

(1934) 03 AHC CK 0018
In the Allahabad High Court

Nanak	Vs	APPELLANT
Faqir Chand		RESPONDENT

Date of Decision : 13-03-1934

Acts Referred:

Citation : AIR 1934 All 697 : 153 Ind. Cas. 553

Hon'ble Judges : Kendall, J

Bench : Single Bench

Judgement

Kendall, J.—This is a defendant's appeal from a decree and order of the Second Subordinate Judge of Shahrampur, confirming the decision of the trial Court. The suit was one for recovery of a sum of money said to be due on a deed of mortgage executed by defendant-appellant on 20th December 1934 for Rs. 450. The mortgage-deed provided for payment of monthly instalments of Rs. 7-8-0. If these instalments were paid regularly, no interest was to be charged over the whole period of five years at the end of which the principal sum would have been repaid; but if there were a default of any instalment the whole sum would be recoverable with interest in a lump sum. The instalments were not paid regularly, but nine payments amounting in all to Rs. 405 were made on various dates within the five years by the defendant-appellant. The plaintiff-respondent claimed that he could demand the whole sum with interest at the rate stipulated in the bond on the ground that there had been a default, but he did as a matter of fact reduce the amount of his claim by remitting Rs. 453, evidently on the ground that he did not expect to recover the full amount said to be due. The only plea in defence with which I am now concerned in second appeal relates to the question of waiver. It is argued that the first default occurred in January 1925 and that there were several defaults afterwards, but that the respondent did not take any steps to enforce the penalty provided in the deed, and that as the case is analogous to that of *Sakhawat Husain v. Gajadhar Prasad* (1906) 28 All. 622 it ought to be held that the plaintiff can only demand the balance of principal together with interest with effect from the date of the last default. The lower appellate Court had considered the case of *Sakhawat Husain v. Gajadhar Prasad*

(1906) 28 All. 622 but has distinguished it from the present case on the ground that the mortgage deed provided an alternative penalty. This distinction can certainly be made. The mortgage deed after providing for the regular payment of instalments in which case no interest would be charged, goes on to recite that the debtor in case of default of any instalment will pay all the money at once on demand with interest at 3 per cent per mensem, and towards the end of the deed in a separate passage it further recites that in the case of default the creditor shall have the power to realise the full amount with interest in a lumpsum or by miscellaneous amounts (hamse ek musht wasul kar le yah mutfariq taur se wasul kar le). It is argued on behalf of the plaintiff-respondent, and it has been found by the Courts, that after the first default although the plaintiff continued to receive payments amounting in all to Rs. 405 payments which in every case amounted either to Rs. 7-8-0 or to some multiple of that sum what he was doing was not receiving payments of instalments, but merely miscellaneous sums in payment of the full amount due with interest. In other words, it is argued that when the first instalment failed the whole arrangement to pay by instalments automatically ceased, and the creditor instead of suing for the full amount due exercised the alternative privilege that he enjoyed under the bond of receiving payment in the form of miscellaneous amounts. It has been admitted by Mr. Panna Lal for the respondent that if it had not been for this clause in the mortgage deed by which the respondent was empowered to receive miscellaneous amounts it would have to be held on the analogy of 28 All. 622(1) that the respondent had waived his right to renounce the agreement and to realise the full amount with interest. In the case of Sakhawat Husain v. Gajadhar Prasad (1906) 28 All. 622 the creditors, in the words of the Bench

instead of proceeding for the recovery of their debt, as they might have done, accepted the irregular payments to which we have referred and waived their right to cancel the arrangement entered into for payment by instalments.

2. In an earlier case that of Radha Prasad Singh v. Bhagwan Rai (1883) 5 All. 289 which was followed in the later case the circumstances that the Bench considered were that the creditor was

well aware of his right to take the benefit of the provision on default taking place in 1876, and his refraining from doing so for so many years and having subsequent instalments as though no default had taken place, must, in the absence of proof to the contrary, be ascribed to Intentional waiver of any right he may have had, and must have been so understood by the judgment-debtors when they paid their subsequent instalment.

3. It will be seen that in the present case the difficulty lies in interpreting the alternative condition entered in the bond. The creditor is to have the power not only of realising the full amount at once, but of realising miscellaneous amounts. The payments which were made by the appellant were certainly not regular payments of instalments on the due dates as provided for in the bond, but they were payments either of the amounts prescribed for instalments or multiples of

that amount. They were made voluntarily by the debtor over a period of years and they must have been understood by the debtors to be made as instalments. If the payment of the first instalment failed - as in fact it did - and if thereafter payments had been made regularly every month, could it be argued that those subsequent payments were miscellaneous amounts which the creditor was receiving not as instalments, but as miscellaneous payments under the penalty clause? In my opinion there can be no doubt that in such a case the decision would be against the respondent. The present case differs from that hypothetical case rather in degree than in kind. The payments of instalments have not been made regularly every month but they have been made at any rate sufficiently regularly to liquidate the whole amount of principal due except Rs. 45 within the prescribed period.

4. It appears to me that the document on which the plaintiff-respondent relies, although it provides two alternative courses for the creditor, certainly intends to provide that the creditor shall take some active step on a default and shall not merely acquiesce in the continuance of payments by the debtor. The words "ek musht wasul kar le yah mutfariq taur se wasul kar le" undoubtedly suggest that the creditor shall proceed in some way against the debtor, whether for the purpose of realising the full amount in a lump sum or for the purpose of realising something less. Unless and until he takes some action to enforce either of these penalties I think it must be held that as the debtor continued to make payments as if he were acting under the original arrangement and the creditor continued to receive those payments, the creditor was undoubtedly acting as if the arrangement still subsisted, and must be held to have waived his right to renounce the agreement until he gave notice of that renunciation by taking the proceeding that resulted in the present suit. I therefore allow the appeal with proportionate costs and modify the decree and order of the lower appellate Court by directing that the plaintiff be given a decree for the balance of the principal rupees 45, together with interest at the contractual rate on that amount with effect from the date of the last default together with pending and future interest at 6 per cent. Leave to appeal refused.