

1879

SAMBHUBHAI  
KARSANDA'S  
v.  
SHIVLA'LDA'S  
SADA'SHIV-  
DA'S DESA'I.

suit was barred by limitation, because the defendant had been in possession and exercising acts of ownership since the 5th January 1865, a period of more than twelve years from the date of the suit, which was not filed till the 27th January 1877. .

The Court confirmed the decree of the lower Court with the following order:—

M. MELVILL, J.—The first issue sent down by this Court would have been more correctly worded if it had required the lower Court to find whether the defendant had been in adverse possession for twelve years before the date, not of the plaintiff's purchase, but of the filing of the plaint. The District Judge's finding, however, is sufficient to enable this Court to dispose of the issue in its proper form. The District Judge has found that the defendant has been in possession since the 5th January 1865, and that such possession has been as owner, Girdharlál having occupied the shop as the defendant's *gumasta*. The present suit was instituted on the 27th January 1877, or more than twelve years after the defendant's adverse possession commenced. That possession was adverse to Nárotam as much as to Girdharlál; and the plaintiff, who is the assignee of Nárotam's and Girdharlál's interest, is affected by the bar created by the defendant's long adverse possession. For these reasons we find the present suit to be barred by limitation, and on this ground we confirm the decree of the District Court, with all costs on the plaintiff throughout.

*Decree confirmed.*

## APPELLATE CIVIL.

*Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.*

RAGHO GOVIND PARA'NJPE (ORIGINAL PLAINTIFF), APPELLANT, v.  
DIPCHAND (ORIGINAL DEFENDANT), RESPONDENT.\*

August 26.

*Bond payable by instalments—Penalty—Waiver of default—Acts IX of 1871 and XV of 1877, Sch. II, Art. 75—Act VIII of 1859, Sec. 194—Act X of 1877, Sec. 210—Jurisdiction.*

Where a bond is payable by instalments, and expressly stipulates for the payment of the whole debt on failure in the payment of any instalment, the law of limita-

\* Second Appeal, No. 256 of 1879.

tion runs on the whole amount of the bond against the obligee from the day on which the obligor first makes default in the payment of any instalment, unless the obligee waive the default, and afterwards from the day on which any fresh default is made in respect of which there is no waiver.

The obligee may waive the default under Acts IX of 1871 and XV of 1877, sch. II, art. 75, but the Courts have no authority to compel him to waive it.

Neither Act VIII of 1859, sec. 194, nor Act X of 1877, sec. 210, confers any authority on the Courts to relieve a contracting party from such an express stipulation in a bond payable by instalments, as to the consequence of default in punctual payment of the instalments.

A debt being presently due, an agreement to pay it 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 in equity. Such a stipulation is not in the nature of a penalty, inasmuch as its object is only to secure payment in a particular manner.

The defendant executed to the plaintiff a bond payable by instalments, and expressly stipulating for the payment of the whole amount on failure to pay any instalment on the day fixed. He paid the first instalment, but made default in paying the second, which fell due on the 3rd August 1878. On the 20th August plaintiff sued to recover the whole balance due on the bond. Defendant admitted the bond, but pleaded tender of the amount of the second instalment soon after the due date, and prayed for payment by instalments without any interest. The first Court passed a decree in the plaintiff's favour for the amount claimed with costs, but ordered defendant to pay Rs. 100 and the costs at once, and the balance by yearly instalments of Rs. 100 each, with interest at 6 per cent. till payment. The District Judge, in appeal, affirmed the decree, with a slight variation as to interest, which he directed the defendant to pay on over-due instalments only.

*Held* by the High Court on second appeal that neither of the lower Courts had jurisdiction, without the consent of the parties, to substitute, for the contract made by them, terms which the Court preferred.

*Held*, also, that plaintiff was entitled to sue on the day after that on which the default was made, viz., on the day after that fixed for the payment of the instalment, and that the Subordinate Judge had no power to rule the contrary.

THIS was a second appeal from the decision of S. H. Phillpotts, Judge of the District Court of Poona, in appeal No. 143 of 1878, amending the decree of C. S. Chitniss, Subordinate Judge (First Class) at the same place in Original Suit No. 809 of 1878.

The plaintiff brought this suit to recover Rs. 750 due on a bond executed by the defendant to the plaintiff on *Shravan Shudh 5, Shaka 1798* (August 1876). The bond was for Rs. 850, which was payable by yearly instalments of Rs. 100 each. It was stipulated that, on failure of any instalment on the day

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fixed for it, the whole debt should become payable at once. The plaintiff was filed on the 20th August 1878, and alleged that the defendant failed to pay the second instalment, which was due on the 3rd August 1878; that, in consequence of this default, he (plaintiff) was entitled to recover the whole amount due on the bond. He also prayed for interest till payment.

The defendant admitted the bond, but pleaded that he had tendered the amount of the second instalment almost immediately after the due date. He, therefore, prayed that he might be allowed to pay by instalments, as stipulated in the bond, without any interest.

The Subordinate Judge raised the issue, whether instalments should be allowed, and decided it in the affirmative. He accordingly decreed that the defendant should pay Rs. 100 and the plaintiff's costs at once, and the balance by yearly instalments of Rs. 100 each, with interest at 6 per cent. till payment.

The defendant appealed on the ground that no interest ought to have been awarded. The District Judge affirmed the decree of the first Court, with this variation, viz., that no interest should be allowed except on instalments which might become over-due.

The plaintiff presented a second appeal to the High Court in June 1879.

*Ráo Sáheb V. N. Mandlik* for the appellant.—The decision of the District Judge is opposed to the terms of the contract entered into between the parties and to the rulings of our High Court. Both the lower Courts were wrong in making the amount of the plaintiff's claim payable by instalments, instead of ordering its payment at once.

*Ghanasham Nilkanth Nádkarni* for the respondent.—The plaintiff was satisfied with the decree made for him by the Subordinate Judge, as he did not object to it, either by an appeal or by any cross objection, in the course of the defendant's appeal. The District Judge confirmed that decree in appeal, with a slight variation as to interest. The plaintiff, therefore, has no right to open it in second appeal. His objection must be restricted to the



question of interest only, as the second appeal is valued at that amount only.

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The following is the judgment of the Court, reversing the decree of the District Judge, and restoring that of the Subordinate Judge, with the consent of both the pleaders :—

WESTROPP, C.J.—This is an action on a bond payable by instalments. The bond contained an express stipulation that, if any instalment were not paid at the date at which it fell due, the whole amount should then become payable. One of the results of such a stipulation is that the law of limitation runs on the whole amount of the bond against the obligee from the day on which the obligor first makes default in the payment of any instalment (*Gamna Dambershet v. Bhiku Hariba*<sup>(1)</sup>, *Navalmal Gambhirmal v. Dhondiba Bhagwantrav*<sup>(2)</sup> and *Hemp v. Garland* <sup>(3)</sup>), unless the obligee waive the default (Act IX of 1871, sch. II, art. 75; Act XV of 1877, sch. II, art. 75), and then when fresh default is made in respect of which there is no waiver. The obligee might, under these recent enactments, waive the default, but we know of no authority which the Courts yet have to compel him to waive it. We do not consider that section 194 of Act VIII of 1859, or section 210 of Act X of 1877, has conferred upon the Courts any authority to relieve a contracting party from such an express stipulation, in a bond itself payable by instalments, as to the consequence of default of punctual payment of the instalments. The provision that a debt shall be payable by instalments is a provision in ease of the debtor, and there is nothing inequitable in a stipulation, that if he be not strictly punctual in payment of the instalments, he shall cease to be entitled to the benefit provided for him of discharging the debt by such measured stages. In equity it has been held by Lords Justices Knight Bruce and Turner 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, and that such a stipulation is

(1) Ind. L. R., 1 Bom. 125 (Full Bench decision.) (2) 11 Bom. H. C. Rep. 155.

(3) 4 Q. B. 519; S. C. 12, L. J. Q. B. 134 per Lord Denman.

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not in the nature of a penalty, inasmuch as its object is only to secure payment in a particular manner: *Sterne v. Beck*<sup>(1)</sup>. Nevertheless in this case default having occurred in the payment of an instalment, the Subordinate Judge took upon himself the authority to lay aside the express contract of the parties as to the consequences of such a default. He held that seventeen days was too soon after the default for the plaintiff (the obligee) to bring his suit for the whole amount. If such a dispensing power be assumed, where is the Court to draw the line at which the plaintiff is to consider himself at liberty to avail himself of the default and sue for the whole amount? If seventeen days be not long enough, will eighteen, nineteen, twenty days or a month be so? The plaintiff was, in truth, entitled to sue on the day after that on which the default was made, viz., on the day after that fixed for the payment of the instalment; and the Subordinate Judge had not any power to rule the contrary, although the District Judge says it was "very properly" so ruled by the Subordinate Judge. Neither of these Courts had jurisdiction, without the consent of the parties, to substitute, for the contract made by them, terms which the Court preferred. In doing so those Courts assumed to themselves legislative authority. It may be that in certain cases and in certain districts it would be advisable for the Legislature to confer such an authority on the Civil Courts. Whether it would be so or not, this is not the proper opportunity for us to express an opinion; but the Civil Courts, which desire such a power, must wait until it pleases the Legislature to invest them with it<sup>(2)</sup>.

In the present case the Subordinate Judge, in still rendering the debt payable by instalments, has made certain provisions as to payment of interest which the District Judge has relaxed in favour of the debtor, who did, as to interest, appeal to the District Court. The plaintiff did not appeal, although he was entitled to do so, and, if he had, he ought to have obtained a decree for the immediate payment of the whole debt; nor does he appear to have made any

(1) 32 L. J. Chan. 682.

(2) Editor's note.—As to payment by instalments by agriculturists in the Deccan, see Act XVII of 1879, secs. 16, 17, 20.

cross objection on that point to the decree during the appeal of the defendant in the District Court. However, he has appealed to this Court on that ground as well as with respect to the District Judge's ruling as to interest, but the plaintiff has not stamped his memorandum of second appeal sufficiently to reopen the whole decree; and were we to permit him to do so, it could be only on the condition of paying the additional stamp duty. Rather than have this permission granted, the learned pleader for the defendant is satisfied that the Subordinate Judge's decree should be restored to its pristine state, and the learned pleader for the plaintiff has, with laudable moderation, assented to such an order. Under these circumstances, and on the above-mentioned consent of both sides, we reverse the decree of the District Judge, with costs of the appeal to him to be paid by the defendant, and restore the decree of the Subordinate Judge. The parties respectively should bear their own costs of this appeal.

*Order accordingly.*

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## APPELLATE CRIMINAL.

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*Before Mr. Justice Kemball and Mr. Justice F. D. Melvill.*

EMPRESS *v.* MAHOMED YA'SHIN.

*September*

*Criminal Procedure Code (Act X of 1872), Secs. 278, 280 and 285—Appeal—Revision.*

An order under section 278 of the Code of Criminal Procedure by the Appellate Court, rejecting an appeal on a perusal of the petition of appeal and the copy of the judgment or order appealed against and without calling for the record and proceedings of the case, is a final order falling within the scope of section 285, and is not subject to revision.

THIS was an application for the revision of an order passed by the High Court rejecting the appeal of the accused, Mahomed Yáshin.

The accused was tried by A. D. Pollen, LL.D., Joint Session Judge of Poona, at Sholapur, on charges of receiving gratification,