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his purchases from Bhabatarini and Gobindamohini and for partition. The suit was not defended, and the then plaintiff obtained a decree *ex-parte* under which the partition was subsequently carried into effect, and the present defendant obtained possession. With respect to the remaining moiety the defendant states that she is not in possession and lays no claim to it.

The question for decision now is, whether the validity of the sales under which the defendant claims can be enquired into in the present suit, and that question appears to us to depend on whether it was incumbent on the present plaintiff in the suit of 1895 to contest the title of the defendant's predecessor on the ground which he now seeks to take, namely, that the sales to him were not supported by legal necessity.

It was contended for the appellant, that it was not necessary in that suit to go into the question of the then plaintiff's title at all, that the mere fact of joint possession gives a right to claim **[82]** partition, and that the appellant, therefore, by abstaining from raising the question of title in the former suit, did not lose his right to raise it now. The case of *Sundar* v. *Parbati* (1) was claimed as an authority for these propositions ; but in that case the widows of Buldeo Sahai, whose rights and interests in the property were of precisely the same nature, were the sole claimants, and there was accordingly no question as between them and the rightful owner of the property. Here, however, it is otherwise, for if the appellant be right, he alone was entitled to the property now in suit and the defendant's husband had no title to it whatever ; so that unless the case referred to goes the length of deciding that a person who has no title may, on the strength merely of his being in possession, enforce a partition as against the true owner, it cannot help the appellant. It, however, we think, lends no support to that view, nor, apart from it, do we think that such a proposition is maintainable.

In our opinion the question of the validity of the sales to the defendant's husband ought to have been raised by way of defence to the partition suit, and it must, therefore, by virtue of the 2nd Explanation to section 13 of the Code of Civil Procedure, be treated as having been directly and substantially in issue in that suit. It is, consequently, we think on the principle of *Mahabir Pershad Singh* v. *Macnaghten* (2) and *Kameswar Pershad* v. *Rajkumar Ruttan Koer* (3) now *res judicata*. The result is, that the appeal fails and must be dismissed with costs.

Appeal dismissed.

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31 C. 83 (=8 C. W. N. 66)

[83] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pargiter.

MOHESH CHANDRA BANERJI *v.* PROSANNA LAL SINGH.*

[14th August, 1903].

Mortgage—Instalments—Waiver—Default of instalments, right to sue on—Part payment of instalment—Interest.

* Appeal from Original Decree No. 168 of 1900 against the decree of Trigunna Prosanna Bose, Subordinate Judge of Bankura, dated March 1, 1900.

(1) (1889) I. L. R. 12 All. 51 ; L. R. 16 I. A. 186.

(2) (1889) I. L. R. 16 Cal. 682 ; L. R. 16 I. A. 107.

(3) (1892) I. L. R. 20 Cal. 79 ; L. R. 19 I. A. 234.

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Where an instalment bond gives the creditor the right to sue for the whole amount due under the bond on default of payment of a single instalment there is no waiver of that right by acceptance of part of an overdue instalment, or by receipt of interest.

Cheni Bash Shaha v. *Kadum Mundul* (1) and *Mon Mohun Roy* v. *Durga Churn Gooee* (2) distinguished.

Gumna Dambershet v. *Bhiku Hariba* (3), *Balaji Ganesh* v. *Sakharam Parashram Angal* (4), *Kankuchand Shivchand* v. *Rustomji Hormusji* (5), *Kashiram* v. *Pandu* (6), *Mumford* v. *Peal* (7), *Keene* v. *Biscoe* (8), and *Nanjappa* v. *Nanjappa* (9) referred to.

[Ref. 9 I. C. 22; 20 I. C. 156 ; Foll. 33 I. C. 606.]

APPEAL by the plaintiffs, Mohesh Chandra Banerji and others.

One Chaitanya Singh Babu, father of the prinicipal defendant Prasonna Lal Singh Babu and others, executed a mortgage instalment bond dated the 10th February 1885, in favour of the plaintiffs and some of the *pro forma* defendants, for the sum of Rs. 17,000. It was stipulated that the sum would be repayable in 34 annual instalments of Rs. 500 each, to be paid in the month of Chaitra of each of the years from 1291 B.S. to 1324 B.S. The mortgagor further stipulated, " if I fail to pay any one of the instalments, all those instalments will be ineffectual and I **[84]** will pay to you the whole amount of the money with the interest at the rate of 1 per cent per month from after the first default of payment of instalment. Interest shall run at the above rate from the date of default till the date of realisation of the said money."

The present suit was instituted by the plaintiffs for the recovery of Rs. 27,568-8 upon the said mortgage bond on the following allegations: that the principal defendant No. 1 had paid the instalments as provided in the bond up to the year 1294 B.S., that he had paid the sum of Rs. 300 only in Chaitra 1295 B. S., and that certain sums of money had been paid in the next year and from time to time, which went only towards part payment of the interest of Rs. 1,764 annually due on account of the default, under the terms of the bond. Hence, in accordance with an account attached as a schedule to the plaint, the sum due to the plaintiffs was Rs. 27,568-8. In the written statement put in by Chaitanya Singh Babu, who was alive at the time and died during the pendency of the suit, it was alleged amongst other things that the whole amount of instalments up to the year 1304 B.S., had been paid, that although some of the instalments had not been paid at the proper time, the plaintiffs having taken the same with interest had waived their right arising from the default, and that certain sums of money, amounting in all to Rs. 1,114, had not at all been given credit to by the plaintiffs in the accounts filed by them.

The Subordinate Judge held that in the circumstances of the case there had been a waiver of the plaintiffs' right to sue for the whole amount due under the bond, and that the suit was on that account not maintainable. But having found that the case, set up by the defendants as to the excess payment was untrue, he decreed the suit partially for the recovery of the said sum of Rs. 1,114 only with costs.

(1) (1879) I. L. R. 5 Cal. 97.
(2) (1888) I. L. R. 15 Cal. 502.
(3) (1876) I. L. R. 1 Bom. 125.
(4) (1892) I. L. R, 17 Bom 555.
(5) (1895) I. L. R. 20 Bom. 109.
(6) (1902) I. L. R 27 Bom. 1.
(7) (1880) I. L. R. 2 All. 857.
(8) (1878) L. R. 8 Ch. D. 201.
(9) (1888) I. L. R. 12 Mad. 161.

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Babu *Lal Mohan Das* (Babu *Sarat Chandra Dutt* and Babu *Amulya Charan Banerjee* with him) for the appellants. There could be no waiver in the circumstances of the case. The receipt of a portion of an instalment or of interest due does not in law constitute waiver: *Hurronath Roy* v. *Maheroollah Mollah* (1), **[85]** *Gumna Dambershet* v. *Bhiku Hariba* (2), *Cheni Bash Shaha* v. *Kadum Mundal* (3), *Ram Culpo Bhattacharji* v. *Ram Chunder Shome* (4), *Kashiram* v. *Pandu* (5), and Starling on Limitation, 2nd Edition, p. 209. In the last case the full amount of instalments was paid subsequently to the due dates and accepted by the creditors. A waiver is a renunciation or abandonment of a right, and must be supported by a valuable consideration, except where it is effectual upon a principle analogous to that of estoppel. In *Keene* v. *Biscoe* (6), acceptance of part payment of amount due was held not to constitute waiver. In *Nanjappa* v. *Nanjappa* (7), it was held that acceptance of part of interest due did not consitute waiver: see also *Sitab Chand Nahar* v. *Hyder Malla* (8), and *Nobodip Chunder Shaha* v. *Ram Krishna Roy Chowdhry* (9).

Babu *Digambar Chatterjee* (Babu *Binode Behari Mukerji* and Babu *Brojo Lal Chakravarti* with him) for the respondents. As to waiver, see *Mon Mohun Roy* v. *Durga Churn Gooee* (10). Besides, if the excess amounts alleged by the defendants to have been paid be held on the evidence to be true, there was no default.

RAMPINI AND PARGITER, JJ. The defendants in this case executed a mortgage bond in favour of the plaintiff on the 29th Magh, 1291 (10th February 1885) for a sum of Rs. 17,000 payable in 34 yearly instalments of Rs. 500 each. The terms of the bond were that if any instalment remained unpaid, then " all the instalments were to be ineffectual" and " the whole amount was to become due with interest at the rate of 1 per cent. per month after the first default of payment of the instalments. " It is admitted that the instalments were paid up to the Bengali year 1295. Then a default took place. Only Rs. 300 were paid that year. Constant defaults were subsequently made. According to the plaintiff no further instalment was ever paid in full, but the defendants made payments to them partly on account of parts of the instalments and partly on account of the **[86]** interest accruing at the rate of Rs. 1,764 per annum on the whole balance then due. These payments continued up to 1305, after which no payments were made and this suit was instituted. The defendants do not deny that default was made in payment of instalments. But they allege that they paid sums amounting to Rs. 1,114 in excess of what the plaintiffs admit to have received, and on their behalf it has been contended that the payments they made were partly on account of instalments due, some of which they paid in full, and partly on account of interest due on the unpaid instalments.

The Subordinate Judge decided that the payments made were as alleged by the plaintiff. He found that the defendants had not proved that they had paid the sums amounting to Rs. 1,114 averred by them to have been paid. But he found that there had been a waiver on

(1) (1867) B. L. R. Sup. Vol., 618; 7 W. R. 21.
(2) (1876) I. L. R. 1 Bom. 125.
(3) (1879) I. L. R 5 Cal. 97.
(4) (1887) I. L. R. 14 Cal. 352.
(5) (1902) I. L. R 27 Bom. 1.
(6) (1878) L. R. 8 Ch. D. 201.
(7) (1888) I. L. R. 12 Mad. 161.
(8) (1896) I. L. R. 24 Cal. 281.
(9) (1887) I. L. R. 14 Cal. 397.
(10) (1888) I. L. R 15 Cal 502

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the part of the plaintiffs by the acceptance by them of instalments after they had become due. He accordingly found that the plaintiff's suit was premature. At the same time he, somewhat inconsistently, gave them a decree for the sum of Rs. 1,114 which the defendants alleged, but could not prove, that they had paid.

The plaintiffs now appeal: and on their behalf it has been pleaded that there has been no waiver, or if there has been, then there has been a fresh default since 1305. The defendants cross-appeal, and urge that the Subordinate Judge was wrong in holding that they had not paid the sums amounting to Rs. 1,114, for which the Judge has given the plaintiffs a decree.

We will deal first with the cross-appeal. We are of opinion that the Subordinate Judge has rightly held that the defendants did not pay the plaintiffs the sum of Rs. 1,114, the details of which he has given in his judgment. We come to this conclusion for the reasons assigned by him, *viz.*, (1) that the evidence adduced by the defendants on this point is unreliable, being the evidence of partizans; (2) that the authenticity of the letters and receipts produced on their behalf as corroborative evidence has not been established; (3) that the signatures on them alleged to be those of the plaintiffs differ from their admittedly genuine signatures; and (4) that the defendant's *khatas* do not appear to have been correctly kept, and are therefore not to be depended [87] on. Some of the letters, *e.g.*, the letter printed at page 97 of the paper-book, are not at all likely to have been written by the plaintiffs. The letter in question (Ext. R.) is quite inconsistent with the admittedly genuine letters of the plaintiffs and with the proved state of accounts between the parties.

We now come to the question of waiver. We are unable to agree with the Subordinate Judge's finding that there was any such waiver on the part of the plaintiffs as would debar them from bringing this suit. It has been held by the Bombay High Court in a long series of rulings [see *Gumna Dambershet* v. *Bhiku, Hariba* (1), *Balaji Ganesh* v. *Sakharam Parashram Angal* (2), *Kankuchand Shibchand* v. *Rustomji Hormusji* (3) and *Kashiram* v. *Pandu* (4)] that the mere acceptance of an overdue instalment will not debar a creditor from suing for the full amount of his debt due on an instalment bond, the terms of which are similar to those of the one on which the suit is brought. The same view has been taken by the Allahabad High Court in *Mumford* v. *Peal* (5), and this seems also to be the English law. See the case of *Keene* v. *Biscoe* (6). But this High Court has held in two cases, *Cheni Bash Shaha* v. *Kadum Mundal* (7) and *Mon Mohun Roy* v. *Durga Churn Gooes* (8), that acceptance of the amount of an overdue instalment does amount to a waiver of the right to sue. But even on this view of the law there appears to us to have been no waiver in this case. We find the payments to have been made as alleged by the plaintiffs, and that no instalment was ever paid in full by the defendants or received by the plaintiffs after the first default. Part of the subsequent instalments were no doubt paid and received and large sums were paid on account of the interest which on the occurrence of the first

(1) (1876) I. L. R. 1 Bom. 125.
(2) (1892) I. L. R. 17 Bom. 555.
(3) (1895) I. L. R. 20 Bom. 109.
(4) (1902) I. L. R. 27 Bom. 1.
(5) (1880) I. L. R. 2 All. 857.
(6) (1878) I. L. R. 8 Ch. D. 201.
(7) (1879) I. L. R. 5 Cal. 97.
(8) (1888) I. L. R. 15 Cal. 502.

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default began to run at the rate of Rs. 1,764 per annum. But part payment and acceptance of part of an overdue instalment has never been held, even by this Court, to amount to a waiver, and it cannot be regarded as such, for admittedly on payment of a part of an instalment, there is still [88] something due and there is still a default. Similarly payment and receipt of interest cannot amount to a waiver (*Nanjappa* v. *Nanjappa*) (1). No doubt the defendants through their pleader have urged before us that in some years they paid the full amounts of the instalments due or overdue, but we do not find this to be proved. The payments in one year, *viz.*, 1303, amounted to Rs. 1,600, but this amount the plaintiffs credited to interest as they were entitled to do, unless the defendants paid the amount expressly for the overdue instalments, which they do not in any way satisfy as they did. Further, the defendants' pleader admits that they made payments on account of interest. This is practically an admission that there had been default, and no waiver on the part of the plaintiffs, for if the plaintiffs claimed interest and the defendants paid it, the former were clearly enforcing the condition of the bond which came in force on the first default. The bond provided for the payment of no interest, except in the case of default in payment of an instalment. The defendants' pleader urges that the payments for interest were made for interest on the instalments unpaid and not on the whole amount of the bond, which became payable on default. But this does not appear to us to have been the case or to make any difference, for if any interest was payable at all, it could only be payable, because there had been default, which the plaintiffs had not waived.

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We therefore consider that there was no waiver on the plaintiffs' part and we also agree to the further contention of the plaintiffs' pleader that, if there was any waiver, there was a fresh default made in 1305, which was not waived and which would entitle the plaintiffs to bring this suit. The great forbearance of the plaintiffs seems to have been entirely due to their having been previously on friendly terms with the defendants, which led them to wish not to press them unduly.

We accordingly consider the plaintiffs entitled to a decree in this suit, as prayed. We therefore allow this appeal and give the plaintiffs a decree for the amount claimed by them. We dismiss the cross-appeal.

Appeal allowed.

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31 C. 89.

[89] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mitra.

TARAN SINGH HAZARI *v.* RAMRATAN TEWARI.*

[26th May, 1903.]

Minor-estate of—Court of Wards Act (Bengal IX of 1879) ss. 6, 27 and 35—Court of Wards, power of, to take over a minor's estate—Right of Court of Wards to sue on bonds executed in favour of executor—Minority.

A died leaving a minor son. By a will he appointed defendant No. 2 executrix to his estate and directed that she should remain in charge of the

* Appeal from Appellate Decree No. 1923 of 1899, against the decree of G. Gordon, District Judge of Chittagong, dated Aug. 7, 1899, reversing the decree of Jogendra Nath Roy, Subordinate Judge of that district, dated Feb. 11, 1899.

(1) (1888) I. L. R. 12 Mad. 161.