

(1903) 08 CAL CK 0005
In the Calcutta High Court

Mohesh Chandra Banerji

APPELLANT

Vs

Prosanna Lal Singh

RESPONDENT

Date of Decision : 14-08-1903

Acts Referred:

Citation : (1904) ILR (Cal) 83

Hon'ble Judges : Rampini, J;Pargiter, J

Bench : Division Bench

Judgement

Rampini and Pargiter, JJ.—The defendants in this case executed a mortgage bond in favour of the plaintiff on the 29th Magh, 1291 (10th February 1885) for a sum of Rs. 17,000 payable in 34 yearly instalments of Rs. 500 each. The terms of the bond were that if any instalment remained unpaid, then "all the instalments were to be ineffectual" and "the whole amount was to become due with interest at the rate of 1 per cent, per month after the first default of payment of the instalments." It is admitted that the instalments were paid up to the Bengali year 1295. Then, a default took place. Only Rs. 300 were paid that year. Constant defaults were subsequently made. According to the plaintiff no further instalment was ever paid in full, but the defendants made payments to them partly on account of parts of the instalments and partly on account of the interest accruing at the rate of Rs. 1,764 per annum on the whole balance then due. These payments continued up to 1305, after which no payments were made and this suit was instituted. The defendants do not deny that default was made in payment of instalments. But they allege that they paid sums amounting to Rs. 1,114 in excess of what the plaintiffs admit to have received, and on their behalf it has been contended that the payments they made were partly on account of instalments due, some of which they paid in full, and partly on account of interest due on the unpaid instalments.

2. The Subordinate Judge decided that the payments made were as alleged by the plaintiff; He found that the defendants had not proved that they had paid the sums amounting to Rs. 1,114 averred. by them to have been paid. But he found

that there had been a waiver on the part of the plaintiffs by the acceptance by them of instalments after they had become due. He accordingly found that the plaintiff's suit was premature. At the same time he, somewhat inconsistently, gave them a decree for the sum of Rs. 1,114, which the defendants alleged, but could not prove, that they had paid.

3. The plaintiffs now appeal: and on their behalf it has been pleaded that there has been no waiver, or if there has been, then there has been a fresh default since 1305. The defendants cross-appeal, and urge that the Subordinate Judge was wrong in holding that they had not paid the sums amounting to Rs. 1,114, for which the Judge has given the plaintiffs a decree.

4. We will deal first with the cross-appeal. We are of opinion that the Subordinate Judge has rightly held that the defendants did not pay the plaintiffs the sum of Rs. 1,114, the details of which he has given in his judgment. We come to this conclusion for the reasons assigned by him, viz. (1) that the evidence adduced by the defendants on this point is unreliable, being the evidence of partizans; (2) that the authenticity of the letters and receipts produced on their behalf as corroborative evidence has not been established; (3) that the signatures on them alleged to be those of the plaintiffs differ from their admittedly genuine signatures; and (4) that the defendants' khatas do not appear to have been correctly kept, and are therefore not to be depended on. Some of the letters, e.g., the letter printed at page 97 of the paper-book, are not at all likely to have been written by the plaintiffs. The letter in question (Ext. E.) is quite inconsistent with the admittedly genuine letters of the plaintiffs and with the proved state of accounts between the parties.

5. We now come to the question of waiver. We are unable to agree with the Subordinate Judge's finding that there was any such waiver on the part of the plaintiffs as would debar them from bringing this suit. It has been held by the Bombay High Court in a long series of rulings see *Gumna Dambershet v. Bhiku Hariba* ILR (1876) Bom. 125, *Balaji Ganesh v. Sakharam Parashram Angal* ILR (1892) Bom. 555, *Kankuchand Shivchand v. Rustomji Hormusji* ILR (1895) Bom. 109 and *Kashiram v. Pandu* ILR (1902) Bom. 1 that the mere acceptance of an overdue instalment will not debar a creditor from suing for the full amount of his debt due on an instalment bond, the terms of which are similar to those of the one on which this suit is brought. The same view has been taken by the Allahabad High Court in *Mumford v. Peal* ILR (1880) All. 857, and this, seems also to be the English law. See the case of *Keene v. Biscoe* ILR (1878) Ch. D. 201. But this High Court has held in two cases, *Cheni Bash Shaha v. Kadum Mundul* ILR (1879) Cal. 97 and *Mon Mohun Roy v. Durga Churn Gooee* ILR (1888) Cal. 502, that acceptance of the amount of an overdue instalment does amount to a waiver of the right to sue. But even on this view of the law there appears to us to have been no waiver in this case. We find the payments to have been made as alleged by the plaintiffs, and that no instalment was ever paid in full by the defendants or received by the plaintiffs after the first default. Part of

the subsequent instalments were no doubt paid and received and large sums were paid on account of the interest which on the occurrence of the first default began to run at the rate of Rs. 1,764 per annum. But part payment and acceptance of part of an overdue instalment has never been held, even by this Court, to amount to a waiver, and it cannot be regarded as such, for admittedly on payment of a part of an instalment, there is still something due and there is still a default. Similarly, payment and receipt of interest cannot amount to a waiver *Nanjappa v. Nanjappa* ILR (1888) Mad. 161. No doubt the defendants through their pleader have urged before us that in some years they paid the full amounts of the instalments due or overdue, but we do not find this to be proved. The payments in one year, viz. 1303, amounted to Rs. 1,600, but this amount the plaintiffs credited to interest as they were entitled to do, unless the defendants paid the amount expressly for the overdue instalments, which they do not in any way satisfy us they did. Further, the defendants' pleader admits that they made payments on account of interest. This is practically an admission that there had been default, and no waiver on the part of the plaintiffs", for if the plaintiffs claimed interest and the defendants paid it, the former were clearly enforcing the condition of the bond which came in force on the first default. The bond provided for the payment of no interest, except in the case of default in payment of an instalment. The defendants' pleader urges that the payments for interest were made for interest on the instalments unpaid and not on the whole amount of the bond, which became payable on default. But this does not appear to us to have been the case or to make any difference, for if any interest was payable at all, it could only be payable, because there had been default which the plaintiffs had not waived.

6. We therefore consider that there was no waiver on the plaintiffs' part and we also agree to the further contention of the plaintiffs' pleader that, if there was any waiver, there was a fresh default made in 1305, which was not waived and which would entitle the plaintiffs to bring this suit. The great forbearance of the plaintiffs seems to have been entirely due to their having been previously on friendly terms with the defendants, which led them to wish not to press them unduly.

7. We accordingly consider the plaintiffs entitled to a decree in this suit, as prayed. We therefore allow this appeal and give the plaintiffs a decree for the amount claimed by them. We dismiss the cross-appeal.