

## APPELLATE CIVIL.

1907  
March 14.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

MAHARAJA OF BENARES (PLAINTIFF) v. NANDI RAM AND ANOTHER  
(DEPENDANTS).\*

Act No. XV of 1877 (Indian Limitation Act) Schedule II, Article 75—Bond—Instalments—Waiver of right to recover whole amount on non-payment of instalment—Limitation.

Where money secured by a bond is payable by instalments, with a condition that the whole amount secured will become due upon non-payment of any instalment, the creditor is not bound to enforce this condition, but he may accept payment of instalments after due date—thereby, impliedly waiving his right to sue for the whole amount due—and may sue upon a subsequent default in payment of any future instalment. *Basant Lal v. Gopal Pershad* (1) distinguished.

THE plaintiff in this case gave a lease of certain property to the defendants for a term of fourteen years, from 1305 to 1319 Faslî. At the date of the lease there were certain arrears of rent due by the tenants of the property leased. These arrears the lessees agreed to pay, and they executed a bond for the same, payable by instalments. The instalments for 1305 and 1306 Faslî were paid, although not upon the due dates. The instalments due for 1307 to 1309 Faslî not having been paid, the plaintiff sued to recover them. The defendants pleaded that as the first instalment had not been paid upon due date, according to the terms of the bond, the whole amount secured thereby became due and payable at once, and the suit was therefore barred by limitation. The Court of first instance (Munsif of Mirzapur) decreed the plaintiff's claim, but upon appeal the lower appellate Court (District Judge) upheld the contention that the suit was time-barred and allowing the appeal dismissed the suit. The plaintiff thereupon appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* (for whom Dr. *Tej Bahadur Supru*), for the appellant.

Mr. *M. L. Agarwala*, for the respondents.

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\* Second Appeal No. 604 of 1906, from a decree of Syed Muhammad Ali, District Judge of Mirzapur, dated the 23rd of May 1906, reversing a decree of Behari Lal Merh, Esq., Munsif of Mirzapur, dated the 31st of January 1906.

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MAHARAJA  
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STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit brought by the plaintiff for recovery of arrears of instalments payable under a bond given to him by the defendants. The plaintiff gave a lease to the defendants of certain property for a term of 14 years, namely, from 1305 to 1319 Fasli. At the date of the deed there were arrears of rent due by the tenants, and the defendants agreed to pay the amount of these arrears, and executed a bond for the same, payable in instalments. The instalments payable for the years 1305 and 1306 were paid, but not upon the dates fixed for payment, but thereafter. The suit which has given rise to this appeal was then instituted by the plaintiff for the instalments for the years 1307—1309 Fasli. His claim was met by the defence that the first instalment was not paid when it fell due, namely, on the 4th of June 1898, and that consequently under the provisions of the bond all the instalments became forthwith due and payable, and this being so the claim is barred by limitation. The Court of first instance decreed the plaintiff's claim, but upon appeal the learned District Judge upheld the contention that the suit was barred and dismissed the plaintiff's claim. An appeal from this decree is now before us.

A number of authorities have been quoted, including the case of *Basant Lal v. Gopal Parshad* (1), in which the question as to the rights of a creditor in respect of bonds payable by instalments was considered. It appears to us that a case of this kind must be decided in view of the language of the particular bond which is the subject of litigation. In the bond sued on there is a provision enabling the creditor on failure on the part of the defendants to pay any instalments on the appointed date, to sue for and recover the entire amount of instalments then remaining unpaid. This option is given to him in very clear terms. The words are '*har guna ikhtiar hoga,*' that is, it will be in his power to sue for the entire amount. When the first instalment became due on the 4th of June 1898, the plaintiff did not take advantage of the provision in the bond inserted for his benefit and sue for the entire debt, but accepted payment of the instalment for that year, as also the instalment payable for the succeeding year in various sums and at various dates. His forbearance to exercise the power given

(1) Weekly Notes, 1906, p. 198.

to him in the bond, is now set up as a defence to his suit for the recovery of the balance still remaining unpaid. The article of the Limitation Act which is applicable to the case is clearly article 75. That article prescribes a period of three years for the institution of a suit upon a bond payable by instalments from the time when the first default is made; but there is this important qualification, namely, unless where the payee or obligee waives the benefit of the provision; in that case limitation runs from the time when a fresh default is made in respect of which there is no such waiver.

The question then is whether or not the plaintiff in this case waived the benefit of the provision to which we have referred. There was no express waiver, but waiver may be implied, and it is implied when a person entitled to anything does or acquiesces in something else which is inconsistent with that to which he is so entitled; for instance, a landlord by acceptance of rent after a forfeiture of the tenancy is deemed to have waived his right to insist on a forfeiture. Here, it appears to us, the plaintiff impliedly waived his right to insist upon payment in a bulk sum of all the instalments remaining due when the first instalment was not paid on the 4th of June 1898, and he accepted payment of the instalments for two years in various sums at various dates. It would be very unfortunate if it were otherwise. It would be to punish a creditor for forbearance shown to his debtor, and compel him to press his demands at the earliest opportunity and insist upon speedy and full satisfaction of his claim. We cannot in this case take this stringent view of the law, which we are asked to do by Mr. *Agarwala*. We think that article 75 provides for this case and that under that article limitation starts from the time when the instalment for 1900 became payable. The suit was not therefore barred by limitation. We allow the appeal, set aside the decree of the lower appellate Court, and, as that Court has decided this case upon a preliminary question, namely, that the suit is barred by limitation, and we have reversed its decision on that question, and other issues have been left undetermined, we remand the appeal under the provisions of section 562 of the Code of Civil Procedure with directions that it be reinstated in the file of pending appeals and be decided on the merits. Costs here and hitherto will abide the event.

*Appeal decreed and cause remanded.*

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