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The other case, S. A. No. 467 of 1869, was a suit to recover from one Nathi and another woman a sum of money due upon a bond alleged to have been executed by them jointly to the plaintiff. Nathi's defence was, *first*, that she had not executed the bond, and, *secondly*, that, being a married woman, she was incompetent to execute it and, therefore, not liable. Upon both of these points the Principal Sadar Amin found in her favour, and he accordingly rejected the claim. That decision, however, was reversed, on appeal, by the Assistant Judge, who held the bond proved, and also that Nathi was personally liable upon it, notwithstanding that her husband was alive. In special appeal against that decision she relied upon coverture as absolving her from all liability upon the bond sued on, which point was ruled against her, and the Court (Sir C. Sargent and Melvill, JJ.,) on the 17th January 1870 amended the Assistant Judge's decree "by striking out so much of it as makes" her "personally liable, and inserting words limiting" her "liability * * * to the extent of her *stridhan*, including the house mentioned in the bond."

We are of opinion that those cases were properly decided, and our reply to the Judge of the Court of Small Causes will accordingly be that a wife who has voluntarily separated from her husband without any circumstances justifying her separation, is liable for a debt contracted by her (even for necessaries), although without her husband's consent; but her liability is limited to the extent of any *stridhan* she may have.

[APPELLATE CIVIL JURISDICTION.]

February 16.

GUMNA DAMBERSHET (PLAINTIFF AND APPELLANT) *v.* BHIKU HARIBA AND ANOTHER (DEFENDANTS AND RESPONDENTS).

Limitation Act XIV. of 1859, *Section* 1, *Clause* 10—*Promissory Note payable by instalments—Waiver of default.*

A promissory note, dated 2nd April 1868, stipulated that the principal amount with interest was to be repaid by half-yearly instalments of Rs. 150 each, and that,

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in the event of any one of these instalments not being punctually paid, the whole amount was to become payable at once. Default was made in payment of the first instalment, which fell due on the 2nd October 1868. In an action brought on the 19th October 1871 for the recovery of the whole amount,

Held that the right to bring the suit under Act XIV. of 1859, Section 1, Clause 10, accrued to the plaintiff on the 2nd October 1868, and that, having omitted to bring it for more than three years, he was too late in instituting it on the 19th October 1871.

Held, also, that the plaintiff's right to the immediate payment of the whole amount was not, under the note, subject to be defeated by any subsequent payment, and that no such subsequent payment (assuming it to have been made) could, in the absence of any fresh agreement, supersede or suspend such right.

The proposition laid down in *Ramkrishna Mahádev* v. *Bayáyi Santáyi* (1) "that, although the instalments were not paid by the defendants at the times fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered, as regards both parties, as if made at the times fixed; and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment, or the defendants rely upon it as making the whole debt due and fixing the period from which the time of limitation ran," over-ruled, as there is nothing in Act XIV. of 1859 to give any such effect to an acceptance of part payment after the whole debt has become due.

THIS was a special appeal from the decision of Baron Larpent, District Judge of Poona, affirming the decree of Mahádev Govind Ránade, 1st Class Subordinate Judge at the same place.

The facts of the case are briefly these:—Gumna Dambershet sued Bhiku and another on a promissory note for Rs. 1,549, bearing date 2nd April 1868. The note was payable by half-yearly instalments of Rs. 150 each, and contained a stipulation that, in default of the payment of any one instalment, the whole amount of the principal money and interest should be paid at once. The first instalment, which fell due on the 2nd October 1868, was not paid on that date. The plaintiff, however, alleged that, about four months after this default, the defendants made and the plaintiff accepted payments on account of the first instalment. Default being made in payment of the second instalment (2nd April 1869), the plaintiff brought the present suit, on the 19th October 1871, to recover Rs. 1,900 on account of the principal sum and interest due on the promissory note. The defendants, among other objections, pleaded limitation, and contended that the cause of action arose at the time of the first default. Both the Lower Courts held the claim barred,

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on the ground that it had been brought more than three years after 2nd October 1868, when the first default was made. They, however, did not determine whether or not the amount of the first instalment was paid to, and accepted by, the plaintiff, as alleged by him, after the due date.

The only point argued in the special appeal was the question of limitation.

The special appeal first came on for hearing before WESTROPP, C. J., and NA'NA'BHA'I HARIDA'S, J., who referred it to the consideration of a Full Bench, in consequence of the conflicting rulings in *Rámkrishna Mahádev* v. *Bayági Santági* (1) and *Hurronauth Roy* v. *Maheroolah Moollah* (2) on the point of limitation raised in the case. Accordingly, the appeal was argued before WESTROPP, C.J., WEST and NA'NA'BHA'I HARIDA'S, JJ.

Dhirájlál Mathurádás (Government Pleader) for the special appellant:—The plaintiff (the special appellant) has alleged that, some time after the default in payment of the first instalment had been made, the defendants offered and the plaintiff accepted the amount of that instalment. If so, the case comes exactly within the principle laid down by Sir R. Couch in *Rámkrishna Mahádev* v. *Bayági Santági* (3), and the claim is not barred, as held in that case. That acceptance amounted to a waiver, on plaintiff's part, to demand the whole amount. Moreover, the acceptance may be regarded as evidence of a fresh agreement between the parties.

[WESTROPP, C.J.:—There is no allegation in the plaint of any such new agreement. Besides, there was no new consideration.]

The Full Bench case of *Hurronauth* v. *Maheroolah* (4), no doubt, is against me; but I rely upon the decision of our own High Court in *Rámkrishna* v. *Bayági* (5).

Bhairavnáth Mangesh for the special respondents:—This case is governed by Act XIV. of 1859. When limitation once begins to run under that Act, nothing can stop it, except the provisions of Section 4. That section does not provide that a claim once

(1) 5 Bom. H. C Rep. 35 A. C. J.
(2) 7 Calc. W. Rep. (F. B.) 21 Civ. Rul.
(3) 5 Bom. H. C. Rep. 35 A. C. J. (4) 7 Calc. W. R. 21 Civ. Rul.
(5) 5 Bom. H. C. Rep. 35 A. C. J.

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barred, is taken out of the law of limitation by part payment. The Full Bench ruling in *Hurronauth* v. *Maheroolah* (1) is a case exactly in point. In that case, the first instalment, paid and accepted after default, was held not to amount to the revival of a barred claim. There is a case, *Hullodhur* v. *Hogg* (2), which is opposed to the Full Bench ruling just cited. But that was a case under the old law of limitation in Bengal, viz. Regulation III. of 1793. He then referred to *Vengappaiyan* v. *Rajapaiyan* (3).

Dhirájlál Mathurádás in reply.

NA'NA'BHA'I HARIDA'S, J.:—This is a suit upon a promissory note dated the 2nd April 1868. The note, among other things, stipulates that the principal amount, with interest at 12 per cent. per annum, is to be repaid by half-yearly instalments of Rs. 150 each, and that, in the event of any one of those instalments not being punctually paid, the whole amount is to become payable at once.

The first instalment accordingly fell due on the 2nd October 1868, when it was not paid, and this suit was instituted on the 19th October 1871. The Subordinate Judge and the District Judge in appeal have both held it barred by the law of limitation; and the only question, therefore, which we have to determine now is, is it so barred?

The law of limitation applicable to this case is Act XIV. of 1859, of which Clause X., Section 1, provides as follows:—

"To suits brought to recover money lent or interest, or for the breach of any contract in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof, the period of three years from the time when the debt became due, or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered [within six months from the date thereof]" (4).

(1) 7 Calc. W. R. 21 Civ. Rul. (2) 1 Calc. W. R. 189 Civ. Rul.
(3) 1 Mad. H. C. Rep. 208.

(4) The words within brackets were altered by Act XX. of 1866, Section 27, to "within the time prescribed in that behalf by the Indian Registration Act, 1866."

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The promissory note in this case is "a written engagement or contract" within the meaning of that clause, which "could have been registered" under Act XX. of 1866, Section 18, "at the time and place of the execution thereof", but was not. The period of limitation, therefore, within which a suit may be brought upon it is "three years from the time when the debt became due". We are thus brought to the question, when did the debt for which this suit is brought, become due?

The defendants, (*inter alia*,) contend that, upon their failure to pay the first instalment on the 2nd October 1868, the whole money became payable at once under the express stipulation to that effect in the promissory note, and that, therefore, this suit, which was not brought till the 19th October 1871, is barred.

The plaintiff, on the other hand, contends that, notwithstanding the defendants' failure to pay the first instalment at the time it fell due—namely, on the 2nd October 1868—he waived his right to exact payment of the whole amount by subsequently accepting payment of that instalment; that, therefore, until a second default was made in the payment of the next instalment six months after, no right would accrue to him to demand any payment; and that this suit, which is within three years from such second default, is consequently not barred.

Neither the Subordinate Judge nor the District Judge has found whether the plaintiff's allegation as to the subsequent payment to him of the amount of the first instalment by the defendants is proved; and if we thought such payment could make any difference, it would be necessary to have that expressly found by the Courts below. But it seems to us to be immaterial. The note sued on, as already stated, distinctly stipulates that, on failure to pay any one instalment, the whole amount shall at once become due. That contingency having happened on the 2nd October 1868, the plaintiff became entitled to the whole of the money at once (1). He might, accordingly, have sued for the whole amount any day after that date. His right to immediate payment thereof was not, under the note itself, subject to be defeated by any subsequent payment, nor was it superseded or suspended by any fresh agreement between the parties; and we do not see how,

(1) 7 Calc. W. R. 21 Civ. Rul. 7 Bom. H. C. Rep. 125 A. C. J. 11 *Idem* 155. 1 Mad H. C. Rep. 209. 12 L. J. Q. B. 134.

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under the circumstances, any such payment, by the defendants, of part of that for which they had already become liable could, in the absence of any fresh agreement, supersede or suspend such right. There is not any fresh agreement alleged here. The suit is brought on the note itself.

In *Rámkrishna* v. *Bayági* (1) it was, no doubt, held by a Division Bench of this Court, consisting of Couch, C. J., and Newton, J., "that, although the instalments were not paid by the defendants at the times fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered, as regards both parties, as if made at the times fixed, and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment, or the defendants rely upon it as making the whole debt due and fixing the period from which the time of limitation ran." But we are unable to accept that view. There is nothing in the Limitation Act (XIV. of 1859) to give any such effect to an acceptance of part payment after the whole debt has become due. The creditor is, no doubt, not bound immediately to sue for, or insist upon payment of, the whole debt. He may, if he chooses, show forbearance towards his debtor, and accept a part of what is due. But, if he does so, he does not thereby prevent, or change in any way, the operation of the law of limitation, which, notwithstanding any such subsequent wish on his part, begins to run from the time of the first default rendering the whole amount due: see *Hemp* v. *Garland* (2); *Hurronauth* v. *Maheroolah* (3); *Keruppanna* v. *Nallamma* (4); *Náráyan-áppá* v. *Bháskar* (5); *Navalmal* v. *Dhondibá.* (6)

In equity it has been held that, a debt being presently due, an agreement to pay by instalments, with a stipulation, that on default the creditor may demand immediate payment of the whole balance due with interest, is not to be relieved against: *Sterne* v. *Beck* (7).

(1) 5 Bom. H. C. Rep. 35 A. C. J.
(2) 4 Q. B. 519, 524; S. C. 12 L. J. Q. B. 134; 3 G. & D. 402. 7 Jur. 302.
(3) 7 Calc. W. R. (F. B.), 21. (4) 1 Mad. H. C. Rep. 209.
(5) 7 Bom. H. C. Rep. 125 A. C. J. (6) 11 Bom. H. C. Rep. 155.
(7) 32 L. J. Ch. 682.

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Assuming, therefore, that the alleged part payment by the defendants really took place, if the plaintiff in this case had chosen the very next day after such payment to sue for the whole of the amount then remaining unpaid, he might have done so, and we do not think the defendants in that case could have successfully contended that no cause of action had accrued, or that the suit was premature because the second instalment had not fallen due.

We must, accordingly, hold that the right to bring this suit accrued to the plaintiff on the 2nd October 1868; that, having omitted to bring it for more than three years, he now comes too late; and that the decrees of the Lower Courts rejecting his claim on that ground are correct, and must be upheld.

Decree affirmed.

Note.—In *Hullodhur Bangal* v. *Hogg*, 1 Calc. W. R. 189 Civ. Rul. (which was a case under Act XIV. of 1859, and not, as stated in the argument *supra*, under the old law), it was held that the question in cases of this description is whether the payment was made on account of the whole amount payable under the bond, treating that whole amount as having become due under the condition, or on account of an instalment, and that if it was made on account of an instalment it would go to show a waiver or agreement to restore the original provision for payment by instalments.

The case of *Hurronauth Roy* v. *Mahcroolah* (7 Calc. W. R. 21 Civ. Rul.), cited in the present case, and which appears to have been heard without the aid of counsel, is so imperfectly reported that it is difficult to say whether the distinction taken in *Hullodhur Bangal* v. *Hogg* was followed or not in it, though it is not easy to understand the *ratio decidendi* except on the ground of some such distinction. The Court rested its decision on the fact that the petitioner sued on the original contract and not on any fresh one. The distinction in question has been observed both in Madras and in the North-Western Provinces. Thus in *Sir Rajah Papama* v. *Toleti* (5 Mad. H. C. Rep. 198), in which it was held that the acceptance of payment amounted to a waiver of the condition of forfeiture, the Court seems to base its decision on the circumstance that the payment was "of one or more sums *as an instalment or instalments* due on the bond".

Similarly *Gyan Chand* v. *Jawahir* (2 N. W. P., H. C. Rep. 83), in which it was held that a plaintiff who had accepted payment after default could not enforce the condition, was expressly decided on the ground that the sums paid "must be held, on the Judge's finding, to have been paid and received *on account of the instalments*".

In *Mulko Singh* v. *Thakoor Pershad* (5 N. W. P., H. C. Rep. 35) in which the acceptance of payment was held not to take the case out of the operation of the Act, it was not shown that any of the payments made within the 3 years before suit had been made *on account of an instalment*.

See Act IX. of 1871, Sch. II., number 75.