

Smt. Amiya Debi and ors. Vs. Ranendra Narayan Saha and ors.

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Court : Kolkata

Decided On : Jul-28-1981

Reported in : AIR1983Cal24

Judge : Chittatosh Mookerjee and ;Ramkrishna Sharma, JJ.

Acts : Bengal Money-lenders Act, 1940 - Section 34(1); ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 34, Rules 3, 4 and 5; ;[Limitation Act, 1963](#) - Schedule - Article 137

Appeal No. : A.F.O.D. No. 397 of 1980

Appellant : Smt. Amiya Debi and ors.

Respondent : Ranendra Narayan Saha and ors.

Advocate for Def. : Shyama Charan Mitter, ;Rameswar Shah and ;Chanchal Kumar Saha, Advs.

Advocate for Pet/Ap. : Bhola Nath Sen and ;Tapan Kumar Pal, Advs.

Disposition : Appeal dismissed

Judgement :

Chittatosh Mookerjee, J.

1. The defendants have preferred this appeal against the final decree passed against them by the learned Subordinate Judge, 8th Court, Alipore in a mortgage suit brought by the plaintiff respondent. The principal point in this appeal is whether or not the mortgagee plaintiffs application in the trial court for drawing up the said final decree was barred by limitation.

2. The respondent, Ranendra N. Saha had instituted the said Title Suit No. 69 of 1972 in the 8th Court of the Subordinate Judge, Alipore against the present appellants and another for recovery of money lent and advanced on mortgage of Premises No. 85B, Raja Rajendra Lal Mitra Road, P. S. Beliaghata. After service of summons, the defendants had appeared but did not file any written statement. On 2nd May, 1973 the said plaintiff and the defendants 1 to 4 jointly filed a petition in the trial court stating that through the intervention of well-wishers and common friends, the suit had been compromised and settled between the parties on the terms and conditions set out in the said petition.

3. The parties agreed in the following manner:--

'There will be a preliminary Mortgage Decree against the defendants 1 to 4 for the sum of Rs. 38,000/- with interest on the principal sum of Rs. 25,000/- at the rate of 6 per cent per annum from 27th Sept., 1972 being the date of filing of this suit until realisation and costs-

(b) If however the defendants Nos. 1 to 4 pay to the plaintiff the sum of Rs. 30,000/- in the manner following that is to say-

(1) Rs. 10,000/- on or before the 30th day of Dec., 1973, (2) the sum of Rs. 10,000/- on or before the 30th day of Dec., 1974, (3) the sum of Rs. 10,000/- on or before the 30th day of Dec., 1975 the plaintiff shall accept the same in full satisfaction of his entire claim on account of the principal interest and costs under this Decree. (c) In case of default of payment of any one of the aforesaid instalments within the time specified in that behalf of the preceding clause, the entire amount then due under this decree shall become at once due and payable and the plaintiff shall be entitled to forthwith apply for a Final Decree for sale of the mortgaged property.'

4. On 2nd April, 1973, the learned Subordinate Judge ordered that the said suit be decreed on compromise in preliminary form in terms of the said petition of compromise which would form part of the decree. The preliminary decree in the said suit was accordingly drawn up.

5. Admittedly, the defendants did not pay any of the instalments granted to them under the said compromise preliminary mortgage decree.

6. On 24th Nov., 1978, a learned advocate on behalf of the plaintiff issued notice to the defendants under sub-clause (ii) of Cl. (a) of Section 34 of the Bengal _ Money-Lenders Act, 10 of 1940, stating that an application will be made by the plaintiff to the trial Court for drawing up the final decree in the said suit under sub-clause (ii) of Clause (c) of sub-rule (1) of Rule 2 of Order XXXIV of the Civil P. C. for sale of the property in suit and also for realising the decretal dues with interest and costs. Thereafter, the plaintiff, Ramendra Nath Saha, filed a petition in the 8th Court of the Subordinate Judge, Alipore for making the preliminary mortgage decree in the said suit final. The defendants 3 and 4 contested, inter alia, on the ground that the said petition of the plaintiff for making the mortgage decree final was barred by limitation. The learned Subordinate Judge, 8th Court, Alipore by his order No. 28 dated 19th Mar., 1980 overruled the said objections and directed that the preliminary mortgage decree passed in the suit be made final on contest with costs. The plaintiff-decree-holder was given liberty to put up the mortgaged property for sale for realisation of the decretal sum including costs of the proceeding. Being aggrieved thereby, the defendants have preferred the present appeal.

7. The aforesaid petition of the plaintiff for passing of the final mortgage decree was filed beyond three years from the dates on which the first and the second instalments were payable by the mortgagor defendants. But the plaintiff's said petition was made within three years from the due date for payment of the third instalment by the defendants.

8. The principal submission of the appellants is that when the defendants had defaulted by not paying the first instalment on or before 30th of Dec., 1973, the entire sum due under the preliminary decree had become at once due and

payable and the plaintiff became entitled to forthwith apply for passing of a final decree for sale of the mort-gaged property. Counted from the said date of default in payment of the first instalment, the plaintiffs right to apply for drawing up of the final decree had accrued more than three years before he filed the instant petition for making the preliminary decree final. According to the appellants, the plaintiff-respondent's said petition was barred by limitation under Article 137 of the [Limitation Act, 1963](#). The learned subordinate Judge did not also correctly interpret the default clause in the preliminary consent decree passed in the instant case.

9. At the outset, it is necessary to point out that the learned subordinate judge did not correctly construe the terms of the preliminary decree which was passed by consent of parties. The preliminary decree passed in the present suit clearly stipulated, that, in case of default of payment of any one of the instalments within the time specified in that behalf, 'the entire amount then due' under the decree shall become at once due and payable and the plaintiff shall be entitled to forthwith apply for a final decree for sale of the mortgaged property.

10. In fact, Mr. Shyaraa Charan Mitter learned Advocate for the plaintiff respondent did not justify UK trial Courts interpretation of the default clause in the preliminary decree. He has supported the decision of the Court below upon a ground which did not find place in the judgment under appeal. According to Mr. Mitter, in the instant case, the trial Court passed the preliminary compromise decree not under Rule 4 of Order 34 of the Code but in the exercise of its inherent powers and accordingly Article 137 or any other article of the [Limitation Act, 1963](#) did not apply. Mr. Mitter submitted that there was no time limit for filing of an application by the plaintiff, in accordance with the terms of the said compromise, for making the decree final. Mr. Mitter further submitted, that, assuming Article 137 of the [Limitation Act, 1963](#) did apply, the plaintiff had impliedly waived the defaults made by the defendant in payment of the first two instalments under the preliminary compromise decree, and, therefore, the plaintiffs right to apply for passing of the final decree had accrued only on the date of default in payment of the third instalment according to the preliminary compromise decree.

11. Mr. Sen, learned advocate for the appellants urged that it is not open to the respondent to submit that he had waived the defaults committed by the defendant in respect of the first and the second instalments stipulated in the preliminary decree. According to Mr. Sen, the said preliminary decree was passed in terms of Section 34 of the Bengal Money Lenders Act, 1940 and therefore, after the defendants had defaulted in paying the first instalment, the whole decretal amount had become due and there was no scope for any waiver by the plaintiff-respondent. These submissions of the appellants are prima facie supported by the decision of P. B. Mukherji and Bose, JJ. in *Nalini Kanta Bhattacharjee v. Mohan Chand Biswas*, (1960) 64 Cal WN 422 : ATR 1960 Cal 477 and also by the unreported decision of S. P. Mitra, C. J. and S. C. Ghosh, J. in Appeal From Original Order No. 231 of 1973 decided on April 10, 1979. But the ratio of these two decisions are not applicable to the facts of the present case. The basis of the decision in *Nalini Kanta Bhattacharjee's case* (supra), which was followed in *Monotosh Kumar Mitra v. Amarendra Nath Shaw*, Appeal From Original Order No. 23 of 1973, was that the statutory provisions of Section 34 of the Bengal Money Lenders Act could not be waived by the creditor to the detriment of the debtor for that would defeat the very object of the said Act. The learned Judges in *Nalini Kanta Bhattacharjee's case* (supra), distinguished the case before them which was governed by Section 34 of the Bengal Money Lenders Act from the cases which related to the construction of instalment money decrees independently of statutes (vide the observations of Bose, J. at page 436, left hand column of 64 CWN) : (at p. 483 of AIR). The learned Judges in *Nalini Kanta Bhattacharjee's case* (supra), had also distinguished the Full Bench decisions in *Ranglal v. Shyamlal*, (1946) 50 Cal WN 735 : (AIR 1946 Cal 500), *Sheo Lal v. Debidas*, : AIR 1952 All 900, on the ground that the two provisos to Section 34 of the Bengal Money Lenders Act introduced different considerations and complications which did not fall to be judged by any of the Full Bench decisions, it was further pointed out that the Full Bench case in *Ranglal's case* (supra), had interpreted the terms of a consent decree. Therefore, the aforesaid two Division Bench decisions, relied upon by the appellants ought to be confined to the interpretation of instalment decrees passed in terms of Section 34 of the Bengal Money Lenders Act and these decisions cannot override the principles of law laid down by the Full Bench at this Court in

Ranglal's case (supra).

12. The aforesaid preliminary decree dated 2nd May, 1973 against the defendant appellants was not passed under the provisions of Section 34 of the Bengal Money Lenders Act, 1940. After service of the summons, the defendants 1 to 4 neither filed written statement nor any substantive application under Section 34 of the Bengal Money Lenders Act, 1940. The compromise petition dated 7th May, 1973 jointly filed by the plaintiff and the defendants 1 to 4 of the said suit cannot be treated as an application by the defendants under Clause (a) of Section 34(I) of the Money Lenders Act. In their joint application the plaintiff and the defendants 1 to 4 did not either expressly or impliedly pray that the said mortgage suit brought by the plaintiff be decreed in the preliminary form by granting the defendant instalments in terms of Section 34 of the Bengal Money Lenders Act to pay the amount due. It is well-settled that filing of the accessory application by the defendant is a condition precedent to the passing of a preliminary decree according to sub-cl. (i) and (ii) of Cl. (a) of Sub-section (1) of Section 34 of the said Act. S. R. Das, J, (as he then was) in *GOUF Chand Mullick v. Pradyumna Kumar Mullick*, AIR 1945 Cal 6 inter alia, observed that Section 34 comes into play only on the application of the defendant. If the defendants did not invite the Court to pass a decree in terms of the said section, the Court was not bound to pass such a decree. This statement of law was accepted by the Division Bench in *Nalini Kanta Bhattacharjee's case* : AIR 1960 Cal 477 (supra). In the instant case, not only there was DO application of the defendants under Section 34(1)(a) of the Money Lenders Act but the terms of compromise forming part of the said preliminary decree were also not in accordance with the Sub-clause (i) and (ii) of Cl. (a) of Sub-section (1) of Section 34 of the Bengal Money Lenders Act, 1940. The said terms did not simpliciter grant the defendants a certain number of annual instalments for paying the amount declared due under the preliminary decree. We have already mentioned that the aforesaid terms of compromise stipulated that there would be a preliminary mortgage, decree against the defendants for Rs. 38,000/- with interest. The Clause 3 (h) of the compromise petition which opened with the expression 'if however indicated that on the other hand the defendants by paying three instalments of Rs. 10,000/- each within the stipulated time could discharge in full their entire liabilities under the said preliminary mortgage decree

Thus, although the preliminary decree was passed for Rs. 38,000/- with interest, under certain circumstances by paying Rs. 30,000/- the defendants could satisfy in full the said preliminary decree. Section 34 of the Money Lenders Act does not contemplate such a decree for two alternative amounts, Mr. Sen, learned Advocate for the appellants, had pointed out that the plaintiff himself through his lawyer caused a notice prescribed by Section 34(1)(a)(ii) of the Bengal Money Lenders Act, 1940 to be served upon the defendants. But Mr. Mitter, learned advocate for the respondents, rightly pointed out that the preliminary decree in question was not passed under Section 34 of the Bengal Money Lenders Act. Therefore, the parties thereto by their subsequent conduct, such as giving of a notice, could not alter the nature and the character of the said decree. Once we reach the conclusion that the preliminary decree was not passed under Section 34, a subsequent notice under Section 34(1)(a)(ii) of the said section given by the plaintiff would be of no legal consequence and the same would be mere surplusage.

13. Mr. Sen, learned advocate for the appellant, has strongly submitted before us that in the trial Court the plaintiff respondent did not plead that he had waived the default in payment of first two instalments by the defendant mortgagors and according to Mr. Sen, therefore, the plaintiff respondent ought not to be allowed to raise at the appellate stage the said question of waiver. At the outset, it is necessary to point out that the decision of the Supreme Court in *Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P.*, : [1979]118 ITR 326 (SC), upon which Mr. Sen placed reliance, is not strictly relevant because the Supreme Court held that in a writ proceeding the Government did not plead in its affidavit the necessary facts for establishing that there had been a waiver by the payment of its right to exemption from payment of sales tax for a period of three years from the date of the commencement of the production and, therefore, the High Court, in the opinion of the Supreme Court, was not right in rejecting the petitioner's claim of executory estoppel against the Uttar Pradesh Government.

14. In the instant case, no question of executory estoppel arises for decision. The moot point is whether or not there was at all any prescribed period of limitation for making an application by the plaintiff for making the decree final and in case

Article 137 of the Limitation Act did apply whether the application was made by the plaintiff within three years from the date on which his said right to apply had accrued. Mr. Mitter has urged that the provision in the consent decree relating to the right of the plaintiff to have the final decree passed was for his benefit and, therefore, it was open to him to give up the benefit and the said waiver was not dependent upon the proof of any subsequent contract between the plaintiff and the defendants. In case, the plaintiff really had such an option to waiver, as claimed by Mr. Mitter, the plaintiff could unilaterally exercise such option. Such right, if any, on the part of the decree holder would be more akin to an election. In other words, if a choice was given to the plaintiff, in case of default in payment of any of the instalments, the plaintiff might elect to exercise his option to immediately apply for passing of the final decree, alternatively he might not exercise his option to apply and thereby he would be deemed to have elected to abide by the terms of the mortgage decree.

15. In our view, points of law involved in this appeal are concluded by the Full Bench decision of this Court in *Rangalal v. Shamlal* (AIR 1946 Cal 500) (supra). The Full Bench in *Rangalal's* case (supra), had enunciated the principles to be applied for interpretation of instalment decrees, which provide that the entire amount would be-come due in default of payment of any one instalment. The Full Bench had also considered and explained the observations of the Judicial Committee in *Lasa Din v. Gulab Kunwar*, (1932) 59 Ind App 376 : 36 Cal WN 1017: (AIR 1932 PC 207). The Full Bench in *Rangalal's* case (supra), pointed out that in such cases the question would not be only one of limitation but more fundamentally of one relating to maintainability. The answer in each case would depend entirely upon the construction of the particular decree concerned. Where the decree itself made it obligatory on the decree-holder to execute it for the entire balance if the default occurred, he could not obviously adhere to the instalments and put the decree into execution for their realisation as such. It was further pointed out that an instalment decree containing a default clause consists of three parts. First, there is a part which declares the amount due and it binds the decree holder and the judgment-debtor equally and absolutely. Next, there is a part providing for payment by instalments and it is for the benefit of the judgment-debtor. Lastly, there is the part providing that in case of a default, the whole of the

unpaid balance shall become due and it is for the benefit of the decree holder who is given a right to foreclose, as it were, the instalments. Such a provision in the opinion of the Full Bench, whenever possible should be construed in favour of the decree holder whose right to get immediate payment has been once interfered with by the order of instalments and the correct way to construe his, right is to hold in favour of an option unless the language used in the decree clearly bars it. A proviso in an instalment decree which merely says that in the event of a default the entire amount shall immediately become due or payable does not, in the opinion of the Full Bench, exclude an option of the decree holder to take advantage of it or not to do so : it is not intended to be substitute of the order for instalments in case of a default but only to come into force as an alternative at the will of the decree holder.

16. The Full Bench did not approve of the view taken by the Division Bench in *Sitab Chand Nahar v. Hydar Malla*, (1897) ILR 24 Cal 281, that mere abstinence from doing anything by the decree-holder could not constitute waiver and that waiver could be established only by proof of some affirmative act. The Full Bench in *Rangalal's case* (AIR 1946 Cal 500) (*supra*), was of the opinion that the correct view is not that when there is no evidence of waiver, the option must be deemed to have been exercised but that when there is no evidence that the option has been exercised, it must be deemed to have been waived. The Full Bench proceeded to observe that a default clause in an instalment decree was entirely for the benefit of the decree holder and it merely gives him an option to avail himself of it, if he chooses. We are not prepared to give any countenance to the submission of Mr. Sen, learned Advocate for the appellant, about the scope of the exceptions pointed out by Sir John Lowndes in the later part of his judgment in *Lasadin's case* (*supra*) because the Full Bench in *Rangalal v. Shamlal* (*supra*), has opined the same were of a tentative character and that their Lordships of the Judicial Committee had only said that in the event contemplated much might be said in favour of the contentions of the mortgagors and not that it would necessarily succeed. We respectfully follow the opinion of the Full Bench in *Rangalal's case* (*supra*), that the substance of *Lasadin's case* (*supra*), was that when there is an option, the mortgage money does not automatically become due by the occurrence of the default but has to be made due by the mortgagee by an exercise

of his option to call it in.

17. Our attention has been also drawn to the views of Lahiri, C. J. and Bachawat, J. in *Sarkar, Dutt, Roy & Co. v. Sree Bank Ltd.*, : AIR1960 Cal243 . The Division Bench had relied upon the Full Bench decision in *Rangalal's case* (supra), and had held that the decree-holder gets a period of three years from the date of each default to realise the amount or amounts for which the default has been made. A. K. Sarkar, J., who delivered the judgment of the Supreme Court in *Sree Bank Ltd. v. Sarkar, Dutt, Roy and Co.*, : [1965]3SCR708 had observed that if the respondent debtors wished to contend that the option had been exercised, it was for them to give evidence for such exercise, but they did not do so. It was further observed that the default clause in the instalment decree considered by them gave an option to the appellant bank for whose benefit the same was put into contract. Therefore, the said default clause had no operation till the appellant bank wanted to take advantage of the default clause.

18. The appellants cannot derive any assistance from the observations of Mukharji, J. and Rose, J. in *Sarat Laksbi Dassya v. Naren-dra Singha*, AIR 1929 Cal 292, because the learned Judges in the said case had relied upon the decision of this Court in *SitabChand Nahar's case* (1897 ILR 24 Cal 281) (supra), which was later on not approved by the Full Bench in *Rangalal's case* (AIR 1946 Cal 500) (supra). Secondly, Mukharji, J. himself recognised that in view of the decision of the Privy Council in *Pancham v. Ansar Hushen*, (1926) 53 Ind App 187 : (AIR 1926 PC 85), doubts had been already cast upon the correctness of the trend of decisions relied upon by them in *Sarat Lakshi Dassya's case* (supra). In our view, the later decision of the Privy Council in *Lasadin's case* (AIR 1932 PC 207) (supra), and also the Full Bench decision in *Rangalal's case* (supra) have now made it clear that such option in an instalment decree is for the benefit of the decree holder and it is for him, to decide whether or not he would take advantage of a default made by the judgment debtor.

19. At least so far as this Court is concerned, law regarding the effect of default clause contained in instalment mortgage decree is already well-settled, and, therefore, it is not necessary for us to consider at length whether or not there is

any divergence amongst the reported decisions of other High Courts in particular those of the Allahabad High Court. For the same reason, we do not propose to make any attempt to make a reconciliation of the said views. We may only point out that the Allahabad High Court in *Sheo Lal v. Devi Das*, : AIR1952 All900 , inter alia held that the words 'when the right to apply accrues' in Column 3 of Article 181 of the Limitation Act means the first default giving rise to a particular cause of action on the basis of which the application for a final decree is made unless there has been a waiver, express or implied, of the first default in which case the words 'when the right to apply accrues' means the next succeeding default which is not waived. The Full Bench was also inclined to hold that the wordings of a default clause are not material and the default clause is to be interpreted liberally and for the benefit of the decree holder.

20. A Full Bench of the Bombay High Court in *Chunilal Motiram v. S. Naguji Ghule*, : AIR1950 Bom188 , held that the right to apply under Article 181 means when such a right first accrues. But Chagla, C. J. in *Chunilal Motiram's case* (supra), pointed out that, in the case before them, no question of waiver or condonation could arise as the decree holder himself had treated the first default made the basis of his *darkhast* of 1936. But it was recognised that such a default clause being for the benefit of the decree-holder or the mortgagee, he had an option either to apply for drawing up of the final decree or to waive a particular default in payment of the instalment. The decree holder in the said case did not exercise such option.

21. In the instant case, both the plaintiff and the defendants had agreed that there would be a preliminary decree against the defendants 1 to 4 for a sum of Rs. 38,009/-. This part of the compromise decree declared the amount due and it bound both the plaintiff and the defendants. The next part of the compromise decree was for the benefit of the defendants 1 to 4. In case, they paid within the stipulated time, by three equal instalments of Rs. 10,000/- each, the plaintiff mortgagee agreed to accept the said sum of Rs. 30,000/- in full satisfaction of his entire decretal claim. The third part of the decree provided that in case of default of payment in any of the aforesaid three instalments, the plaintiff shall be entitled to forthwith apply for a final decree for sale of the mortgaged property. In the present

context, the expression 'entitled' meant 'qualified to' or 'eligible'. In other words, in case of default of any one of the instalments a right would accrue in favour of the plaintiff to forthwith apply for a final decree. On the authority of the judicial decisions referred to hereinafter, we hold that the said part of the compromise decree being for the benefit of the plaintiff, the plaintiff could waive his said right to apply for drawing up of the final decree. The expression 'the entire amount then due under this decree' under Clause (c) of the compromise decree was referable to the sum of Rs. 38,000/- with interest payable thereon less any payment by the defendants. The decree by using the expression 'then' meant the particular point of time when the default in payment of an instalment might occur. Once the defendants defaulted in making timely payment of any one of the three instalments, they forfeited their right to satisfy the decree by paying Rs. 30,000/- instead of the full amount of Rs. 38,000/- with interest. In other words, the preliminary compromise decree was for two sums in the alternative. Although the said decree was passed for a sum of Rs. 38,000/- with interest and costs, the same was subject to a proviso according to which the defendants could fully discharge their liabilities under the preliminary decree by paying Rs. 30,000/- in three instalments. In case of their default in paying any one of these instalments, the defendants were liable to forfeit the said benefit and the plaintiff would get an option to apply for passing of a final decree for the entire sum then due. In case the defendants had duly paid the first instalment of Rupees 10,000/- but had committed default in payment of the second or the third instalments, the amount then due would be Rs. 38,000/- with interest less the sum of Rs. 10,000/- paid by the defendants.

22. Although the defendants committed default in paying the very first and the second instalments due under the consent decree, the plaintiff then did not exercise his option to immediately apply for drawing up of the final decree for sale. Therefore, he must be deemed to have waived the first and the second defaults by the defendants. The very fact that he did not enforce the default clause immediately after the defendants defaulted in paying the first two instalments, established that the plaintiff had waived his option to apply for the final decree for sale. The Full Bench of the Allahabad High Court in (Sheolal's case : AIR1952 All900 (supra), left hand column of the report, rightly pointed out that when the de-

fault in payment of the first two instalments was waived or condoned, the plaintiff's 'cause of action' to apply for final decree was washed out and he would be treated as if the cause of action had never arisen. In other words, the plaintiff waived or condoned a particular default, therefore, no right to apply accrued to him. No cause of action would arise at all on the occurrence of the said default which has been waived. In such circumstances, the second or the subsequent defaults gave the decree holder different cause of action. Waiver of any earlier defaults cannot preclude the plaintiffs from exercising his option to apply under Cl. (c) of the compromise decree in case of default in payment of the third instalment. In the instant case, the plaintiff exercised his option by applying for final decree within three years from the date of the default on the part of the defendants in paying the third instalment. Therefore, his application was not barred under Article 137 of the said Act.

23. There is no substance in the other argument made on behalf of the appellant that the first and the second instalments had become barred and at the highest he could only apply for a final decree for a sum of Rs. 10,000/-. We have already pointed out that the decree in question was in the alternative. In case of default of payment of any one of the three instalments, the entire amount under the decree became due and payable, i.e. the sum of Rs. 38,000/- with interest less the amount, if any, paid by the defendants. After the defendants had defaulted in paying the third instalment, the plaintiff did not seek to recover the three sums of Rs. 10,000/- which were payable by instalment but the full amount of Rs. 38,000/- with interest mentioned in the preliminary consent decree. In Rangalal's case (AIR 1946 Cal 500) (FB) (supra), the decree holder himself had relinquished a part of his decretal dues and had applied for recovery by execution of those instalments which were payable within three years from the date of his application. The Full Bench had no occasion to consider the question whether the decree holder's claim for instalments due more than three years before the date of filing of his execution application would have been barred by limitation. Further, in the instant case, we have already pointed out that the preliminary decree was in the alternative which clearly stipulated that in the default of any one of the instalments the entire decretal amount of Rs. 38,000/- with interest less the sum paid would become immediately due and payable. Therefore, we reject the contention of the

defendants that the plaintiff was entitled to apply for a final decree for a sum of Rs. 10,000/-.

24. For the foregoing reasons, we conclude that the application of the plaintiff-respondent for passing a final mortgage decree against the appellants was filed within three years from the date of accrual of his cause of action and, therefore, the plaintiff's said application was not barred by limitation. In view of this finding, it is not really necessary to consider the further submission of Mr. S. C. Mitter, learned advocate for the respondent, that there was no prescribed period of limitation for making an application for making the decree final according to the provisions of the preliminary consent decree. In this connection, Mr. Mitter had relied upon the decision of Asutosh Mookerjee and Carnduff, JJ. in *Bechu Singh v. Bicharam Sahu*, (1909) 10 Cal LJ 91. Their Lordships, inter alia, held that Section 88 of the Transfer of Property Act, 1882 (corresponding to Order 34, Rule 4 of the Civil P. C. 1908) did not contemplate the provision for payment by instalments. But, there was nothing to prevent the parties to a mortgage suit to consent to passing of a decree for payment of the mortgage dues by instalment. Such a consent decree directing payment by instalments was perfectly valid though it was not covered by Section 88 and consequently the provisions of Section 89 of the T. P. Act, 1882 (corresponding to Order 34, Rule 5 of the Civil P. C., 1908) were inapplicable to such a decree. The learned Judges further held that the Court has, where the circumstances require it, an inherent power to do that justice for the administration of which it alone exists; and where the Legislature has provided no procedure to be followed in cases which must and do arise, the Courts must be taken to have inherent power to decide the question of procedure and, if necessary, to invent a procedure for themselves. Their Lordships in *Bechu Singh's* case (*supra*), held that in case of default in payment of instalment an application for making decree final was not governed by any of the articles of the Limitation Act. Our attention has been drawn to several other decisions under Sections 88 and 89 of the T. P. Act which also took the view that in case of an application for making the decree final, no question of limitation arises. But, we find that the later reported decisions have consistently taken the view that Article 181 of the Limitation Act, 1908 (corresponding to Article 137 of the [Limitation Act, 1963](#)) govern applications for making the decree final under Order 34, Rule 5 of

the Civil P. C. Further, we have already held that the plaintiff respondent had applied for making the decree final within three year from the date en which his right to apply had accrued. Therefore, we need not any further consider the above question.

25. We, accordingly, dismiss this appeal. There will be no order as to costs.

R.K. Sharma, J.

26. I agree.

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