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clear that an offence punishable with fine only is an offence of a minor character, of very much less gravity than an offence punishable with imprisonment up to seven years. Reading the section as a whole, I have no doubt whatever that the expression "offence punishable with imprisonment for not more than seven years" was intended to be read in the same sense as the expression in sub-section (*1A*) "offence punishable with not more than two years' imprisonment", and that both expressions were intended to cover offences punishable with a less severe sentence than those indicated, and, therefore, to include offences punishable only with fine. In my opinion we ought to treat the case of *Emperor* v. *Kasturi*[1] as overruled. That being so, we must reject the reference.

N. J. WADIA J. I agree.

DIVATIA J. I concur.

Reference rejected.

J. G. R.

[1] (1926) 28 Bom. L. R. 1031.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.

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August 9

VEHERBHAI VALLAVBHAI AND OTHERS (ORIGINAL DARKHASTDARS-PLAINTIFFS), APPLICANTS *v.* PATLIA JAVER SOMA (ORIGINAL DEFENDANT), OPPONENT.*

Instalment decree—In default of payment of any one instalment, decree-holder entitled to recover whole debt—Default clause inserted for benefit of decree-holder—He can execute decree to recover instalments which became due within three years before filing of the darkhast—Indian Limitation Act (IX of 1908), Schedule I, Article 182 (7).

A money decree, dated February 13, 1930, provided for payment of the decretal amount by three instalments in October 1930, October 1931, and October 1932. There was a provision in the decree that if the defendant failed to pay any one instalment, the plaintiffs might recover the whole debt at once by executing the decree.

* Civil Revision Application No. 35 of 1935.

Default was made in the payment of the first instalment. A darkhast was filed on October 2, 1934, to recover the amount due for the last two instalments. The Subordinate Judge dismissed the darkhast as time-barred as in his opinion in view of the default clause in the decree all the instalments became payable at the expiration of October 1930. On a revisional application to the High Court:

Held, that the darkhast proceedings were not barred as the omission on the part of the decree-holder to enforce the entire debt did not deprive him of the right to recover the instalments which became due within three years before the filing of the darkhast.

Lasa Din v. *Gulab Kunwar*,[1] followed.

Raichand Motichand v. *Dhondo Laxuman*,[2] disapproved.

Joti Prasad v. *Sri Chand*,[3] referred to.

CIVIL REVISION APPLICATION against the order passed by N. C. Vakil, Second Class Subordinate Judge at Borsad.

Proceedings in execution.

The petitioner obtained a decree for Rs. 135-15-6 in a small cause suit, on February 13, 1930, against the opponent, payable by three annual instalments in October 1930, October 1931 and October 1932. There was a provision in the decree that if the opponent failed to pay any one instalment, the petitioners might recover the whole debt at once by executing the decree. The opponent made default in payment of the first instalment which became due in October 1930. On October 2, 1934, the petitioners filed a darkhast to recover the amount due in respect of two instalments of October 1931 and October 1932.

The Subordinate Judge held that as the darkhast was filed three years after the date of first default the claim was time-barred and dismissed the same. His reasons were as follows :—

" From the earliest times it has been held by our Honourable High Court that in such a case, time would run against the plaintiff from the date of the first default, *vide* I.L.R. 2 Bom. 356 and 20 Bom. L.R. 773. On behalf of the plaintiffs it was contended that in such a case, if the application was to recover the whole amount due at once in case of default, article 181 could apply but if the application was to recover some instalments, that had already become due, article 182, sub-clause 7, would apply. • In support of this contention reliance was placed in a case reported

[1] (1932) L. R. 59 I. A. 376; 34 Bom. L. R. 1660, P. C.

[2] (1918) 42 Bom. 728.

[3] (1928) 51 All. 237.

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in A.I.R. 1928 All. 629. It was further contended that the principle underlying the ruling of the Privy Council case reported in 34 Bom. L.R. at p. 1600 would show that the Allahabad view is preferable to the view of the Bombay High Court and that the Allahabad High Court in a later case relating to the execution of a decree with a default clause followed the Privy Council ruling: A.I.R. 1934 All. 534. Reliance was also placed on the Privy Council ruling reported in 29 Bom. L.R. at page 1014.

* * * * * *

The question for consideration is whether any of the Privy Council cases referred to above has by necessary implication overruled the view of our High Court on the subject. If that is not so, it is no longer possible for me to follow the view of other High Courts in preference to the view of the Bombay High Court on the subject. The ruling reported in 29 Bom. L.R. at page 1014 is clearly not applicable to the facts of the present case. In that case there was no question of recovering the whole amount in case of default as every year a right to recover the amount of Rs. 2,000 was accruing due to the plaintiff, as the defendant was remaining in possession. In case of default to pay the amount of Rs. 2,000 as it might become due each year, defendant had to hand over possession. Hence, though the right to recover Rs. 2,000 each year may become barred by limitation, yet the right to recover possession would accrue due, as soon as a fresh default was committed. It was the case of a recurring cause of action for possession with each default committed. It cannot be said that in an instalment decree with default clause, there is a recurring right to apply for the whole amount due, as each default is committed. Even the Full Bench case of the Allahabad High Court above referred to, in which this case was considered does not seem to have gone so far. The decision in that case was arrived at as a result of the construction of the decree itself.

The second Privy Council case on which reliance was placed in the course of the arguments, viz. 34 Bom. L.R. 1600, was decided under Article 132 of the Limitation Act. It was the case of an instalment mortgage bond. The principal amount was made payable by six annual instalments. It was further provided that in case of default, the mortgagee was entitled "within and after the expiry of the stipulated period of six years" to realise the entire mortgage money in a lump sum. The mortgagee brought a suit to enforce his security within 12 years after the expiry of the stipulated period of 6 years but more than 12 years after the first default. It was held that the proviso in question was inserted in the mortgage bond, exclusively for the benefit of the mortgagee and it gave him an option either to enforce his security at once on default or to wait for the full term of the mortgage. It was pointed out that it was not open to the mortgagor to take advantage of his own default. It was further pointed out that the mortgage money did not become due within the meaning of Article 132 immediately upon default but when both the mortgagor's right to redeem and the mortgagee's right to enforce his security accrued. The contrary view held by the Allahabad High Court in I.L.R. 37 All. 400 and 45 All. 27 was definitely overruled.

The first thing that should be observed in connection with the case is that there was a clear option reserved to the mortgagee in the deed itself. Undoubtedly the

view that formerly prevailed, that despite such an option the mortgage money became recoverable immediately when the first default was committed was not approved as the provision for the default clause was exclusively held to be for the benefit of the mortgagee and if the option was not exercised, the money did not become due till the right to redeem and the right to enforce the security become due. It cannot be said that every instalment decree with a default clause necessarily gives an option of the kind referred to above to the plaintiff in the absence of clear provision to that effect, as found in the Privy Council case above referred to. In the case of *Raichand* v. *Dhondo* 20 Bom. L.R. 773 such an argument was addressed but it was not accepted. Both the Allahabad cases on which reliance was placed by the pleader for the plaintiffs, were cases in which an option was expressly reserved to the decree-holders. It is therefore not possible to hold that the Privy Council ruling above referred to has, by necessary implication, overruled the principle underlying the decision in *Raichand*'s case."

The decree-holders applied in revision to the High Court.

S. R. Parulekar, for the applicants.

No appearance for the opponent.

BEAUMONT C. J. This is an application in revision under section 25 of the Provincial Small Causes Courts Act asking us to review an order of the Second Class Subordinate Judge at Borsad, dismissing a darkhast proceeding.

The case raises a point of law upon which there has been considerable difference of judicial opinion, as noted by the learned Subordinate Judge. The point is a very simple one. There was a decree dated February 13, 1930, providing for payment of the decretal amount by three instalments, in October, 1930, October, 1931, and October, 1932, and there was a provision in the decree that if the defendant failed to pay any one instalment, plaintiffs might recover the whole debt at once by executing the decree. Default was made in the payment of the first instalment, and darkhast proceedings were filed on October 2, 1934. Admittedly the first instalment is time-barred, but the darkhast is within three years of the due date fixed for payment of the other two instalments, and the question is whether in view of the default clause in the decree all the instalments became payable at the expiration of October, 1930, so that

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the darkhast is time-barred. That was the view adopted by the learned Subordinate Judge.

The question as to the effect of a default clause has recently been discussed at length by their Lordships of the Privy Council in *Lasa Din* v. *Gulab Kunwar*.[1] That was a case of moneys payable by instalments under a mortgage bond containing a default clause, and it was held that the mortgage bond did not "become due" within the meaning of Article 132 of the Indian Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security had accrued. Their Lordships pointed out that the default clause was inserted for the benefit of the mortgagee, that he might or might not take advantage of it, and that it did not lie in the mouth of the mortgagor to insist that the mortgagee must take advantage of the mortgagor's default. The Privy Council overruled various cases in which a contrary view had prevailed.

In the present case, I think, the Article of the Limitation Act applicable to the case is Article 182 (7) which provides that time runs for the execution of a decree or order of any Civil Court "where the application is to enforce any payment which the decree or order directs to be made at a certain date," from such date. In the present case the decree makes the money payable on the three dates specified for payment of the instalments, and those dates are certain. But, as pointed out in *Joti Prasad* v. *Sri Chand*,[2] it cannot be said that in a decree of this sort there is any certain date for payment of the whole amount in default of payment of any instalment. There is no certainty that there will be default. In terms, therefore, the relevant Article of the Limitation Act is not a bar to the last two instalments, and, moreover, I think the reasoning of the Privy Council, in the case to which I have just referred, applies with equal force to a default clause in a money decree, such clause being inserted for the benefit of the creditor, and the creditor

[1] (1932) L. R. 59 I. A. 376; 34 Bom. L. R. 1600, P. C.
[2] (1928) 51 All. 237.

being free to take advantage of the privilege or not as he thinks best.

The learned Subordinate Judge in a careful judgment considered the ruling of the Privy Council, but came to the conclusion that he was bound by the decision of this Court (*Raichand Motichand* v. *Dhondo Laxuman*),[1] to hold that time ran from the date of the default in payment of the first instalment. That was a decision of Mr. Justice Beaman and Mr. Justice Heaton. They differed from the decision in *Shankar Prasad* v. *Jalpa Prasad*,[2] in which it had been held that under a decree for payment by instalments with a default clause, the occurrence of a default did not make the whole debt payable immediately so that time ran from that date in respect of the whole debt. I must confess that I find the reasoning of the learned Judges in *Raichand Motichand* v. *Dhondo Laxuman*[1] very difficult to follow. The Judges seem to take the view that a creditor who gets a decree for payment by instalments is really entitled to a decree for immediate payment, that the privilege of payment by instalments is inserted entirely for the benefit of, and out of sympathy for, the debtor, and that if the debtor fails to take advantage of the privilege accrued to him, then the creditor has a decree for immediate payment of the full amount. It is difficult to see why, if a creditor is entitled to a decree for immediate payment, he should only get a decree for payment by instalments. I think the correct view is that the debtor must be treated in such cases as entitled to a decree for payment by instalments, and that the clause making the whole amount payable on default in payment of any instalment is inserted for the benefit of the creditor, who has an option to enforce the clause or not. It is to be observed that the learned Judges in *Raichand Motichand* v. *Dhondo Laxuman*[1] do not refer to any of the Articles of the Limitation Act, and do not mention the Article under which they held that

[1] (1918) 42 Bom. 728. [2] (1894) 16 All. 371.

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the darkhast proceedings were barred. In my opinion it is quite impossible to reconcile the reasoning in *Raichand Motichand* v. *Dhondo Laxuman*[1] with the reasoning of the Privy Council in *Lasa Din* v. *Gulab Kunwar*,[2] and I think we must follow the latter reasoning.

In my opinion, therefore, we ought to hold that the fact that default occurred in the payment of an instalment and that the creditor might thereupon have enforced the decree for the whole amount is irrelevant since he did not in fact attempt to do so, and his omission to do so has not deprived him of the right to recover the instalments which became due within three years before the filing of the darkhast. The application must be allowed with costs throughout.

Rule made absolute with costs throughout. Darkhast to proceed.

N. J. WADIA J. The decree in this case expressly made it optional on the decree-holder to recover the whole amount at once on default of payment of any one instalment. The view taken in *Raichand Motichand* v. *Dhondo Laxuman*,[1] which the learned Subordinate Judge felt himself bound to follow, was that such provision in an instalment decree made it obligatory on the decree-holder to proceed to realize the whole amount at once on the occurrence of a default, and that on his failure to do so, his right to execute the decree would become time-barred after three years from the date of the first default. The learned Subordinate Judge took the view that the decision in *Raichand Motichand* v. *Dhondo Laxuman*[1] was not overruled even by implication by the decision of the Privy Council in *Lasa Din* v. *Gulab Kunwar*.[2] It seems to me that he is wrong in this view. It is true that *Lasa Din* v. *Gulab Kunwar*[2] was a case dealing with a mortgage bond. But the principle which was there laid down that a proviso of this nature (*i.e.*, a proviso giving the mortgagee an option to realize the

[1] (1918) 42 Bom. 728.
[2] (1932) L. R. 59 I. A. 376; 34 Bom. L. R. 1609, P. C.

entire amount of the debt on the occurrence of a default in payment of any one instalment) was inserted for the benefit of the mortgagee, must, in my opinion, necessarily apply also in the case of an instalment decree. And there is no reason why the judgment-debtor should be enabled, as a result of his own default in the payment of one instalment, to deprive the decree-holder of the right to recover subsequent instalments which may become due. The terms of Article 182, clause 7, of the Indian Limitation Act, do not appear to me to debar such a right. The right is one which accrues to him on the date of each instalment, and I see no reason why the fact that he has waived his right to recover the first instalment should debar him from exercising a right which the decree expressly gives him to recover subsequent instalments. I agree, therefore, that the application should be allowed with costs.

Rule made absolute.

J. G. R.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

POONAMCHAND PRATAPJI (PLAINTIFF), *v.* MOTILAL KAPURCHAND (DEFENDANT).*

1935 *February* 21

Presidency-towns Insolvency Act (III of 1909), section 52—After-acquired property—Suit by insolvent as regards such property—Intervention of Official Assignee claiming such property—What amounts to such intervention.

Plaintiff, who was an undischarged insolvent, filed a suit against his partner for dissolution of the partnership and for partnership accounts. The defendant objected, *inter alia*, that the suit was not maintainable as the plaintiff was an undischarged insolvent.

Held, that unless the Official Assignee intervenes, so as to assert, under section 52 of the Presidency-towns Insolvency Act, a right to divide amongst the creditors of an insolvent, property acquired by the insolvent after his adjudication, such property may be dealt with by the insolvent himself, and third parties may acquire it from him.

*O. C. J. Suit No. 127 of 1930.