

(1942) 03 BOM CK 0012
In the Bombay High Court
Case No : Second Appeal No. 501 of 1940

Hanmant Bhimrao Kalghatgi	Vs	APPELLANT
Gururao Swamirao Kulkarni		RESPONDENT

Date of Decision : 13-03-1942

Acts Referred:

Citation : AIR 1943 Bom 36 : (1942) 44 BOMLR 880

Hon'ble Judges : John Beaumont, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Beaumont, C.J.—This is a second appeal, which comes before me on a reference occasioned by a difference of opinion between Mr. Justice Divatia and Mr. Justice Macklin, raising this question:

Whether on the terms of the decree under execution the installment decree came to an end after the decree-holder unsuccessfully exercised his option in the first darkhast to recover the whole amount?

2. The facts giving rise to the question are these. On February 26, 1927, there was a decree for Rs. 1,850, payable by annual installments of Rs. 300 each, the first installment being due on May 31, 1927, and subsequent installments on May 31 in succeeding years, and there was a default clause providing that if the defendants failed to pay duly any one installment, the plaintiff should recover forthwith the whole of the remaining amount and further interest by sale of the mortgaged property at his pleasure. There was default in payment of the first installment, and on) July 1, 1929, the decree-holder issued a darkhast for recovery of the whole amount due on the decree. On June 2, 1933, that darkhast was disposed of for lack of bidders. On September 2, 1937, the present darkhast was issued for recovering payment of the installments due under the decree during the three years preceding the date of the darkhast.

3. The question, which I am asked to decide, is, of course, relevant on the

question of limitation. If the decree has become a decree for payment of the whole amount in one sum, then it is time-barred, and the darkhastdar is therefore, endeavouring to treat the decree as still being an installment decree and to recover the installments due within the preceding three years. Mr. Justice Divatia took the view that the decree-holder by issuing a darkhast to recover the whole amount had conclusively elected to treat the decree as a decree for immediate payment, and that he could not afterwards recede from that position, and seek to recover the installments. Mr. Justice Macklin, on the other hand, held that as the previous darkhast for recovery of the whole amount had been infructuous, it did not debar the decree-holder from subsequently recovering the amount due by installments.

4. It is well settled that a default clause of this nature is inserted for the benefit of the creditor, and that when default in payment of an installment occurs, the creditor may either exercise his right to recover the whole amount, or may waive the operation of the default clause, and continue to recover the debt by installments. But it is clear that he cannot have both rights together ; they are alternative rights. If he is entitled to recover the amount in one lump sum, he is not entitled to recover annual installments. On the other hand, if he is entitled to recover annual installments, he is not entitled to recover the whole amount in one lump sum. In my opinion as soon as default occurs, the decree-holder has two alternative, and inconsistent,. rights, and he must make up his mind which he is going to rest upon. Having in this case issued a darkhast to recover the whole amount, he has, in my view, unequivocally elected to stand on his right under the decree to recover the whole amount in one sum, and he cannot afterwards go back on that election, and proceed to recover the amount in installments. I, therefore, agree with the conclusion of Mr. Justice Divatia.

5. Mr. Justice Macklin relied upon a recent case in the House of Lords, *United Australia, Ltd. v. Barclays Bank, Ltd.* [1941] A.C. 1. But I venture to think that the learned Judge has not observed the warning uttered by Lord Atkin in the course of his very learned and interesting judgment (page 29):

It seems to me that in this respect it is essential to bear in mind the distinction between choosing one of two alternative remedies, and choosing one of two inconsistent rights.

6. The House of Lords in that case was dealing with a case of two alternative remedies, one in contract and the other in tort, and it was held that the mere issue of a writ to enforce one remedy did not debar the plaintiff from proceeding on his other remedy. Nothing short of judgment on the one remedy would have that effect. There are other cases of alternative remedies, for instance, the well-known case of *Scarf v. Jardine* (1882) 7 A. C. 345 where the plaintiff had a right to proceed against the partners in a firm on the true facts, and an alternative remedy against former partners in the firm for the same debt on estoppel: and the case of *Morel Brothers & Co., Limited v. Westmoreland (Earl of)* [1903] 1 K.B. 64 where the plaintiff had alternative remedies against a principal and an

agent. In cases of that nature the plaintiff can pursue all or any of his remedies up to judgment. In general it is only on obtaining judgment on one remedy that the plaintiff loses the right to proceed on the other remedy. But where a man has two inconsistent rights, he must elect which of them he is going to rely on, and having elected to rely on one right, he is not allowed to retract his election. A good illustration of that principle is to be found in the case of a landlord who has a right under a lease to forfeit the lease. As soon as he has notice of an event which occasions forfeiture, he has an option either to enforce the forfeiture, or to waive it and maintain the lease. It is well settled law that if, in such a case, the landlord issues a writ to recover possession, that amounts to an unequivocal election to enforce the forfeiture, and he cannot afterwards rely on the lease as subsisting. On the other hand, if he issues a writ to recover rent accrued due under the lease after he received notice of the act giving rise to the forfeiture, he waives the forfeiture, and cannot afterwards seek to enforce it. It is irrelevant in such a case that the action does not proceed to judgment. It seems to me that that principle applies here. The decree was originally a decree for payment by annual installments. As soon as default was made, the decree-holder was given two inconsistent rights; he could continue under the decree to recover the amount by installments, or he could recover the whole amount at once; but he could not do both. He was bound to limit his *darkhast* to a principal sum either of Rs. 1,850 or Rs. 300. He had alternative rights, and the debtor was subject to alternative obligations. The creditor having elected to enforce his right to recover the whole debt in one lump sum, the future obligation of the debtor was fixed accordingly, and, in my opinion, it was not open to the creditor subsequently to turn round, and seek to enforce the decree as an installment decree.

7. I, therefore, answer the question submitted to me in the affirmative.

8. The appeal is dismissed with costs in accordance with the opinion of the majority of the Judges.