

(1935) 12 BOM CK 0008
In the Bombay High Court

Bomatu Bhadu Ghatole and Others

APPELLANT

Vs

Govardhandas Nanabhai Gujarathi and Others

RESPONDENT

Date of Decision : 10-12-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 48
Transfer of Property Act, 1882 — Section 99

Citation : AIR 1936 Bom 268 : 163 Ind. Cas. 937

Hon'ble Judges : N.J. Wadia, J;Broomfield, J

Bench : Full Bench

Judgement

Broomfield, J.—These appeals have been heard together as they involve a common question as to the law of limitation applicable to instalment decrees where the whole amount is made payable in default of one or more instalments. In the case from which Second Appeal No. 568 of 1933 arises, there was a consent decree for Rs. 769-2-9 with costs and future interest payable in four equal instalments, the first being due in January 1928. The decree also provided that "if any instalment remains unpaid, the defendants to pay all the moneys due in one sum after deduction of the payment already made, and in case the defendants fail to pay accordingly, the plaintiff may recover the amount due by sale through Court of the property under attachment." The vernacular expression for "the defendants do pay" is dyavi; the vernacular for "plaintiff may recover" is vasul Karun qhyavi. On the point of the construction of the decree we take the view that the use of this subjunctive form implies that the judgment-creditor is given an option of recovering the whole amount in case of default, and not that the decree makes it compulsory to apply at once for the whole amount. The words vasul harun ghyav qually well be translated "may or should recover."

2. In this case no instalments were paid. So that if time were to run from the first default, an application for execution would be barred after three years from 1st February 1928. The darkhast which gave rise to the appeal was filed on 1st February 1932, and the judgment-creditor then applied to recover the whole amount due. But he gave up his claim for the first instalment and sought to

recover the remaining instalments, all of which had fallen due. The District Judge agreeing with the trial Judge, held that the darkhast was in time. He applied the decision of the Privy Council in *Lasa Din v. Gulab Kunwar* 1932 P.C 207 and held that the provision in the decree allowing the whole amount to be recovered in case of default was one in favour of the judgment-creditor, and that if he did not avail himself of it, he did not thereby lose his right to recover the instalments as they fell due. In the other appeal, Second Appeal No. 716 of 1933, there was a consent decree for Rs. 2,798 with costs and future interest, which was made payable by annual instalments of Rs. 500, and it was provided that "in default of payment of any two instalments, the plaintiff do recover the whole amount then remaining due in one sum by sale of the property in suit." The vernacular for "do recover" is *vasul karavi*. In our opinion there is nothing in the language of these two decrees to justify any distinction being made between them, and in this case also we think that the judgment-creditor was given an option to recover the whole amount. The facts in this case were that the first instalment was made payable in January 1924, and four instalments were paid, viz. for the years 1924, 1925, 1926 and 1927. Instalments for 1928 and 1929 were not paid. The darkhast giving rise to the appeal was presented on 15th June 1932. The cause of action for the recovery of the whole amount arose on 1st February 1929, but the judgment-creditor gave up his claim for the instalments for 1928 and 1929 and prayed for the balance.

3. The Subordinate Judge held that the darkhast was in time. The District Judge, who, as it happens, was the same District Judge as in the other case, took the other view and held that it was time barred. He relied on two cases of this Court, *Gulabrao v Magan* 1925 Bom 326 and *Raichand v. Dhondo* 1918 Bom 163. The point in issue in both cases is directly covered by a recent decision of a Bench of this Court in *Veherbhai v. Javer Soma* 1936 Bom 17 where it was held by the learned Chief Justice and my learned brother N.J. Wadia, that where a decree for money is made payable in instalments and in default of payment of any instalment the whole of the decree becomes payable immediately, it is open to the decree-holder to apply, even after three years from the date of the default, to recover such of the instalments as have become due within three years of the date of his application. The reasoning of the Judicial Committee in *Lasa Din v. Gulab Kunwar* 1932 P.C 207 was held to apply and *Raichand v. Dhondo* 1918 Bom 163 was doubted and not followed.

4. The learned advocate, who appears for the appellants in Second Appeal No. 568, contends that this decision is inconsistent with several previous decisions of this Court which, he says, have not been overruled by the Privy Council in the case referred to. Now it is a fact that no Bombay authorities were referred to in 59 I A 376 (I), and also, as is pointed out at p. 384 of the report of that case, the important and difficult questions involved had to be decided without the assistance of counsel for the respondents. Moreover, it is clear, as Mr. Pardhan says, that in *Lasa Din v. Gulab Kunwar* 1932 P.C 207 their Lordships were concerned with a default clause in a mortgage bond and with Article 132,

Limitation Act, not with Article 182 or Article 181, and it can hardly be said that they intended to lay down any general principle of law which would necessarily apply to any other article of the Limitation Act. The case 59 I A 376 has been distinguished on that ground by a Full Bench of the Allahabad High Court in *Jawaharlal v. Mathu Prasad* 1934 All 661. But, on the other hand, the point we have to decide depends not so much on the construction of any article of limitation as on the construction of the decrees. The question really is what is the effect of the default clause on the rights of the judgment-creditor. The construction placed by the Privy Council on a similar clause in a mortgage bond is not conclusive certainly, but may be regarded as a valuable criterion. I do not think it is possible to dispute the position that the default clause in an instalment decree is as much for the benefit of the creditor as a similar clause in a mortgage bond, and, if so, on principle it is difficult to see why the creditor's failure to avail himself of it should deprive him of the remedy he would have had, apart from the clause.

5. In support of the contrary view we have been referred to three cases, *Dulsook Rattanchand v. Chugon Narrun* (1877) 2 Bom 356 *Raichand v. Dhondo* 1918 Bom 163 and *Gulabrao v. Magan* 1925 Bom 326. *Dulsook Rattanchand v. Chugon Narrun* (1877) 2 Bom 356 it was held that a decree payable by instalments, with a proviso that in default of payment of any one instalment the whole amount of the decree shall become payable at once, is barred, if application for execution be not made within three years from the date on which any one instalment fell due and was not paid. There is little discussion of the question in the judgment of Westropp, C.J., but the Court relied on an earlier Full Bench case, *Gumna Dambershet v. Bhiku Hariba* (1875) 1 Bom 125 where reliance seems to have been placed on the rule laid down in *Hemp v. Garland*, (1843) 4 Q.B 519. The last mentioned case and also *Reeves v. Butcher* (1891) 2 Q.B 509 were cited in the argument before the Privy Council in *Lasa Din v. Gulab Kunwar* 1932 P.C 207. *Hemp v. Garland*, (1843) 4 Q.B 519 was not mentioned in the judgment, but as to *Reeves v. Butcher* (1891) 2 Q.B 509 their Lordships, at p. 385 of the report, made the comment that it is always dangerous to apply English decisions for the construction of an Indian Act. There is a reference to *Dulsook Rattanchand v. Chugon Narrun* (1877) 2 Bom 356 in *Kashiram v. Pandu* (1903) 27 Bom 1. Jenkins, C.J., observed in connexion with it (p. 9):

Notwithstanding the high respect that must at all times be yielded to the opinion of the learned Judges responsible for that decision, it undoubtedly detracts from its value that the case was unargued, and this disadvantage is, I think, apparent in the somewhat inconclusive reasoning on which the opinion is supported.

6. There are other criticisms in Sir Lawrence Jenkins' judgment which must be said, I think, to weaken the authority of *Dulsook Rattanchand v. Chugon Narrun* considerably. *Raichand Motichand v. Dhondo Laxman* 1918 Bom 163 has been criticised by the learned Chief Justice in *Veherbhai v. Javer Soma* 1936 Bom 17. With respect I agree with his observations, and I may add this. The main ground

on which Beaman, J., in *Raichand Motichand v. Dhondo Laxman* 1918 Bom 163 seems to have held that the judgment-creditor is barred from applying for the instalments(1877) 2 Bom 356 which are within time, is that if he be allowed this right, his right to apply for the whole amount of the decree may also be extended indefinitely He says (p. 730):

The ground of appeal is that it was optional with him (the judgment-creditor) to waive all breaches on the part of the debtor to fulfil his obligations under the instalment decree and so at the very end of the eight years, sue for at least three instalments in arrears then due. If this view be correct, it follows that the creditor would likewise be entitled to sue, within three years of failure to pay the last instalment, for the total amount of debt with interest.

7. He goes on to say that:

The effect of acceding to this argument would be that no matter how complete the right to call in a definite sum of money had become, the judgment-creditor might ignore it and extend the period of limitation, perhaps to the extent of some 20 instead of 3 years, as for example, if the instalment decree had provided for the repayment of the capital sum over a period of 20 years.

8. With due deference, this reasoning seems to me to be fallacious On any view the claim to recover the whole amount of the debt on default of payment of one or more instalments must be barred within three years of the default either under Article 182 or Article 181, Limitation Act. The difficulty to which the learned Judge refers appears, therefore, to be non-existent, and his finding that the creditor's right to enforce the payment of the full amount upon breach of the condition puts an end to the instalment decree as an instalment decree, must be supported on some other ground. I am unable to see any reason why the decree should cease to be regarded as an instalment decree, unless indeed the terms of the decree itself make it clear that that result of the failure to pay the instalments in time was intended. That is to say, if the terms of the decree made it perfectly clear that the judgment-creditor had no option, and in case of default was bound to execute the decree for the full amount, then no doubt it might be said that the decree would cease to be an instalment decree. But, in the two cases with which we are concerned at any rate, the language of the decrees did allow an option to the judgment creditor either to apply for the full amount or to waive that privilege.

9. As to *Gulabrao v Magan* 1925 Bom 326 the decision there turned largely on the provisions of Section 48 Civil P.C, and, although Sir Norman Macleod has held in his judgment at p. 462 that the decree was no longer an instalment decree after default had been made, no reasons are given for that view. We think, therefore, that we are at liberty to follow, and we prefer to follow, the latest ruling of this Court in *Veherbhai v. Javer Soma* 1936 Bom 17 which is in accordance with the view taken by the Allahabad High Court in two recent cases in which the earlier rulings of that High Court have been reconsidered: Joti

Prasad v. Sri Chand 1928 All 629 a Full Bench decision, and Ram Prasad Ram v. Jadunandan Upadhia 1934 All 534. We are all the more inclined to take this view, because, looking at the question apart from authority, it appears to be more consonant with justice and commonsense. We could hardly decline to follow Veherbhai v. Javer Soma 1936 Bom 17. We might, in view of the conflict of authority, have referred the matter to a Full Bench, but under the circumstances there seems to be no necessity to do so.

10. There is one special point in Second Appeal No 568 which should be mentioned. The learned advocate for the appellant argued that apart from the point of limitation the darkhast should fail because it was not an application in accordance with law. The decree provided that in case of default the plaintiff might recover the amount due by sale through Court of the property under attachment. Certain Immovable property had been attached before judgment and this attachment was directed to continue until the whole amount was paid up. The relief prayed for in the darkhast, however, was the recovery of the sum due by attachment and sale of the moveable property of the judgment debtor. That, it is contended, is not in accordance with law, and in support of that proposition we were referred to Ram Prasad Ram v. Jadunandan Upadhia 1934 All 534 and Chatter v. Newal Singh. I do not consider that these cases have any bearing on the present case. In the former there was an application made for possession of a house which was not mentioned in the decree at all. In the other case an application had been made for arrest of the judgment-debtor contrary to the provisions of Section 341 of (1889) 12 All 64 the old Civil P.C., and there was also an application for the sale of property contrary to Section 99, T.P. Act. It is easy to see, therefore, why those applications should have been held to be not in accordance with law. But there is nothing illegal in an application to recover money found due by the decree by sale of the moveable property of the judgment-debtor. That is a method of execution the right to which is given by the Civil Procedure Code, and the right is not taken away in my opinion, because the decree gives the further right of recovering the money by sale of the attached Immovable property. I think, therefore, there is no substance in this point. A minor point was also mentioned in the other Appeal No. 716, in connection with the amount of future interest awarded. The trial Court has awarded future interest on Rs. 1.039-6-6 from 1st February 1930.

11. It is contended on behalf of the respondents that future interest should run from 15th June 1932, i. e. the date of the darkhast, because interest up to that date has been included. However, as the learned advocate for the respondents points out, the decree provided that interest should be payable at six per cent, on the full amount Rs. 1,500 and not on any lesser amount. As it does not appear that the judgment-creditor has been awarded anything more than is due to him, we do not propose to interfere. The result of our finding on the question of limitation is that appeal No. 568 of 1933 is dismissed with costs. Appeal No. 716 of 1933 is allowed. The order of the District Judge is set aside and that of the Subordinate Judge restored with costs throughout.

N.J. Wadia, J.

12. I agree