15th December, 1882, on failure of the payment due in Aughran 1289, and that he should have sued to recover the whole of the amount due under the *kistibundi* within three years from that date, and that, not having done so, the suit was barred under Art. 75 of Sch. II of the Limitation Act.

The plaintiff appealed to the District Judge on the ground that the terms of the *kistibundi* made it optional, and not obligatory, on the creditor to sue for the whole amount, and that the suit fell under Art. 74, Art. 75 only contemplating cases where the whole amount is not only forfeited by a single default but where also the entire amount is sued for. The District Judge dismissed the appeal, affirming the judgment of the lower Court.

The plaintiff appealed to the High Court.

Baboo *Sharoda Churn Mitter* for the appellant contended that Art. 75 did not apply, and that it was optional on the part of the plaintiff on default of any instalment either to sue for such instalment or for the total amount due under the *kistibundi*, and that what was done by the plaintiff amounted to a waiver of his right to sue for the whole amount.

Baboo *Guru Das Banerjee* for the respondent contended that the suit was barred, and that there had been no waiver, citing *Cheni Bash Shaha* v. *Kadum Mundul* (1), *Selhu* v. *Nayana* (2) and *Mumford* v. *Peal* (3).

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was delivered by

PETHERAM, C.J.—This is an action brought by the plaintiff against the defendants upon a bond executed by the defendants

(1) I. L. R., 5 Calc., 97. (2) I. L. R., 7 Mad., 577.
(3) I. L. R., 2 All., 857.

in his favor to secure payment of a sum of money by instalments; and the bond contains a proviso, the effect of which is that, in the event of any of the instalments being unpaid, the whole amount shall become due at once.....

The instalments have been unpaid for some time, and, as a matter of fact, the time the last payment was made was so long ago that, if the whole amount became due at that time, the cause of action would become barred; and upon that state of things the question that arises is, whether the mere fact that the creditor has done nothing but simply allowed the matter to sleep, without enforcing his remedy against the debtor, is any evidence of waiver within the meaning of Art. 75 of the Limitation Act.

We do not think it necessary to say what opinion we might have formed on this matter if it had not been already decided by judicial authority, because it has been so decided and is concluded by that authority. The decisions which have been reported, *viz.*, *Cheni Bash Shaha* v. *Kadum Mundul* (1), *Sethu* v. *Nayana* (2) and *Mumford* v. *Peal* (3), are clear authorities to show that, in the opinion of the Courts in this country, such a condition of things would be no evidence of waiver. The law on this subject must, therefore, in my opinion, be treated as having become settled. The Court below has held in this case that the last default was made so long ago that the time that has elapsed since then would be enough to bar the remedy. That Court has accordingly followed the authority of those cases, and has decided that the remedy is barred in this case; and, as I said before, without expressing any opinion which we might have entertained upon this point if it had been new matter, we think that, as it had been considered settled law in this country for so long a time, it is not desirable that this matter should be referred to the Full Bench and further questions raised upon it.

Therefore, following the decisions referred to in this case, we dismiss the appeal with costs.

Appeal dismissed.

T. A. P.

(1) I. L. R., 5 Calc., 97. (2) I. L. R., 7 Mad., 577.
(3) I. L. R., 2 All., 857.