

(1918) 06 CAL CK 0022
In the Calcutta High Court

Hara Kumar Saha and Another

APPELLANT

Vs

Ram Chandra Pal and Others

RESPONDENT

Date of Decision : 20-06-1918

Acts Referred:

Citation : AIR 1919 Cal 960 : 47 Ind. Cas. 943

Hon'ble Judges : Walmsley, J; Charles Chitty, J

Bench : Division Bench

Judgement

Charles Chitty, J.

I have had the advantage of reading the judgment which is about to be delivered by my learned brother and I agree that the appeal must fail. It may now be taken to be settled, so far as this Court is concerned, that mere forbearance to see is not sufficient proof of waiver on the part of the plaintiff. In this case the plaintiffs feeling that difficulty set up another case that in 1312, when default was first made, they had arranged with the defendants not to insist in the future on the clause in the bond, which provided that on failure of two instalments the whole amount would become due. To this contention there are two objections. The first is one of fact that no such arrangement was pleaded nor was it found by the Courts to have been actually made. What did take place was that in 1312 there was a default and a waiver of the plaintiffs' rights in respect of that default, with the result that further instalments were paid, the last instalment being that for Baisakh 1313. If it be argued that there was such an arrangement with regard to future payments, the answer would be that such an arrangement would amount to a variation of the contract which could only be effected by a writing similar to that of the contract itself, namely, a writing registered. The appeal is dismissed with costs.

Walmsley, J.

2. The plaintiffs prefer this appeal. The defendants, or their predecessors, owed a large sum of money to the firm which is now represented by the plaintiffs, and

on Sraban 24th, 1312, they executed a bond by which they agreed to pay Rs. 3,000 by monthly instalments of Rs. 25. The bond was registered. It contained a provision that if the defendants made default in two consecutive months, the creditors should be entitled to sue for the whole amount due under the bond. It is found by the lower Courts that the defendants paid ten instalments only, the last payment being the one made on Baisakh 31st, 1313.

3. The present suit was instituted on June 13th, 1914, (Jaith 30th, 1321), and is for 72 instalments beginning with the instalment payable for Jaist 1315.

4. Both the lower" Courts have held that the suit is barred by limitation. On this question I need only refer to the case of "Girindra Mohun Roy Chowdhury v. Bocha Das 1 Ind. Cas. 49 : 36 C. 394 : 9 C.L.J. 226 : 13 C.W.N. 1004 where all the earlier cases were considered. According to the view expressed in that judgment, the present suit is barred by limitation, even though the demand is confined to the instalments which would have fallen due in the six years preceding the institution of the suit.

5. The plaintiffs, however, tried to avoid this difficulty by seeking to prove that in Asvin 1312 there was an oral undertaking on their part, made at the request of the defendant?, to waive their right to enforce payment of the whole on two successive defaults. The lower Courts have held that evidence of such an oral undertaking is barred by Section 92 of the Evidence Act, and if the effect of the undertaking was to modify the original registered contract they are correct.

6. It is now urged for the plaintiffs that the undertaking did not modify the contract, and that it amounted to nothing more than a promise on their part to show indulgence to the defendants as long as they chose to do so. Assuming that such was the effect of the undertaking, it seems to me that the plaintiffs are not in any better position. If it did not have the effect of modifying the original contract, that contract stands intact, and if it is not shown that as a fact the right conferred by the contract was waived, the suit is barred. It is said that the promise explains the subsequent inaction on the part of the plaintiffs and that the right was waived each month as default was committed: but that argument leads the plaintiffs into difficulties: if they did not take action because their promise had deprived them of the right to do so, they are faced "by the provisions of Section 92 of the Evidence Act; if their right to demand immediate payment of the whole continued undiminished they have no evidence of waiver to offer except mere forbearance to sue, and a vague promise to show indulgence made before the last payment and the subsequent defaults cannot convert such forbearance into waiver.

7. I think that the decision of the lower Courts is correct, and that the appeal should be dismissed with costs.