**Misri Lal Vs. Budhraj**

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**SooperKanoon Citation** : sooperkanoon.com/753012

**Court** : Rajasthan

**Decided On :** Mar-19-1962

**Reported in** : AIR1963Raj145

**Judge** : Jagat Narayan, J.

**Acts** : Limitation Act, 1908 - Schedule - Articles 181 and 182(7)

**Appeal No.** : Ex. Second Appeal No. 80 of 1959

**Appellant** : Misri Lal

**Respondent** : Budhraj

**Advocate for Def.** : M.D. Bhargava, Adv.

**Advocate for Pet/Ap.** : Hastimal, Adv.

**Disposition** : Appeal allowed

**Judgement** :

**Jagat Narayan, J.**

1. This is an execution second appeal by the decree-holder against an appellate order of the Civil Judge, Beawar, holding that the execution application was barrea by limitation.

2. An instalment decree for Rs. 1,643-12-9 was passed against the judgment-debtor on 3-12-53. The amount was payable in instalments of Rs. 20/- per month commencing from 15-1-54. In default of payment of any two instalments the whole amount was to become payable in lump sum. The present execution application was filed on 24-5-57 for recovering the balance due on that date on the allegation that the judgment-debtor had paid all the instalments due upto 15-2-57 amounting to Rs. 760/- and had committed a default in the payment of three successive instalments falling due on 15-3-57, 15-4-57 and 15-5-57 respectively. The judgment-debtor filed an objection in which he alleged that he had not paid any amount and contended that the execution application was barred by limitation. Both the Courts below have come to the finding that the instalments were paid by the judgment-debtor amounting to Rs. 760/-on the dates alleged by the decree-holder. The executing Court held that the application was within time. But the appellate Court held that it was barred by limitation, on the ground that the instalments which fell due on 15-3-54 and 154-54 were not paid in time, that the balance due on 15-4-54 became recoverable on that date and the present execution application made on 24-5-57 was barred by limitation under Article 182(7) as it was made more than 3 years after 15-4-54.

Having heard the learned counsel for the parties I am satisfied that the decision of the appellate court is erroneous and that the execution application is within time. I may here refer to my decision in Heera Lal v. Deep Chand, Ex. Second Appeal No. 14 of 1959 D/- 21-7-1961 in this connection. There is conflict of judicial opinion about the article of Limitation Act which is applicable to the execution of an instalment decree with a default clause. So far as a suit based on instalment bond with default clause ts concerned it is governed by Article 75. The period of limitation is 3 years and time begins to run-

'when the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.'

The articles which have been applied to the execution oran instalment decree containing a default clause are Article 182 (7) and Article 181 which are in the

following terms:

Descriptionof suit

Periodof limitation

Timefrom which period begins to run.

Article182.

For theexecution of a decree or order of any civil Court not provided for by Art.183 or by S. 48 of the Civil P.C., 1908(V of 1908).

Threeyears; or where a certified copy of the decree or order has been registered, six years.

7.(Where the application is to enforce any payment which the decree or order directsto be made at a certain date) such date.

Article181.

Applicationsfor which no period of limitation is provided else* where in this schedule orby S. 48 of the Civil P. C., 1908 (V or 1908).

Threeyears

Whenthe right to apply accrues.

3. So far as a suit based on an instalment bond with a default clause is concerned there is express provision in Article 75 laying down that time begins to run when the default is made unless the benefit of the provision is waived by the creditor. There is no similar provision contained in any article of the Limitation Act governing tne execution of decrees. Some High Courts took the view that the principle underlying Article 75 is applicable to the execution of instalment decrees with a default clause. Others were opposed to importing the provision of Article 75 into Articles 182 or 181 governing execution of decrees which did not contain any such provision. Now all the High Courts with the exception of the Bombay High Court have wared round to the view that the application for entorcement of the

payment of the instalments which tall due within 3 years of the application will not be barred though the application for the enforcement of the default clause may be barred. The Bombay High Court held in Chunilal Motiram v. Shivram Naguji, AIR 1950 Bom 188 (FB) that an application for the execution of the decree made after 3 years from the date of the earliest default will be barred not only with reference to the default clause maxing the whole amount payable but also with reference to the instalments so that even the instalments which fell due within 3 years of the application cannot be recovered unless the default has been waived by the decree-holder, with all respect I am unable to subscribe to this view. I am in agreement with the view taken by the majority of the High Courts.

4. Before considering the question whether a particular suit or application is barred by time, it is essential to settle at the very outset which particular article of the Limitation Act applies to the case and then to examine the language of that article only. It is dangerous to assume that there is any general principle underlying the whole of the Limitation Act governing cases of default. Each article has its own phraseology for fixing the time from which limitation begins to run, and we have only to determine the date, which on the language of the relevant article Is fixed. For instance, Article 75 talks of default being made and of the waiver of the default by the payee. Article 181 says 'when the right to apply accrues'. Article182(7) has used the expression 'the certain date on watch the decree directs payment'.

5. Now Article 181 is a general article for applications, but it only applies to applications for which no period of limitation is provided elsewhere. If an application is specifically provided for, Article 181 is out of the question.

6. Article 182 specifically provides for the execution of decrees. Clause (7) of it specifically provides (or the execution of a decree in respect of instalments which have fallen due. Article 182 (7) is thus applicable where the decree-holder wishes to recover instalments. Time begins to run under it 'while the application is to enforce any payment which the decree or order directs to be made at a certain date' from such date. Where a default has occurred and the remaining instalments are still recoverable as such, the date would be the date on which the instalments are payable under the decree. If however the decree-holder seeks to recover the

entire amount under the default clause, Article 182(7) would not apply. For it cannot be said that the date of default is a certain date under the decree. It is an uncertain date. But if the application for execution is an application to recover the balance of the decretal amount remaining unpaid Article 181 applies and limitation will run as to the whole balance unpaid, from the date of the later of the last two successive Instalments unpaid, the decree-holder being entitled to execute the decree for the whole balance if his application is witnm 3 years on that date. This was the view taken by a Full Bench of the Allahabad High Court in Jotj Prasad v. Sncnana, AIR 1928 All 629. Article 182(7) is thus not applicable to the present execution application. Article 181 is the only article of Limitation Act which can be applied to it. Under this article time begins to run from the date from which the right to apply accrues.

7. Coming now to the question as to when the right to apply accrued in the present case, a proviso in instalment decree which says that in the event of a deafult the entire amount shall immediately become due or payable does not exclude the option In the decree-holder to take advantage of it or not to do so. It is not intendeo to be substitutive of the order for instalments in casa of a default, but only to come into force as an alternative at the will of the decree-holder. An option is always between two alternatives and when there is no evidence of any act, there Is no justification for presuming that it was exercised in favour of one of the alternatives, rather than the other. The correct view would therefore appear to be that when there is no evidence that the option has been exercised, it must be deemed that the decree-holder has not chosen to rely on the default clause. He cannot be deemed to have abandoned his rights under the order for instalments and elected to rely on the default clause in the absence of proof of his having done so. I am supported in this view by the decision of a Full Bench of the Calcutta High Court In Ranglal v. Shyamtal, AIR 1946 Cal 500.

8. There is no proof in the present case that the decree-holder elected to rely on the default clause when the two instalments due on 15-3-54 and 15-4-54 were not paid in time. He only elected to rely on the default clause when he filed the present execution application on 24-5-57. The defaults on which he relied were committed on 15-3-57 and 15-4-57 respectively as the whole amount became payable when

the second default was committed, time began to run under Article 181 from15-4-57. The present application which was filed on 24-5-57 is therefore within time.

9. On behalf of the respondent on the strength of the decision in Shiv Dayal v. RamriKh, ILR (1955) 5 Raj 671 : (AIR 1955 Raj 188), it was argued that mere acceptance of payment by the creditor after the instalments have become due does not amount to waiver within the meaning of Article 75, Limitation Act. I would like to point out that it was also observed in that case that when the payment is made by the debtor specifically towards the satisfaction of a particular defaulted instalment such payment and its acceptance by the creditor may amount to a waiver of that default and of the benefit arising out of it When only one instalment is due and there is a default In the payment of it, but it is accepted after the due date, such an acceptance would certainly raise a presumption of waiver on the part of the creditor, the acceptance of over due payment being the requisite overt act of the creditor by which he shows that he is waiving his right under the default clause. Only one instalment being due the payment is necessarily made by the debtor and accepted by the creditor specifically towards the satisfaction of it. Similarly if more than one instalments are due and all the instalments due upto the date of payment are paid by the debtor and accepted by the creditor then also the acceptance of payment on the part of the creditor would raise a presumption of waiver, the creditor showing expressly by his conduct in accepting the payment that he was waiving his right under the default clause. Here again there can be no doubt that the payment by the debtor and the acceptance by the creditor are specifically made towards the satisfaction of the particular defaulted instalments which are due on the date of payment.

10. In the present case whenever payments were made they covered all the instalments which were due on the date of payment. The decree-holder therefore willbe taken to have waived all the earlier defaults.

11. Further Shiv Dayal's case was the case of asuit based on an Instalment bond to which Article 75 Isapplicable under which time begins to run

'when the default is made, unless where We payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no

such waiver'.

In view of the provision of this article It is for the plaintiff in such a suit to prove that he had waived the previous defaults. But as I have shown above, in case of an execution application it is not for the decree-holder to prove that he waived earlier defaults, but it is for the Judgment-debtor to prove that he did not waive them. In the absence of any evidence to show that the decree-holder has elected to take advantage of the default clause It must be deemed that he has not chosen to do so.

12. On behalf of the respondent the decision in Harakchand v. Khetdan, AIR 1959 Raj 107, was referred to in which it was held that when a decree-holder certifies a payment made out of Court he cannot be said to have taken a step-in-aid of execution and that such payment cannot extend limitation unless it is in writing ana Is signed by the judgment-debtor or his duly authorised agent as provided under Section 20 Limitation Act. That decision is not applicable to the execution of an instalment decree with a default clause. Such a decree is governed by Article 182 (7) in respect of instalments and by Article 181 In respect of the balance due on the date of default.

13. For reasons given above the appeal is allowed, the order of the lower appellate Court is set aside, it is held that the execution is within time and the case is sent back to the executing Court for proceeding with the execution in accordance with law.

14. In the circumstances of the case, I direct that parties shall bear their own costs of this appeal.