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**(1923) 03 CAL CK 0026**

**Calcutta High Court**

**Case No:** None

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| Surendra Nath and Others | | APPELLANT |
| | Vs | |
| Raja Reshee Case-Law and Others | | RESPONDENT |

**Date of Decision:** March 29, 1923

**Citation:** 79 Ind. Cas. 271

**Hon'ble Judges:** Cuming, J; Chatterjea, J

**Bench:** Division Bench

**Judgement**

1. This appeal arises out of a suit upon an instalment mortgage-bond, dated the 23rd Bysah 1308.

2. The bond provided for payment of the debt in twelve instalments, the first falling due in POUS 1308 and the others in the month of Pous of each of the next 11 years ending with 1319. It was further provided that on default in payment of any one instalment the creditor would be entitled to recover the entire amount due under the bond with interest thereon at 2 per cent, per mensem, without waiting for the future instalments falling due. The plaintiff alleged that the first instalment was duly paid and the instalments for 1309 to 1311 together with interest thereon were paid and accepted although the payments were made out of time and the suit was brought for the subsequent instalments.

3. The main defence was that the suit was barred by limitation. The Court of first instance disbelieved the case set up by the defence but also disbelieved the case of the plaintiff as regards payments made by the defendants, and, holding that there was no waiver, came to the conclusion that the suit was barred by limitation. On appeal the learned Subordinate Judge held that the plaintiff''s case was proved and that there was waiver and accordingly gave the plaintiff a decree. The defendants have appealed to this Court.

4. The question for consideration is whether the suit is barred by limitation. The Article applicable to the suit is Article 132 which provides that for a suit to enforce payment of money charged upon Immovable property the period of limitation is 12 years from the time when the money sued for becomes due.

5. The question, therefore, is when did the money become due in the present case. A number of decisions has been cited before us mostly in connection with cases coming under Article 75 of the Limitation Act, or relating to instalment decrees.

6. It is a general rule that, where money is payable by instalments with a provision, that the whole of the money will become due on default of payment of one of the instalments, the money becomes due when default is made in any of the instalments. See Hurronath Ray v. Maheroola Moolah 7 W. R. 21 (F.B.) and Hemp v. Garland (1848) 4 Q.B. 519 : 3 G. and. D. 402 : 12 L.J.Q.B. 134 : 7 Jur. 302 : 62 R.R. 423 : 114 E.R. 994. But as pointed out by Wilson and O''Kinealy, JJ, in Mon Mohan Boy v. Durga Charn Gooee 15 C. 502 : 7 Ind. Dec. (N.S.) 919 an exception has been engrafted upon the general rule in certain oases, viz, that if the right to enforce payment of the whole sum due upon default being made in payment of an instalment has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other, then the penalty having been waived, the parties are remitted to the same position as they would have been in, if no default had occurred. In the case of Mohesh Chandra Banerjee v. Prosanna Lal Singh 31 C. 83 : 8 C.W.N. 66, Rampini and Pargiter, JJ., appear to have taken a different view relying upon certain decisions of the Bombay High Court. But in that case no instalment was paid in full, and the learned Judges referring to the decisions of this Court pointed out that part-payment and acceptance of part of an overdue instalment has never been held even by this Court to amount to a waiver.

7. A distinction, however, has been taken between a waiver by payment and receipt of an overdue instalment and a mere omission to sue or take steps on the default, and although there may be a waiver by the payment and receipt of the overdue instalment, there could be none by the mere fact of doing nothing. It was held accordingly in Girendra Mohan Roy v. Bocha, Das 1 Ind. Cas. 49 : 36 C. 394 : 13 C.W.N. 1004 : 9 C.L.J. 226 (where the cases on the point are collected) 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 instalments (as agreed upon in that case) did not amount to waiver. In the present case there was payment and acceptance of the overdue instalments.

8. As already stated, most of the decisions on the point relate to cases coming under Article 75 of the Limitation Act which provides for waiver of default in payment of instalments, or to cases relating to instalment decrees to which the principle has been applied.

9. Article 132 of the Limitation Act does not provide for oases of waiver, and there is no case directly deciding that the principle of waiver would apply to mortgage bonds payable

by instalments. In the case of Juggut Mohini Dasee v. Monohur Koonwar 25 W.R. 278, however, Mitter, J., observed that the principle indicated in Article 75 might be adopted in determining "when the money sued for becomes due" within the meaning of Article 132, but the learned Judge himself added that it was not necessary to express any decided opinion upon that point. And in Sitab Chan Nahar v. Hyder Malla 24 C. 281 : 1 C.W.N. 229 : 12 Ind. Dec. (N.S.) 854, Banerjee and Rampini, JJ., applied the principle of the eases decided upon analogous questions relating to execution of decrees for money payable by instalments (rather the balance of authority in this Court upon the question before them) to a case coming under Article 132. We think that in the absence of any provision in Article 132, with respect to cases of waiver, and of any direct authority on the point, we may apply the principle indicated in Article 75 in determining "when the money sued for becomes due" within the meaning of Article 132.

10. Applying that principle, and having regard to the weight of authority in connection with cases under Article 75 and instalment-decrees, we think that the payment and acceptance of overdue instalments in the present case constitute a waiver, and that the plaintiff is entitled to recover the subsequent instalments.

11. It is contended, however, on behalf of the appellants that there was no waiver, because the acceptance of interest on the overdue instalments shows that penalty by way interest was realized and there was therefore no waiver. But the penalty, referred to in the decisions, does not refer to penalty by way of interest, but the penalty by way of suing for all the instalments. Reliance was placed upon the case of Mohesh Chandra Banerjee v. Prosanna Lal Singh 31 C. 83 : 8 C.W.N. 66 to show that payment and receipt of interest cannot amount to waiver. The learned Judges in that case referred to Nanjappa v. Nanjappa 12 M. 161 : 4 Ind. Dec. (N.S.) 462. In the latter case the bond provided for interest, at 9 per cent, and on default at 15 per cent. The creditor accepted interest at a rate a little higher than 9 per cent, on default and it was held that he had not waived any right under the bond by accepting payment on account of interest. That decision, therefore, does not throw much light upon the question before us. Besides, payment and acceptance of interest alone cannot constitute waiver of default of an overdue instalment. In Mohesh Chandra Banerjee"s case 31 C. 83 C.W.N. 66 there was payment of interest and part payment of overdue instalments. In the present case the entire overdue instalment together with interest thereon was paid and accepted by the creditor though out of time, and no authority has been shown to us that in such a case it would not constitute waiver.

12. On the whole, we are of opinion that the decree of the Court below is right and the appeal is accordingly dismissed with costs.