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witnesses, but none on this point. They had competent legal advice, and it is not unreasonable to presume that their failure to produce this class of evidence was due to the fact that none existed.

Taking all the circumstances into account and making allowance for the fact that the symbol of elephant is a common feature of the tins and packets of chewing tobacco sold by the defendant and those of cigarettes and Virginia Bird's-eye tobacco sold by the plaintiffs, I am led to the conclusion that, while it is not impossible for some ignorant and particularly indiscriminating persons to mistake the defendant's goods for those of the plaintiffs, persons exercising ordinary caution are not likely to assume that the tobacco sold by the defendant was manufactured by the plaintiffs. Accordingly I answer the second question in the negative.

The answer to the first question should follow that to the second and I answer the first question also in the negative.

REVISIONAL CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

SUKH LAL (PLAINTIFF) *v.* BHOORA (DEFENDANT)*

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Limitation Act (IX of 1908), article 75—Simple money bond, payable by instalments, with default clause—Waiver—Nature of waiver—Must be by some overt act and not mere omission to sue.

In the case of simple money bonds, payable by instalments, with a default clause entitling the creditor to sue for the whole amount at once on the occurrence of a particular default, when once the whole amount has thus fallen due, and there is no waiver, time begins to run in respect of the entire amount under article 75 of the Limitation Act, and upon the expiry of the period prescribed thereby the whole amount becomes barred by limitation.

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The waiver mentioned in article 75 of the Limitation Act may be a purely one-sided act, and need not be for a fresh consideration proceeding from the debtor; it is not necessary that it should amount to any novation of contract or any other bilateral arrangement. The waiver may be by the expression of an intention to waive the benefit either by communication to the debtor or by any other overt act. A mere inaction or omission to sue within the prescribed period can not amount automatically to a waiver within the meaning of article 75.

Messrs. *K. N. Agha* and *Din Dayal,* for the applicant.

Mr. *R. K. S. Toshniwal,* for the opposite party.

RACHHPAL SINGH, J.:—This is a revision application against an order passed by the learned Judge of Small Cause Court dismissing the suit instituted by the plaintiff on foot of a simple money bond alleged to have been executed by the defendant on the 25th of June, 1925. Under the provisions of the bond in suit a sum of Rs.600 was agreed to be paid by the defendant in instalments of Rs.40 yearly within a period of 15 years. There was a further stipulation to the effect that in case of default of payment of any instalment the creditor would be entitled to recover the whole amount due on the bond at once. The defendant denied the execution of the bond. The learned Judge has found that the execution of the deed by the defendant was duly proved. He further found that the defendant had made no payment towards the bond. He, however, held that the suit was not within limitation, because the plaintiff had not instituted it within a period of three years from the date of the default as provided for under the provisions of article 75 of the Limitation Act. The plaintiff has preferred this revision against the order of the dismissal passed by the learned Judge.

The finding of the learned Judge of the Small Cause Court that the suit is barred has been challenged before us by the learned counsel appearing for the applicant. A large number of authorities were cited by him. After hearing the arguments of the learned counsel I am of opinion that the view taken by the learned Judge of

the court below is correct. In *Jawahar Lal* v. *Mathura Prasad* (1) the question as to whether a suit instituted to recover some instalments, on the basis of a bond like the one before us, and which was instituted more than three years after the whole amount had become due, was within limitation came up for consideration before a Full Bench of this Court. The case law on the point was exhaustively discussed by the CHIEF JUSTICE and it was decided that unless there was a waiver the suit would be governed by the provisions of article 75 of the Indian Limitation Act and would be barred. At page 126 the following remarks were made by the CHIEF JUSTICE:

"To hold that although limitation has run out under article 75 which applied to the facts of the case the creditor can still fall back on article 74 would be tantamount to holding that the starting points of limitation for purposes of recovering one and the same amount are different when the claim is to recover the whole or when it is to recover a part of it.

To my mind, when there is an option either to sue for the whole or to wait and the creditor exercises the option, the whole amount becomes due, and the question of a right to recover the instalments only does no longer arise. Cases where the whole amount has not become due are, of course, different, but where there is no question that the whole amount has become due by reason of the exercise of the option of the creditor, I am of opinion that the creditor cannot fall back on the alternative right of recovering instalments only after their successive dates."

KING, J., in the same judgment made the following remarks at page 144:

"The suggested interpretation of article 75 involves the view that although the instalment bond contains a default clause which entitled the creditor to sue for the whole amount as soon as the default was made, nevertheless it is open to the creditor to ignore the default clause and to treat the bond as if it were a simple instalment bond governed by article 74. With all due respect I am unable to accept the suggestion, as it seems to me that it conflicts with the provisions of article 75. If article 75 applies to the facts of this case, as I think it clearly does, then

(1) (1934) I.L.R., 57 All., 108.

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we are bound to give effect to it even though it may result in hardship to the creditor."

At another place, at page 142, KING, J., observed:

"I think that too much has been made of the so-called 'option' given to the creditor in the present case. The only option given is to sue for the whole sum either within the stipulated period or after it. It appears to me that this practically amounts to no option at all. I think it only amounts to this, that the creditor was to be entitled to sue for the whole sum even within the stipulated period as soon as default was made in the payment of two successive monthly instalments."

It may be remarked that the Full Bench case did not involve the question of "waiver". That has been made clear in the judgments passed by the three Judges who constituted the Full Bench. In the case before us the agreement, as already pointed out, was that as soon as there was a default the creditor became entitled to sue for the whole amount. Under the provisions of article 75 time would begin to run against him as soon as the default was made. He could have waived the benefit of this provision and in that case his suit for the recovery of the instalments would not have been barred by limitation, but before he can fall back upon the first clause in the bond entitling him to recover Rs.40 yearly, he had to decide as to whether or no he would exercise the option given to him to sue for the whole amount immediately. If he did not waive that option and allowed a period of three years to pass after the date of the default, then he cannot, after the expiry of the period of limitation, come and say now that he should be allowed to sue for the instalment or some of the instalments that remain still due. The reason is that by the time he instituted the suit for the recovery of some of the instalments his claim for the entire amount had become barred by limitation. I am, therefore, of opinion that the Full Bench ruling cited above is applicable to the case before us, unless the plaintiff can show that there was a waiver on his part. The learned Judge of the small cause court in his judgment has stated that

waiver was not pleaded, much less proved. Under these circumstances it must be held that the plaintiff's suit is barred by limitation. The learned counsel appearing for the applicant argued before us that the mere fact that his client refrained from suing for the whole amount after the default had been made in payment of one of the instalments amounted to a waiver. I find myself unable to accept this contention. There are a large number of decided cases in which it has been held that the mere fact that the plaintiff slept over his rights would not constitute a waiver in law. In *Abinash Chandra Bose* v. *Bama Bewa* (1) it was held that mere omission to sue is not a waiver as contemplated by article 75 of schedule I of the Limitation Act. At page 1013 the learned Judges who decided the case remarked: "The law was very clearly enunciated by WILSON, J., in *Mon Mohun Roy* v. *Durga Churn* (2), and we cannot improve upon the language which he employed. To hold that by merely doing nothing the plaintiff could give the go-by to the condition in the bond would, in our opinion, render nugatory the provisions of article 75." The question as to whether or not there has been a waiver is not a mere question of law. Its decision would depend on a variety of circumstances and the court will have to decide whether, having regard to the evidence in each case, a waiver had been established or not. As in the case before us the learned Judge of the court below has found that waiver was not pleaded and that it was not proved, so it must be held that the claim of the plaintiff was rightly dismissed. I therefore dismiss this application with costs to the respondent.

SULAIMAN, C.J.:—I concur, and would only like to add a few words, because some question has been raised as to what was decided by the majority of the Judges in the Full Bench case of *Jawahar Lal* v. *Mathura Prasad* (3). Several cases of this Court were

(1) (1909) 13 C.W.N., 1010. (2) (1888) I.L.R., 15 Cal., 502.
(3) (1934) I.L.R., 57 All., 108.

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cited by me in the judgment, in which article 75 had been applied to suits brought on the basis of bonds which contained a default clause. But it was never intended to be laid down, and was in fact not laid down, that whenever a suit is brought on the basis of a bond, no matter for what relief, the mere fact that the bond contains a default clause would make article 75 applicable to it. At page 123 I took pains to point out "that the mere fact that a bond contains a default clause of that nature would not necessarily make article 75 applicable, if the nature of the claim or the character of the suit be different, for instance where some other covenant in the document is being sought to be enforced . . . . or where the suit is brought for the recovery of the instalment that has fallen due and before there is such a default as makes the whole amount become due." In such cases article 74 would be applicable even though the bond contains a default clause. What was decided in the Full Bench case was that where there has been no waiver of the benefit of the provision of a default clause made by the creditor, and owing to a default the whole amount has become due, and a suit is brought to recover either the whole of that amount or only a portion of it after the expiry of three years from the date of the default (or 6 years if the deed be a registered one), then the whole claim is barred by time and the creditor cannot be allowed to say that he should get a portion of that amount because his suit should be treated as one falling under article 74.

In the Full Bench case, the decision proceeded on the assumption that there had been no waiver whatsoever of the benefit of the provision, and that the whole amount had become due and time had begun to run from the first default. It was accordingly held by the majority of the Judges that a creditor could not evade the law of limitation by saying that he would sue for a portion only of the amount which had become due.

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To such a case article 75 and that article alone was applicable, for when once the whole amount has fallen due and there is no question of waiver, then no question for future instalments arises, and a suit cannot be maintained when brought after the period prescribed for such suits under article 75 of the Limitation Act has expired.

It was also pointed out by me in that case incidentally, at page 127, that for a waiver "it is not necessary that there should be either a fresh contract between the parties or a fresh consideration proceeding from the debtor in order to bind the creditor by his choice". It seems to me that the words, "waives the benefit", in article 75 do not mean the same thing as availing oneself of the equitable doctrine of waiver, for which either fresh consideration, a fresh agreement or something amounting to an estoppel is necessary. That doctrine is invoked against a creditor, whereas the waiver of the benefit spoken of in article 75 is something exercised for the benefit of the creditor and not against him. The waiver therefore may be a purely one-sided act and need not be for consideration proceeding from the debtor. The waiver may be by the expression of an intention to waive the benefit either by communication to the debtor or by any other overt act. Waiver is a mixed question of law and fact, and, as pointed out by my learned brother, it depends on the circumstances of each case.

It necessarily follows that a mere inaction or omission to sue within the prescribed period cannot amount automatically to a waiver within the meaning of the third column of this article. To hold so would make this article nugatory and the first portion of the column altogether superfluous. Then in every case where there has been an omission to sue, there would necessarily be a waiver inferred as a matter of law and no further question of limitation would arise. I do not think that this is the meaning of that word. There is

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abundant authority for the view that waiver is something more than mere inaction or omission. But in my opinion it is not necessary that it should amount to any novation of contract or any new agreement for consideration or that it should be any other bilateral arrangement.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

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AJODHIA KALWAR AND ANOTHER (DECREE-HOLDERS) *v.* BALKARAN AND OTHERS (JUDGMENT-DEBTORS)*

Agra Tenancy Act (Local Act III of 1926), sections 199, 203—Interest of Thekadar—Saleability in execution of decree—Perpetual lease by owner of sir *plots—Lease of proprietary rights and not mere agricultural lease.*

According to section 203 of the Agra Tenancy Act, if the lease specifically grants the right of transfer the interest of the thekadar is saleable in execution of a decree.

Where the lessor is the sole proprietor of the plots and grants a perpetual lease thereof, giving to the lessee rights of inheritance and transfer, with full liberty to cultivate the lands himself or to get it cultivated by others, or to build houses or to plant groves thereupon, the lease is of necessity a lease of proprietary rights in the land and not a mere agricultural lease, and the lessee is a thekadar and not a mere non-occupancy tenant, and his interest is saleable in execution of a decree.

Messrs. *Mushtaq Ahmad, Gajadhar Prasad* and *Shankar Sahai Verma,* for the appellants.

Mr. *S. S. Sastry,* for the respondents.

SULAIMAN, C.J., and RACHHPAL SINGH, J.:—This is a decree-holders' appeal arising out of execution proceedings. The decree-holders had obtained a simple money decree against the judgment-debtors, and in execution of it they attached three plots of land belonging to the judgment-debtors. The latter objected that they were mere non-occupancy tenants of these

*Appeal No. 29 of 1933, under section 10 of the Letters Patent.