

**Kanhai Vs. Amrit**

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**Court :** Allahabad

**Decided On :** Feb-17-1925

**Reported in :** AIR1925All499; 87Ind.Cas.162

**Appellant :** Kanhai

**Respondent :** Amrit

**Judgement :**

**Mukerji, J.**

1. This is an application in revision against a judgment of a Court of Small causes under the following circumstances:

The applicant was the plaintiff in the Court below. He held an instalment bond by which he was to receive from the respondent a sum of Rs. 11 every year for eight; years. There was a stipulation in the bond by which the obligor agreed that in case of any default in the payment of any instalment, he would pay the entire amount due on the bond irrespective of the instalments. None of the instalments were paid. The plaintiff stated in the plaint that his claim with respect to three of the instalments was barred by time, that he did not want to sue for the entire sum due and thus, leaving out the last two instalments, he sued for three which, according to him, fell due within three years of the institution of the suit.

2. The respondent met the claim with a plea of limitation. The learned Judge of the Court below held that the suit was time-barred, there being no evidence of any waiver.

3. In this Court it is contended that the applicant had as option to sue either for the whole money or for some of the instalments as he was advised and that as he waived his right to sue in respect of the first three instalments, he came within the period of limitation as laid down by Article 75 of Schedule 1 of the Limitation Act.

4. Article 75 of the Limitation Act lays down that a suit based on an instalment bond which provides that in case of default made in payment of one or more instalments the whole shall be due, the period of limitation would be three years and would begin to run from the date of default, unless there has been a waiver with respect to any such default. It provides that where there has been a waiver in respect of any defaulted instalment, the period would run from such default in respect of which there is no waiver. In the case before me there is no allegation that on a default having occurred any payment was made after the default and was accepted. There is no allegation whatsoever as to the parties having in any way agreed to change the terms of the bond. It is, however, argued that the mere fact that the plaintiff did not sue for the first three instalments amounted to waiver and the plaintiff's suit was within time.

5. As I read the provision of column 3 of the Limitation Act, I do not think that it was ever meant to lay down that the question of waiver would depend on the sweet will of the plaintiff. If that were the meaning, the result would be this, on the same facts, if a claim be made for a portion of the amount due the suit would be within time, but if a claim (equally maintainable on the terms of the bond) be made for the entire amount due on the bond, the suit would be time barred.

6. Waiver is a technical word and, so far as I am aware, the word has never been applied to a circumstance which amounts to nothing more than this that the plaintiff has stayed his hands in seeking his remedy. In Wharton's Law Lexicon, 12th edition, the word 'waiver' is defined as follows:

The passing by an occasion to enforce a legal right whereby the right to enforce the same is lost; a common instance of this is where a landlord waives a forfeiture of a lease by receiving rent, or distraining for rent, which has accrued due after the breach of covenant, causing the forfeiture, became known to him.... Mere lapping by is not waiver for this purpose; there must be some positive act on the part of the landlord, which act, however, if done, is a waiver in law, notwithstanding any protest.

7. The question of waiver was considered in some Calcutta cases and it was laid down that a mere staying of the hand in enforcing the remedy could not amount to a waiver. In the case of *Jadab Chandra Bakhshi v. Bhairab Chandra Chuckerbutty* (1903) 31 Cal. 297 the learned Judges remarked as follows:

It is argued in support of the rule that his (plaintiff's) abstinence from suing amounts to a waiver of his right to sue for the whole. We do not agree with that contention, but we agree with the observation made by the learned Judges who decided the case of *Hurri Pershad Chowdhury v. Nasib Singh* (1894) 21 Cal. 542.

8. The same opinion was reiterated in the same Court in the case of *Abinuas Chandra Bose v. Rama Bewa* (1909) 13 C.W.N. 1010 by two other learned Judges. It was held that mere omission to sue was not such a waiver as was contemplated by Article 75 of Schedule I of the Limitation Act.

9. The law of waiver has been considered in its various aspects by Lord Halsbury in his work, viz.: 'Laws of England'. With respect to a contract the law laid down would appear in Volume 7 at page 423, Article 868. I need not quote all that is considered there. But what has been said there leads me to think that waiver is, in effect, a substituted contract for the previous one. This may be expressed or implied. As an illustration it is said that where one party consents, at the request of the other, to extend the time for performance or to accept performance in a different mode from that contracted for etc., there is a waiver. Again the same authority in Volume 13 of the book page 165, Article 197, lays down rules with respect to a waiver when it relates to enforcement of a right. It is said that waiver of this kind depends upon consent and the fact that the other party has acted upon it is sufficient consideration. Where the waiver is not express, it may be implied

from conduct which is inconsistent with the continuance of the right. It is pointed out there that where the right is a right of action, an express waiver depends upon the same consideration as a release. I need not labour the point any further. But it seems clear to me that a mere abstinence from enforcing a right at the time when the cause of action arose will not; amount to waiver.

10. As I have already said, if we accept the argument advanced on behalf of the applicant, the result would be that, on the same facts, if a claim is made for a part of the amount due it would be within time, while on the same facts if the claim be made for a larger amount which is also due the suit must be treated as barred by time. This is a position which could not have been contemplated by the legislature, nor does such position follow from the language used. If the language used had compelled the Courts to come to the conclusion contended for, the matter would have been different.

11. On behalf of the applicant reliance has been placed on the case of *Ajudhia v. Kunj Lal* (1908) 30 All. 123. In that the language to be found in the bond was materially different from the language in the bond before me. There it was expressly stated that in case of default the creditor 'would be entitled to sue for the whole amount due etc.' The learned Judges of this Court were of opinion that it would go very hard with the debtor if he was deprived of the benefit, which the creditor was prepared to give him, of his forbearance. At page 125 their Lordships remarked as follows:

It is conceivable that a bond might be so worded as to compel a creditor to sue for the whole amount immediately if any default occurred.

12. This remark really distinguishes the case of *Ajudhia v. Kunj Lal* (1908) 30 All. 123, from the case before me. Under the circumstances I need not express any opinion as to the value of that case as an authority.

13. The result is that the application in revision fails and it is hereby dismissed with costs.