1887

In re MULLA ADJIM.

No one appeared for the respondent.

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

CUNNINGHAM, J.—The first point which arises in this appeal is the question whether we have any right to hear it. We think we have not. The powers of appeal from the Court of the Recorder of Rangoon are of a special character, and are defined in s. 49 of Act XVII of 1875, which lays down certain money limits within which, and within which alone, an appeal lies to the High Court here. Then s. 28 of Act XL of 1858 provides that all orders passed under the Act shall be open to appeal under the rules in force for appeals in miscellaneous cases from the orders of such Courts. We might have felt some doubt as to the effect of these two provisions but for the provisions of s. 95 of the Burmah Courts Act, which expressly refers to Act XL of 1858, and in effect embodies it as one of the enactments of the Act itself.

We think, therefore, that it is perfectly clear that the appeal given in Act XL of 1858 is subject to the ordinary law of appeal as laid down in the Burmah Courts Act; and consequently, as in this case there is no specific money value which enables us to say that an appeal does lie to this Court, we must, following former rulings of this Court on the point, hold that no appeal lies. The present appeal must therefore be dismissed.

T. A. P. *Appeal dismissed.*

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

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March 11.

RAM CULPO BHATTACHARJI (DECREE-HOLDER) *v.* RAM CHUNDER SHOME AND OTHERS (JUDGMENT-DEBTORS).*

Decree payable by Instalments—Instalment, Failure of whole sum decreed to all due—Right of decree-holder to waive his right to execute the whole decree—Waiver—Limitation Act, XV of 1877, *Sch. II, Art.* 75.

A proviso, in a decree made payable by instalments, by which the whole amount of the decree is to become due upon default in payment of any instalment, is a proviso enuring for the benefit of the decree-holder

* Appeal from Order No. 406 of 1886, against the order of S. H. C. Taylor, Esq., District Judge of Burdwan, dated the 14th of July, 1886, reversing the order of Baboo Nundo Lall Dey, Munsiff of Bood Bood, dated the 7th of April, 1886.

alone, and he is at liberty to take advantage of it or to waive it as he thinks fit.

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RAM CULPO BHATTACHARJI v. RAM CHUNDER SHOME.

ONE Ram Culpo Bhattacharji obtained a decree against one Ram Chunder Shome on the 9th October, 1879, for Rs. 623-8, the decree directing that the said sum should be paid by instalments falling due on the 18th November in the year 1879 and the 14th November in the years 1880, 1881, 1882 and 1883, and that on default in the payment of any one of such instalments being made, the whole of the decretal money should immediately fall due.

The whole of the first instalment was not paid on the due date, but it appeared that the total amount of such instalment was subsequently received by the decree-holder; subsequently at different dates all other instalments due up to the 14th November, 1881, were received, and also a portion of the instalment due on the 14th November, 1882.

On the 11th November, 1885, the decree-holder applied for execution of the balance remaining due under the decree; this application after notice had been served on the judgment-debtor was struck off. And on the 18th January, 1886, the decree-holder again applied for execution.

The judgment-debtor contended that, inasmuch as more than three years had expired from the 18th November, 1879, the date of the default made in payment of the first instalment, the application was barred by limitation.

The Munsiff held, on the authority of *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (1) that, although execution for the full amount of the decree could have been taken out after failure of the payment of the first instalment, yet it was open to the decree-holder to waive his right to take out execution for the whole amount, and that, the application having been made within three years from the 11th November, 1885, execution was not barred.

The judgment-debtor appealed to the District Judge, who held that the decree-holder was not entitled to waive his right to take out execution for the whole decree after default made; that the words of the decree left him no option in the matter; that he was bound to apply for execution of the whole decree within three

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years from the 18th November, 1879; and that therefore the application was barred under Art. 179 of the Limitation Act.

The decree-holder appealed to the High Court.

Baboo *Rash Behary Ghose* for the appellant contended that the decree-holder was at liberty to waive his right to execute the decree as a whole on the failure in the payment of an instalment, citing *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (1); that leases often contained covenants for re-entry on failure in payment, and that it was open to the lessor to waive his right to re-enter, and to sue for subsequent rent, and that the present case was analogous to such cases.

Baboo *Srinath Das* for the respondent.

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

PETHERAM, C.J.—We think that this appeal must be allowed. The question is whether a particular decree is barred by limitation. The decree is a decree for the recovery of a certain sum of money by instalments, and it contains a proviso that, in the event of default in the payment of any of the instalments, the whole sum shall become due. It is found, as a fact, that default was made in the payment of one instalment, and therefore the creditor might, if he had thought fit, have issued execution for the whole amount due under the decree, and that at a period which is so long ago that, if he was obliged to do it, his remedy is now barred by limitation; and consequently the only question is whether, when default is made under such circumstances, the judgment-creditor is bound, at his peril, to put his decree into force for the whole amount, and whether, if he does not, the Statute runs against him.

A good deal has been said about the wording of the decree, but we do not think it very material that we should consider the precise wording. The proviso by which the whole amount of the decree becomes due upon default in payment of any one instalment is a proviso which, look at it how you will, is put in for the benefit of the creditor, the decree-holder, and his benefit alone; and when a proviso is put into a contract or security,

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and in "security" I include "decree," for the benefit of one individual party, he can waive it, if he thinks fit, and consequently the only question which arises in a case of this kind is the same question as that which arises under Art. 75 of Sch. II of the Limitation Act, namely, whether the decree-holder did, at the time when default was made, waive his right to the whole sum that was decreed to him or whether he did not.

On the findings in this case, and on the facts in this case, we do not think there can be any doubt that he did waive it, because what he says, and what is uncontradicted, is that, although there was a default in the payment of an instalment, the creditor accepted so much of it as was not paid at the time afterwards, and therefore it is obvious that he did waive it, because he did not, as he was not bound to, insist upon putting into force the decree for the whole amount; and inasmuch as this proviso was for his benefit he might or might not take advantage of it as he pleased. Under these circumstances we think that this creditor did waive the right which he had under the decree to enforce it for the whole amount in the event of a default being made in the payment of any instalment, and having waived it, the decree still remained a decree for the recovery of the sum decreed by instalments, and therefore the Statute of Limitations did not run against him.

For these reasons we think that the Judge was wrong in holding that this decree was barred by limitation, and his judgment must be reversed with costs.

T. A. P. *Appeal allowed.*

CRIMINAL REFERENCE.

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

QUEEN-EMPRESS *v.* CHANDU GOWALA AND ANOTHER.*

1887 *March* 21.

Magistrate, Jurisdiction of—Criminal Procedure Code (Act X of 1882), s. 349 — Penal Code, Act XLV of 1860, s. 411—Receiving stolen property.

Under s. 349 of the Criminal Procedure Code a Second Class Magistrate transmitted a case to the District Magistrate, being of opinion that a more

* Criminal Reference No. 51 of 1887, made by T. Smith, Esq., Sessions Judge of Gya, dated the 12th of March, 1887.