CIVIL RULE.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

1909
Feb. 4

GIRINDRA MOHAN ROY
v.
KHIR NARAYAN DAS.*

Waiver—Instalment bond—Default in payment of instalments—Limitation—Limitation Act (XV of 1877), s. 9, Sch. II, Art. 75—Cause of action—Disability or inability.

In an unregistered instalment bond there was a stipulation that in the event of default in payment of two consecutive instalments the creditor would be entitled to recover the whole amount covered by the bond, which was payable in twelve instalments. The second instalment was due on the 12th June, 1899.

The plaintiff brought a suit on the 1st June, 1908, for recovery of the instalments due on the bond, relinquishing the first two instalments :—

Held, that mere abstinence on the part of the plaintiff from bringing a suit for recovery of the whole amount due, on the failure of payment of the first two instalments, did not amount to waiver ; and that limitation began to run from the 12th June 1899, when the cause of action arose. No subsequent disability or inability could arrest the running of limitation, under s. 9 of the Limitation Act.

Hurronauth Roy v. *Maheroollah Mollah* (1) and *Mon Mohun Roy* v. *Doorga Churn Gooee* (2) followed.

CIVIL RULE.

RULE granted to the plaintiff, Girindra Mohan Roy, a minor, by his next friend Satish Chandra Chowdhry, Manager under the Court of Wards, petitioner.

The plaintiff brought a suit for recovery of the amount due on an unregistered instalment bond executed by the defendant in the names of the adoptive mother and the step-mother of the plaintiff before his adoption. The whole amount of the bond was payable in twelve instalments, and there was a stipulation in the bond that in the event of default in payment

* Civil Rule No. 3319 of 1908, against the judgment of Ali Ahmad, Small Cause Court Judge of Rungpur, dated Aug. 14, 1908.

(1) (1867) 7 W. R. 21. (2) (1888) I. L. R. 15 Calc. 502.

of two consecutive instalments the creditor would be entitled to recover the entire amount due on the bond. The first instalment was payable on the 30th Falgoon 1305 B. S., and the second on the 30th Joista 1306 B. S. (12th June 1899).

The plaintiff was adopted on the 2nd of July 1899, and thereupon he succeeded to the estate of his adoptive father, together with the aforesaid instalment bond.

The defendant failed to pay the instalments, and the suit was brought on the 1st June 1908 for recovery of the instalments due on the bond, relinquishing the first two instalments, which had become due before his adoption.

The defendant contended that as the cause of action to recover the whole amount arose on the 12th June 1899 (the date on which the second instalment fell due) the suit was barred by limitation.

The Court below dismissed the suit on the ground that it was barred by limitation.

The plaintiff, thereupon, moved the High Court and obtained this Rule.

The Advocate-General (Hon'ble Mr. S. P. Sinha) (*Babu Umakali Mookerjee* and *Babu Debendra Nath Bagchi* with him), for the petitioner. It is optional with the creditor, under the bond, to sue or not for the whole amount on the first default. The plaintiff brought the suit relinquishing his claim for the first two instalments which, I submit, amounted to a waiver under Article 75, Schedule II of the Limitation Act: *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (1). The first two instalments became due before the plaintiff's adoption, and he, being still a minor, the cause of action arose during his minority, and his present claim is, therefore, saved from limitation.

Babu Hem Chandra Mitra (*Babu Atul Chandra Dutt* with him), for the opposite party. There is no distinction between an optional and compulsory institution of suit. A mere

(1) (1906) 11 C. W. N. 903.

1909

GIRINDRA MOHAN ROY v. KHIR NARAYAN DAS.

abstinence from suing, or mere payment and receipt of overdue instalments do not amount to a waiver: *Balaji Ganesh* v. *Sakharam Parashram Angal* (1), *Mumford* v. *Peal* (2). To constitute a waiver there must be payment and circumstances clearly indicating an intention to waive. The limitation runs, in this case, from the time when default was made in payment of the second instalment in consequence of which the whole amount became due: the claim is therefore barred by limitation. Reliance was placed on the following cases:—*Hurronauth Roy* v. *Maheroollah Moollah* (3), *Nobodip Chunder Shaha* v. *Ram Krishna Roy Chowdhry* (4), *Mon Mohun Roy* v. *Doorga Churn Gooee* (5), *Hurri Pershad Chowdhry* v. *Nasib Singh* (6), *Sitab Chand Nahar* v. *Hyder Malla* (7), *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (8), *Nagappa* v. *Ismail* (9), *Hemp* v. *Garland* (10), *Chenibash Shaha* v. *Kadum Mandul* (11).

Babu Debendra Nath Bagchi, in reply, referred to *Badi Bibi Sahibal* v. *Sami Pillai* (12), and also to *Chunder Komal Das* v. *Bisassurree Dassia* (13), *Nobocoomar Mookhopadhya* v. *Siru Mullick* (14), *Ganesh Krishn* v. *Madhavrav Ravji* (15) and *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (16), on which the case of *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (17) was based.

Cur. adv. vult.

SHARFUDDIN AND COXE JJ. This is a Rule granted to the petitioner under section 25 of the Provincial Small Cause Court Act.

(1) (1892) I. L. R. 17 Bom. 555.
(2) (1880) I. L. R. 2 All. 857.
(3) (1867) 7 W. R. 21.
(4) (1887) I. L. R. 14 Calc. 397.
(5) (1888) I. L. R. 15 Calc. 502.
(6) (1894) I. L. R. 21 Calc. 542.
(7) (1896) I. L. R. 24 Calc. 281.
(8) (1904) I. L. R. 31 Calc. 297.
(9) (1889) I. L. R. 12 Mad. 192.
(10) (1843) 4 Q. B. 519.
(11) (1879) I. L. R. 5 Calc. 97.
(12) (1892) I. L. R. 18 Mad. 257.
(13) (1883) 13 C. L. R. 243.
(14) (1880) I. L. R. 6 Calc. 94.
(15) (1881) I. L. R. 6 Bom. 75.
(16) (1883) I. L. R. 9 Calc. 857.
(17) (1906) 11 C. W. N. 903.

The facts giving rise to the present Rule are that the petitioner was adopted on the 2nd of July, 1899 (18th of Sravan 1306). His adoptive mother and step-mother were in temporary possession of the estate as Hindu widows with limited rights, which ceased on the date of the petitioner's adoption.

Along with the estate to which the petitioner succeeded on his adoption there was also an instalment bond executed by the defendant in favour of the two ladies mentioned above.

The instalment bond above referred to stipulated for payment of the money covered by it in twelve instalments, falling due on the dates mentioned in the bond, the second instalment falling due on the 30th Jaista 1306. There was a further stipulation in the bond to the effect that in the event of default in payment of two consecutive instalments, the creditor would be at liberty to recover the entire amount due on the bond.

It appears that the petitioner was a minor when adopted, and is still a minor. It further appears that the defendants have failed to pay any instalment of the bond.

30th Jaista 1306 (12th June 1899) was the date on which the 2nd instalment was due, and under the stipulation in the bond, the cause of action arose on that date as the defendants had failed to pay two consecutive instalments. The adoption of the petitioner took place, as observed before, on the 2nd of July 1899, *i.e.*, within three weeks of the date when the cause of action arose. This instalment bond is an unregistered document, and, if the cause of action arose on the 12th, June 1899, it was contended that, the suit having been brought on the 1st of June 1908, was barred by the Statute of Limitation.

The lower Court has dismissed the suit holding that the plaintiff's case is barred by Limitation, and the plaintiff has obtained the present Rule from this Court.

It is contended that the Article of the Limitation Act, that governs the present case, is Article 75, Schedule II, Act XV of 1877. The limitation therein provided is three years from the date when the first default is made, unless the payee or obligee

1909

GIRINDRA MOHAN ROY v. KHIR NARAYAN DAS.

waives the benefit of the stipulation to sue for the whole amount of the bond, and then from the date when the fresh default is made in respect of which there is no such waiver.

It is contended on behalf of the petitioner that the suit was brought after distinctly waiving his claim for the first two instalments, which had fallen due before his adoption and that hence the "cause of action" arose during his minority and his claim was, therefore, saved from limitation.

Under section 9 of the Limitation Act (XV of 1877) "when once time has begun to run no subsequent disability or inability to sue stops it." If the limitation began to run from 12th June, 1899, the due date of the second instalment under section 9 of the Limitation Act, the petitioner's adoption some three weeks after that date could not arrest the limitation, which had already commenced to run, unless the right to sue on two consecutive instalments falling due was waived. The whole question therefore hinges on the question of waiver.

A number of authorities has been referred to by the parties in support of their respective contentions.

There is no allegation in the present case that there was any acceptance on the part of the plaintiff of the overdue instalments.

It is contended on his behalf that his relinquishment of his claim for the first two instalments amounts to a waiver as contemplated by Article 75, Schedule II of the Limitation Act (XV of 1877), and in support of his contention our attention has been drawn to various authorities, of which the most recent is the case of *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (1), where it was decided, that the proviso in the bond having been inserted for the advantage of the creditor, it was open to him, if default were made, to sue at once for the whole amount, or if he so elected, to waive the benefit of the proviso, which was thus conferred upon him. In that suit no claim was made for the first instalment on the non-payment of which the benefit of the

(1) (1906) 11 C. W. N. 903.

proviso was conferred upon the plaintiff. We further find in this reported case the following observation :—"The question therefore is, whether the suit is barred altogether or whether the plaintiff waiving, as he has done, the benefit of the proviso, to which I have referred, is not entitled to the instalments, which have accrued due within the limit of six years from the date of suit." This suit was upon a registered instalment bond. The authorities relied upon in this case were *Chunder Komal Das* v. *Bisassurree Dassia* (1), *Nobocoomar Mookhopadhya* v. *Siru Mullick* (2), *Ganesh Krishn* v. *Madhavrav Ravji* (3), and *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (4). It is not clearly stated in this judgment whether abstinence from bringing the suit for the whole claim was considered as in itself a sufficient waiver in law, and the only fact stated is that the suit was not for the over-due instalment. It is stated that the plaintiff had waived the benefit of the proviso, but it is not clear how he waived it.

In the case of *Chunder Komal Das* v. *Bisassurree Dassia* (1), it was held that an application for the execution of an instalment decree was not barred except as to the instalments, which had fallen due more than three years before, and that it was optional with the decree-holder to realize the whole decree at once upon default being made or to waive his right to do so and seek to realize instalments as they became due. This was so held following *Asmutullah Dalal* v. *Kally Churn Mitter* (5), which was also followed in the case of *Nil Madhub Chuckerbutty* v. *Ramsodoy Ghose* (4). We find in the last-mentioned case that the decision hinged on the construction of the decree. The wording of that decree is not given in the judgment, but is said to have been obscure.

The cases of *Nobocoomar Mookhopadhya* v. *Siru Mullick* (2) and *Ganesh Krishn* v. *Madhavrav Ravji* (3) have no application to the present case.

(1) (1883) 13 C. L. R. 243.
(2) (1880) I. L. R. 6 Calc. 94.
(3) (1881) I. L. R. 6 Bom. 75.
(4) (1883) I. L. R. 9 Calc. 857
(5) (1881) I. L. R. 7 Calc. 56.

1909

GIRINDRA MOHAN ROY v. KHIR NARAYAN DAS.

In the case of *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (1), the execution was allowed to proceed on the ground that the judgment-debtor had paid up the over-due instalment, which was accepted by the decree-holder, and hence it was held that limitation began to run in this case from the time when the judgment-debtor stopped making any payment.

On behalf of the respondent, on the other hand, a number of authorities have been placed before us in support of his contention that the suit was barred by limitation. We propose to take up and discuss these authorities one by one.

In *Chenibash Shaha* v. *Kadam Mundul* (2), it was held that, when a debt is made payable by instalments with the proviso that on default of payment of any one instalment, the whole or so much as may then remain unpaid will become due, limitation runs from the time of the first default. A subsequent acceptance of the instalment in arrear operates as a waiver and suspends the operation of the law of Limitation: but merely allowing the default to pass unnoticed does not. The word waiver in this authority has been explained to mean that, where the whole amount secured by the instalments becomes payable on default of payment of the first instalment and the payee, instead of taking measures to recover the whole amount, accepts payment of the instalment in default, he must wait till there is a fresh default in the matter of the recovery of the remainder. It was further remarked in this case that the non-receipt of the particular instalment or suffering it to fall through by operation of the Statute of Limitation is not a waiver as, if this were so, waiver and *laches* would be convertible terms and the object of the law of Limitation would be frustrated.

In *Nobodip Chunder Shaha* v. *Ram Krishna Roy Chowdhry* (3), it was held that the mere fact that a creditor had done nothing to enforce the condition in an instrument under which the whole debt became due on failure of payment of one

(1) (1883) I. L. R. 9 Calc. 857. (2) (1879) I. L. R. 5 Calc. 97.
(3) (1887) I. L. R. 14 Calc. 397.

instalment, is no evidence of waiver within the meaning of the Limitation Act. In this case the instalments had been unpaid for sometime and, as a matter of fact, the time that the last payment was made was so long ago that, if the whole amount became due at that time, the cause of action was barred, and upon that state of things the question that arose was whether the mere fact that the creditor had done nothing, but simply allowed the matter to sleep without enforcing his remedy against the debtor, was any evidence of waiver within the meaning of the Limitation law. It was held that such a condition of things would be no evidence of waiver.

In *Monmohun Roy* v. *Doorga Churn Gooee* (1), it was held that, where a decree or order makes a sum of money payable by instalments on certain dates and provides that, in default of payment of any instalment the whole of the money shall become due and payable and recoverable in execution, limitation begins to run from the date of the first default, unless the right to enforce payment has been waived by subsequent payment of the over-due instalment on the one hand and receipt on the other. It was held that the application was barred by limitation. The learned Judges, who decided this case, followed a decision of the Full Bench in the case of *Hurronauth Roy* v. *Maheroollah Moollah* (2), where it was held that limitation ran from the time when default was made in the payment of the first instalment in consequence of which the whole amount became due. The decision of the Full Bench was upon a reference made by the Judge of the Small Cause Court at Kushtea. The above decision of the Full Bench is supported by an English case, *viz.*, *Hemp* v. *Garland* (3). In this English case it was held that, when a note payable by instalments contains a provision that, if default be made in payment of one instalment, the whole shall be due, the cause of action arises upon the first default for all that then remained

(1) (1888) I. L. R. 15 Calc. 502. (2) (1867) 7 W. R. 21.
(3) (1843) 4 Q. B. 519.

1909

GIRINDRA MOHAN ROY v. KHIR NARAYAN DAS.

owing of the whole debt, and limitation has to be computed from the date of such default.

In *Hurri Pershad Chowdhry* v. *Nasib Singh* (1), it was held that a clause in the decree to the effect that on non-payment of an instalment by the specified date it should be in the power of the decree-holder to realize the whole amount was not intended to give him the option of waiving the default, if he pleased, but that it implied nothing more than the usual condition that on non-payment of an instalment the whole decretal amount becomes exigible. It was further held that, as the first instalment had not been paid on the due date, the application for execution not having been made within three years from the date when the whole amount became due was barred by limitation. It was also held in this case that mere abstinence from suing cannot amount to a waiver.

Sitab Chand Nahar v. *Hyder Mallah* (2) was a case of a mortgage-bond executed by the defendants whereby a sum of money was made payable by four instalments and the plaintiff was given the liberty in case of any default to sue either for the amount of that instalment or for the whole amount then due; it was held that limitation ran from the date of the first default. In this case it was remarked that, where there is an optional right given to enforce payment of money, such right may be waived, but when it is not waived or where there is nothing to show that it has been waived, limitation would run from the date when the right accrues. The learned Judges, who decided this case, relied upon certain observations of Lord Denman, Chief Justice, in *Hemp* v. *Garland* (3) referred to above—the observations being :—"That if he (plaintiff) chose to wait till all the instalments become due no doubt he might do so; but that which was optional on the part of the plaintiff would affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it." The learned Judges, who decided this case, further remarked

(1) (1894) I. L. R. 21 Calc. 542. (2) (1896) I. L. R. 24 Calc. 281.
(3) (1843) 4 Q. B. 519.

that the money sued for became due according to the terms of the bond when the first default in the payment of an instalment was made and it became due none the less because the right to enforce immediate payment was optional with the creditor.

Jadab Chandra Bakshi v. *Bhairab Chandra Chuckerbutty* (1) was a case of an instalment-bond wherein it was stipulated that on default being made in payment of any one instalment, the creditor would be at liberty to realize the amount covered by all the instalments. It was held that in such a case limitation would run from the date of the first default, unless there was a waiver by the creditor of the right to demand the whole on a default by subsequent acceptance of an over-due instalment. The learned Judges, who decided this case, dissented from the decision in the case of *Chunder Komal Das* v. *Bisassurree Dassia* (2), and followed the decision in the case of *Hurri Pershad Chowdhry* v. *Nasib Singh* (3).

The preponderance of the authorities supported by the decision of the Full Bench quoted above is to the effect that in the case of instalment bonds with the stipulation of the whole debt becoming due on the failure of payment of a certain instalment limitation would begin to run from the date of the non-payment of that instalment, unless there has been a waiver by the decree-holder by the acceptance of the over-due instalment.

In view of the conflicting rulings on the subject of waiver, we feel bound to follow the decision of the Full Bench in the case of *Hurronauth Roy* v. *Maheroollah Moollah* (4). It is true that that case was decided under Act XIV of 1859, in which there was no provision corresponding to Article 75. But it was followed in *Monmohan Roy* v. *Doorga Churn Gooee* (5) in 1888, and the principle it embodies, in our opinion, is still the law.

We hold that mere abstinence on the part of the plaintiff in this case from bringing a suit for the recovery of the whole

(1) (1904) I. L. R. 31 Calc. 297.
(2) (1883) 13 C. L. R. 243.
(3) (1894) I. L. R. 21 Calc. 542.
(4) (1867) 7 W. R. 21.
(5) (1888) I. L. R. 15 Calc. 502.

1909

GIRINDRA MOHAN ROY v. KHIR NARAYAN DAS.

amount due on the failure of the payment of the first two instalments did not amount to waiver. The cause of action arose on the 12th June 1899 and limitation began to run from that date. Under section 9 of the Limitation Act, no subsequent disability or inability could arrest the running of limitation.

In the above circumstances, we think that the judgment of the Small Cause Court is correct, and we therefore discharge the present Rule.

Rule discharged.

B. D. B.