

CIVIL RULE.

Before Mr. Justice Harington and Mr. Justice Brett.

JADAB CHANDRA BAKSHI

v.

BHAIRAB CHANDRA CHUCKERBUTTY.*

1904

Jan. 13.

Limitation—Instalment-bond—Default in payment of instalments—Waiver.

In an instalment-bond 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 :—

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 a subsequent acceptance of an overdue instalment.

Hurri Pershad Chowdhry v. Nasib Singh(1) followed.

Mon Mohan Roy v. Doorga Churn Gooee(2) referred to.

Chunder Komal Das v. Bisassuree Dassia(3) dissented from.

RULE granted to the petitioner, Jadab Chandra Bakshi, under s. 25 of the Provincial Small Cause Courts Act, 1887.

The petitioner brought a suit in the Court of Small Causes at Serampore against the defendant, Bhairab Chandra Chuckerbutty, for recovery of a certain sum of money due on a registered instalment-bond dated the 15th May 1895. The amount was payable by seven instalments, and it was stipulated that on failing to pay any one of the instalments the creditor would be at liberty to realize the whole amount due on the bond. Bhairab Chandra made default in respect of the first three instalments, but the plaintiff (petitioner) stated that Bhairab paid the amount due under the said instalments afterwards. The suit was brought for the last four instalments on the 20th March 1903, that is, more than six years after the date fixed for the payment of the first instalment, which was due on the 15th July 1895, but

* Civil Rule No. 2831 of 1903.

(1) (1894) I. L. R. 21 Calc. 542.

(2) (1888) I. L. R. 15 Calc. 502.

(3) (1883) 13 C. L. R. 243.

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within six years from the date when the fourth instalment fell due, *i.e.* the 12th April 1897.

The defence was that the suit was barred by limitation.

The lower Court held that the payment of the overdue instalment was not proved, and that the suit was barred by limitation; and it accordingly dismissed the plaintiff's suit. Against this decision the plaintiff moved the High Court and obtained this Rule.

Babu Baidya Nath Dutt (Babu Khetter Mohan Sen with him) for the petitioner. The suit being for money due under the last four instalments was in time, as limitation ran from the date when the fourth instalment fell due. The bond gave the plaintiff liberty to sue either for the entire amount due on the bond, or for money due on each instalment. The cases of *Chunder Komal Das v. Bisassurree Dassia*(1), and *Nilmadhub Chuckerbutty v. Ramsodoy Ghose*(2) support the contention that the suit was not barred by limitation. The plaintiff waived his right to sue, inasmuch as he abstained from suing when the defendant made default in payment of the first three instalments: see Articles 75 and 116, Sch. II, of the Limitation Act (XV of 1877). The case of *Sitab Chand Nahar v. Hyder Malla*(3) being in conflict with the two cases cited above, the present case should be referred to a Full Bench.

Babu Shib Chandra Palit for the opposite party. The plaintiff's suit was barred by limitation, inasmuch as it was not brought within six years from the date of the first default: see *Mon Mohun Roy v. Durga Churn Gooce*(4) *Murri Pershad Chowdhry v. Nasib Singh*(5) and *Sitab Chand Nahar v. Hyder Malla*(3). There was no waiver in this case, as it was found by the Court below that there was no payment by the defendant of the overdue instalments.

HARRINGTON AND BRETT JJ. In this case a Rule was granted calling upon the opposite party to show cause why the order of

(1) (1883) 13 C. L. R. 243.

(3) (1896) I. L. R. 24 Calc. 281.

(2) (1883) I. L. R. 9 Calc. 857.

(4) (1888) I. L. R. 15 Calc. 502.

(5) (1894) I. L. R. 21 Calc. 542.

the Small Cause Court Judge of Serampore complained of should not be set aside, or such other order made as to this Court might seem fit. The order was an order dismissing the plaintiff's suit on the ground that it was barred by limitation. The plaintiff sued on a bond for money borrowed by the defendant. The condition of the bond was that the money should be repaid in certain instalments, and the material proviso which has to be considered in this case, is "and on failure to pay any one of the said instalments, you," that is, the plaintiff, "shall be at liberty to realize the amount covered by all the instalments immediately with interest at the above rate, until realization." The question that arises on this proviso is: does the Statute of Limitation run from the date of the first instalment in respect of which default is made, or is the plaintiff at liberty to sue for each instalment as it falls due under the bond, taking the date of its falling due as the starting point for limitation? In our opinion the question is concluded adversely to the petitioner by authority. He relies on the case of *Chunder Komal Das v. Bisaseurree Dassia*(1), which is an authority for the proposition that the decree-holder might realize the whole decree at once upon default being made in payment of any one instalment, or might waive his right to do so and seek to realize the instalments, as they became due. But this case has been dissented from expressly in the case of *Hurri Pershad Chowdhry v. Nasib Singh*(2) and also in the case of *Mon Mohun Roy v. Durga Churn Goose*(3). In our opinion limitation under the Statute begins to run from the time when the plaintiff first has his right to sue, unless it is proved that he waived the right to demand the whole on default being made in the payment of one of the instalments and agreed, notwithstanding the default, to accept subsequently the instalments payable under the bond. It is argued in support of the rule that his abstinence from suing amounts to a waiver of his right to sue for the whole. We do not agree with that contention, but we agree with the observation made by the learned Judges, who decided the case of *Hurri Pershad Chowdhry v. Nasib Singh*(2), that mere abstinence from suing cannot amount to waiver, and that there cannot be any waiver so as to

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(1) (1883) 13 C. L. R. 243.

(2) (1894) I. L. R. 21 Calc. 542.

(3) (1888) I. L. R. 15 Calc. 502.

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affect limitation save by payment and acceptance of an overdue instalment.

It has been argued that in the present case the bond gives liberty to the plaintiff either to sue for the whole or to sue for the separate instalments. That point has been disposed of by the same learned Judges in the observation next following that to which we have referred. The Judges say that no distinction can be drawn between a case in which it is provided that, on non-payment of an instalment, the whole amount shall become due, and one in which it is provided that on non-payment of an instalment the whole amount may be sued for. They point out that there is no reason why the limitation should begin to run in the case in which the amount shall "become due under the terms of the bond on the first default" and not in the case in which it may "become due under the terms of the bond on the first default," and it is clear that there can be no distinction because the real question is what is the date on which the plaintiff's right to bring his action arose. That being so we follow the decision in *Hurri Pershad Chowdhry v. Nasib Singh*(1) which, we may say, is consistent with all the authorities under the English law on this point. We accordingly discharge the rule with costs.

Rule discharged.

S. C. G.

(1) (1894) I. L. R. 21 Calc. 542.