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Sheo Lal and anr. Vs. L. Devi Das and anr.

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Court : Allahabad

Decided On : Aug-04-1952

Reported in : AIR1952All900

Judge : Malik, C.J., ;Agarwala and ;V. Bhargava, JJ.

Acts : Limitation Act, 1908 - Schedule - Articles 181 and 182

Appeal No. : F.A.F.O. No. 350 of 1945

Appellant : Sheo Lal and anr.

Respondent : L. Devi Das and anr.

Advocate for Pet/Ap. : Bhagwan Das Gupta, Adv.

Judgement :

ORDER

Raghubardayal and Agarwala, JJ.

1. This is a judgment-debtors' appeal against an order of the learned Additional District Judge of Moradabad dated 4th August 1945, allowing an appeal of the decree-holder respondent against the order of the Munsif dismissing an application for preparation of a final decree. The only question in appeal before as is whether the application for the preparation of a final decree was barred under Article 181, Limitation Act. The facts bearing upon the question may be stated shortly as follows :

2. The appellants judgment-debtors brought a suit for accounts under Section 33, U. P. Agriculturists' Relief Act. The suit was decreed in terms of a compromise according to which the decretal amount was made payable in twelve half yearly instalments. The first instalment was to fall due on 23rd June 1937 and the last was payable on 23rd December 1942. It was further provided that in default of payment of any two instalments thewhole amount would become payable with interest allowed by law. The Hindustani expression used in the compromise was rather clumsy. It was: 'Kul mutalba ekmusht mae sud qanooni lagaya jawe.' As it stands the expression is meaningless, but there can be no doubt that parties meant what we have stated above. No instalment was paid. An application for the preparation of a final decree was made on 26th July 1943. The decree-holder claimed that he was entitled to get a final decree prepared in respect of all the twelve instalments.

3. Now, if regard be had to the default in payment of the first two instalments then the cause of action accrued on 23-12-1937, and an application for preparation of the

final decree should have been made by the latest on 23-12-1940. But if regard be had to the last of the defaults or to the individual instalments alone, then it was clear that the last five instalments, namely, those that fell due on 23-12-1940, 23-6-1941, 23-12-1942, 23-6-1942, and 23-12-1942, were within time.

4. The Munsif held that the application was time barred. Against that order the decree-holder appealed to the lower appellate Court. The lower appellate Court held that the ruling reported in Buttan Singh v. Sakal Raj Singh, 1945 ALL. W. R. H. C. 54 applied to the case. In that ruling it was held that there was nothing in Article 181, limitation Act which indicated that the decree-holder's right to apply for a final decree accrued only once; rather a new cause of action accrued upon every fresh default and not only once on the occurrence of the first default. The lower appellate Court, therefore, ordered that the decree-holder was to have a final decree prepared in respect of the last five instalments which fell due within three years of the making of the application and remanded the case to the lower Court for the preparation of a final decree. The decree-holder has submitted to this order but the judgment-debtors have come up in appeal to this Court.

5. It has been contended before us by Mr. B.D. Gupta on behalf of the judgment-debtors-appellants that the cause of action for preparation of the final decree accrued only once and that was on the first default in the payment of two consecutive instalments, that is to say, on 23-12-1937, and that, therefore, the application was time-barred under Article 181 Limitation Act. According to him 'the right to apply' within the meaning of col. 3 of Art 181, Limitation Act means the first right to apply, and he has relied upon a Division Bench decision of this Court reported in Mt. Bhagwati v. Sant Lal, A. I. R. 1946 ALL. 360. (Verma and Pathak JJ.)

6. We think that the question involved in this appeal is not free from difficulty and there does not appear to be a uniformity of decisions in this Court.

7. Now let us mention the case law bearing upon the point in chronological order. But before we do so, it will be well if we take note of similar provisions under different Articles of the Limitation Act:

Article 74:

On a promissory note or bond payable by instalments.

(3years)

The expiration of the first term of payment as to thepart then payable and for the otherparts, the expiration of the respective terms of payment.

Article 75:

On a promissory note or bond payable by instalments,which provides that if default be made in payment of one or more instalments,the whole shall be due.

(3years)

When a default is made, unless where the payee orobligee waives the benefit of the provision, and then when fresh default ismade in respect of which there is no such

waiver.

Article 80:

Suit on bill of exchange, promissory note or rond notherein expressly provided for.

(3years)

When the bill, note or bond be-domes payable

Article 120:

Suit for which no period of limitation is providedelsewhere in this schedule.

(6years)

When the right to sue accrues.

Article 132:

To enforce payment of money eharges upon immovableproperty.

(12years)

When the money sued for becomes due.

Article 181:

Applications for which no period of limitation isprovided elsewhere in this Schedule or by S. 48,Civil P. G., 1908.

(3years)

When the right to apply accrues.

Article 182:

For the execution of a decree or order of any Civil Court not provided for by Art. 183 or by S. 48,Civil P.O., 1908.

(Three years;or where) (a certified copy of) (thedecree or order) (has been registered) (six years.)

(Where the application is to enforce any payment whichthe decree or order directs to be made ata certain date (such date).

8. In Juneswar Das v. Mahabeer Singh, 1 Cal. 163, a case falling under Act 14 of 1859, the facts were these: B having borrowed money from A executed in his favour a bond (which was afterwards duly registered) in which he engaged to repay the amount with interest on a day named and hypothecated certain lands by way of security with a condition that, in the event of the said lands being sold in execution of the decree before the day fixed for repayment, A should be at liberty to sue at once

for the recovery of the debt. Before the term of repayment expired, the mortgage land was sold in execution of a decree obtained by another creditor on a second bond made by B. More than six years after the date of sale in execution of the decree, but within six years of the date fixed in the bond for repayment, A brought a suit against B and the purchasers of the lands at the auction sale for recovery of the money due under the bond.

Clause 10, Limitation Act, (XIV [14] of 1859) applied to suits for money lent where the instrument was not registered. Clause 16 applied to all other suits for which no period of limitation was expressly provided. Under Clause 16 a period of six years was provided from the time 'the cause of action arose.' Clause 12 provided a period of 12 years for the recovery of immoveable property, or of an interest in immoveable property. The contention of the defendants in that case was that Clause 16 providing a period of 6 years applied and that the cause of action arose on the date when the property was sold in execution of the decree. On the other hand, the plaintiff claimed that a period of 12 years applied under Clause 12. Sir M. E. Smith delivering the judgment of the Privy Council held that Clause 12 applied and the suit was within time, but he also made observations to the following effect :

'Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon that this suit would have been barred if the limitation of 6 years under Clause 16 tad been applicable to it. They think, upon the construction of this bond, there would be good reason for holding that the cause of action arose within 6 years before commencement of the suit.'

The words 'cause of action' should be noted. It is clear that although the mortgagee was entitled to sue under the terms of the bond upon the sale of the property and his cause of action thus arose on that date yet in their Lordships' view he was not bound to do so and if he elected not to do so, his cause of action nevertheless arose when the payment was not made on the date fixed in the bond. In other words, the second cause of action was to be taken into account when the default clause was for the benefit of the mortgagee.

9. In Gaya Din v. Jhumman Lal, 37 ALL. 400, a Full Bench of this Court had to consider a case falling under Article 132. There was a mortgage bond in which the mortgage money was payable after a certain period. There was a default clause to the following effect :

'If we fail to pay the interest aforesaid in any month, on the principal by the end of the stipulated period, as specified above, or no payment is made in a year, the mortgagee shall, under all these circumstances, be at liberty to realise the entire amount with the interest aforesaid in a lump sum, through Court, by means of a suit, from the mortgaged and other moveable and immoveable property and the persons of us the executants.'

It was held by Richards C.J. and Tudball J. that within the meaning of the article the money became due as soon as it could be legally demanded, that is, upon the first default. The learned Chief Justice followed the judgment of the Court of Appeal in England in Reeves v. Butcher, (1891) 2 Q. B. 509. Banerji J. took the opposite view. He thought that the clause in question was clearly inserted for the benefit of the creditor and that it was at his option to treat the money as being immediately due or not. He relied upon the dictum of Sir M. E. Smith in Juneswar Dass v. Mahabeer Singh, 1 Cal.

163 (P. C.) referred to above.

10. Gaya Din's case, 37 ALL. 400 was affirmedby another Full Bench of this Court in ShibDayal v. Meharban, 45 ALL. 27.

11. In Ashiq Husain v. Chatarbhuj, 50 ALL. 328, Sir Grimwood Hears C. J. and Sen J. had a case in which the facts were these: A mortgage bond, executed on 1-5-1909, was payable in three years. But it was provided in it that if the mortgagor transferred the hypothecated property or if anyone advertised the same for sale, the creditors shall, even before the expiry of the term, be at liberty to institute a suit for recovery of the amount of this bond, with the entire interest and compound interest for the aforesaid period of 3 years. On 8-3-1911, the mortgagor executed a hypothecation bond and hypothecated a portion of the mortgaged property. The mortgagee brought a suit against the mortgagor himself and the transferees on 27-3-1924, that is, beyond 12 years of the hypothecation of the mortgagor, but within twelve years of the expiry of 3 years fixed for payment of the mortgage amount in the mortgage bond.

12. Their Lordships refused to extend the principle laid down in Gaya Din's (37 ALL. 400) and Shib Dayal's (45 ALL. 27 P. B.) cases to the facts before them.

13. As the Privy Council observed in Lasa Din v. Gulab Kunwar, (A. I. R. 1932 P. C. 207) to which we shall refer presently, there is no difference in principle between the principal money becoming due immediately upon the default by the mortgagor in payment of interest or of an instalment and it becoming due upon the breach of any other condition to which a similar provision is attached.

14. In Pancham v. Ansar Husain, 53 Ind. App. 187 there was a default in payment of interest, the default clause giving the mortgagees right, without waiting for the expiry of the stipulated period, to enforce the security. This Court followed Gaya Din's case, (37 ALL 400) and had dismissed the suit as beyond time. On appeal Lord Blanesburgh delivering the judgment of the Board observed as follows :

'Applying certain previous decisions of that Court, and in particular a Full Bench decision in Gaya Din v. Jhumman Lal, 37 All. 400 the High Court held that under a clause in the above form a single default on part ofthe mortgagors, without any act of election, cancellation or other form of response or acceptance on the part of the mortgagees, and even, it would appear, against their desire operates, eo instanti, to make the money secured by the mortgage 'become due,' so that all right of action in respect of the security is finally barred twelve years later, that is in the present case, on 21-2-1906. All this the High Court held, notwithstanding that the mortgage is for a term certain, a 'provision which may be as much for the benefit of the mortgagees as the mortgagors, and notwithstanding that the proviso is exclusively for the benefit of the mortgagees. The decision also apparently proceeds upon the view that the words of the English Limitation Act and the English decisions thereon apply without question to the words of Article 132 of Schedule to the Indian Act--a conclusion which, as it seems to their Lordships, may involve, and, on the critical point when applied to such a proviso as the present, a large assumption.'

The Board, however, did not decide the question finally and left it to be decided in some other case.

15. In Maung Sin v. Ma Tok, 54 Ind. App. 272 (P. C.), there was a decree which

provided that the husband would pay Rs. 2,000 annually to the wife and remain in possession of the disputed property, but in case of default of payment the property would be made over to the wife. There was default in payment on several occasions. More than three years after the first default the decree-holder applied on the basis of a fresh default for recovery of the amount then due and also for recovery of possession over the disputed property. Their Lordships of the Privy Council held that the decree-holder was entitled not only to the instalments claimed but also to the delivery of possession of the disputed property. According to their Lordships upon the construction of the decree itself, on the occasion of a default in each payment the right of the respondent to have the said property made over to her arose, and, therefore, the claim was not time barred.

Their Lordships did not mention the particular article which applied to that application but it is clear, as was held in a Full Bench case of this Court, Joti Prasad v. Sri Chand, 51 ALL. 237 that to the application for delivery of possession over the property Article 181 was the only article that was applicable, and their Lordships of the Privy Council must have had that article in their minds, when they decided that case. This case is very important and clearly decides that in a case in which there is a default clause and the relief claimed is based upon the default clause, the right to apply accrues on the happening of every default and not only on the happening of the first default.

16. This was followed by a Full Bench of this Court in Joti Prasad v. Sri Chand, 51 ALL. 237. In that case there was a decree based on a compromise by which the decretal amount was made payable by instalments. The decree further provided that in ease of default of any two consecutive instalments the defendants would pay up the whole of the balance due. There was default in the payment of several instalments. The decree-holder filed an application for execution more than three years after the first default. The matter came up before a Division Bench which referred five questions for decision by a Full Bench.

17. In the Full Bench, Boys J. held that the instalments as individual instalments could be recovered under Article 182, Clause (7) within three years of their falling due and that the whole amount then remaining due could be recovered within three years of the last of two consecutive defaults under Article 181. Sulaiman A. C. J. after pointing out that in that case the default clause did not provide that in case of default the decree-holder shall have power or option to recover the amount, but provided that the amount shall be paid by the defendants to the plaintiffs, held that this difference in language was not material. In his Lordship's opinion Article 181 was applicable to the relief claimed under the default clause and relying upon the Privy Council case just cited, Maung Sin v. M Tok, 54 Ind. App. 272 (P. C.), concurred with Boys J. in holding that:

If the application for execution is one for the remaining unpaid balance of the decretal amount under the default clause, it is not governed by Article 182, at all but by Article 181, and limitation will run from the date of the last of any two successive defaults, the decree holder being entitled for an order for whole balance due less the amount of any individual instalments which regarded as individual instalments, are already barred by limitation and that in cases of this description it is undesirable to interpret the application too strictly, and that the Court may well pay regard to the substance of the application.

18. This was a case in which the terms of the decree were exactly similar to the case before us with the only difference that in our case it was a preliminary decree, the application was for the preparation of a final decree, whereas in the case before the Full Bench it was a final decree and the application was for execution of the decree. So far as the question of the enforcement of the default clause and the recovery of the amount due under that clause is concerned, the same Article, namely, Article 181, was held to apply, and the decision is directly in point and we think binding upon us unless it is overruled expressly, or impliedly, by any subsequent decision of a higher authority.

19. In our opinion this case lays down the following propositions:--(1) Where there is a default clause the decree-holder has a right to apply for recovery of the whole amount upon the happening of any default; (2) That even where the default clause has come into operation by default in payment, the individual instalments, as and when they fall due, do not become extinct, and the provision with regard to their payment remains intact and may be enforced, and (3) That it is immaterial that the default clause is worded as expressly giving an option to the decree-holder to apply for the recovery of the whole amount on the happening of a default or whether it provides that on the happening of a default the whole amount shall become due or payable. The reason is that in both cases the default clause is for the benefit of the decree-holder, and not for the benefit of the judgment-debtor.

20. The matter which was left undecided in Pancham's case, (53 Ind. App. 187 P. C.) (ubi supra) again came up before the Board in Lasa Din v. Gulab Kunwar, 1932 ALL. L. J. 913 (P.C.). In that case the mortgage deed provided that the principal sum would be paid within six years and the stipulated interest every year and further that in case of default in punctual payment of interest the mortgagee shall, within the expiry of the stipulated period of six years, have power to realise the entire mortgage money and the remaining interest and compound interest due to him in a lump sum through Court by sale of the mortgaged property. There was default in payment of interest, but the mortgagee did not avail himself of the option given to him. He sued upon the mortgage after 12 years from the date of such default but within twelve years from the date of the expiry of the stipulated period of six years.

Sir George Lowndes delivering the judgment of the Board observed as follows:

'There can be no doubt, as pointed out by Lord Blaneshburgh, a proviso of this nature is inserted in a mortgage deed 'exclusively (or the benefit of the mortgagees', and that it purports to give them an option either to enforce their security at once, or if the security is ample, to stand by their investment for the full term of the mortgage. If on the default of the mortgagor, in other words, by the breach of his contract the mortgage money becomes immediately 'due' it is clear that the intention of the parties is defeated and that what was agreed to by them as an option in the mortgagees is, in effect, converted into an option in the mortgagor. For if, the latter, after the deed has been duly executed, and registered, finds that he can mate a better bargain elsewhere, he has only to break his contract by refusing to pay the interest, and 'eo instanti,' as Lord Blanesburgh says, he is entitled to redeem.

If the principal money is 'due', and the stipulated term has gone out of the contract, it follows, in their Lordships' opinion that the mortgagor can claim to repay it, as was recognised by Wazir Hasan J. in his judgment in the Chief Court. Their Lordships think that this is an impossible result. They are not prepared to hold that the

mortgagor could in this way take advantage of his own default; they do not think that upon such default he would have the right to redeem, and in their opinion the mortgage money does not 'become due' within the meaning of Art 132, Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would, of course, also be the position if the mortgagee exercised the option reserved to him.

'Their Lordships are not greatly oppressed by the authority of Reeves v. Butcher, (1891) 2 Q. B. 509. It is, they think, always dangerous to apply English decisions to the construction of an Indian Act. The clause there under consideration differed widely from that now before their Lordships, and indeed from the clauses with which the Allahabad Court had to deal; the question for decision would have fallen in India, not under Article 132, but under Article 75, which is in very special terms; and Section 3 of the statute of James, with which the Court was concerned, made the time to run, not from the date when the money became due. but from the date when the cause of action arose. If in the Indian eases the question were 'when did the mortgagee's cause of action arise ?' i.e., when did he first become entitled to sue for the relief claimed by his suit their Lordships think that there might be much to be said in support of the Allahabad decisions. Judged by the Indian criterion, 'when the money sued for became due,' upon the best consideration their Lordships have been able to give to this difficult question, they think that the decision of the Chief Court of Oudh was wrong, and that they should have held that the appellant's suit was within time.'

21. It will be observed that the reasoning upon which the decision was based was that where a default clause is inserted in a bond 'exclusively for the benefit of the mortgagee' and gives him an option to either enforce the security at once, or, if the security is ample, to stand by his investment for the Full term of the mortgage, the mortgagee is not bound to sue at once upon the happenning of the default, but may wait and sue when the time fixed for the payment expires. It is true that while distinguishing the case of Beeves v. Butcher, (1891-2 Q. B. 509) (supra), their Lordships have observed that:

'If in the Indian cases the question were did the mortgagee's cause of action arise? i.e., when did he first become entitled to sue for the relief claimed by his suit --their Lordships think that there might be much to be said in support of the Allahabad decisions.'

The words 'there might be much to be said in support of the Allahabad decisions' are significant. Where two views are possible and much can be said on both sides, the mere fact that much can be said in favour of one view does not mean that that view is necessarily correct. Having regard to the other decisions of the Board on the subject, already referred to, namely, Juneswar Das v. Mahabeer Singh, 1 Cal. 163 (P. C.) and Maung Sin v Ma Tok, 54 Ind. App. 272 (P. c.), we do not think that when their Lordships themselves did not decide the question finally the Courts in India should feel bound by observations of that nature.

22. In Muhammad Husain v. Sanwal Das, (1934 ALL. L. J. R. 261) a Full Bench of this Court had to consider Article 80 read with Article 110. There was a mortgage which provided that the principal sum would be paid in eight years and the stipulated interest every month and further that if the interest for one full year remained unpaid the mortgagee shall be at liberty to recover the principal and interest without waiting

for the expiry of the stipulated period. No interest was paid and there was default at the expiry of one year, but the mortgagee did not avail himself of the option given to him. He sued for the recovery of the mortgage money within six years from the date of the expiry of the stipulated period, and obtained a decree. The sale proceeds of the mortgaged property having proved insufficient to pay up the mortgaged money the mortgagee applied for a simple money decree for the balance under Order 34, Rule 6. The case was referred to a Full Bench.

23. It was contended that since in Article 80 time began to run from the date when the money became 'payable,' limitation would begin to runwhen the money first became payable by the mortgagor, that is. on the happening of the first default, and that this result was not affected by the question of mortgagee's option. Lasa Din's case, (A. I. R. 1932 P. C. 207) was attempted to be distinguished upon the ground that the language of Article 132, which was applicable to that case -was different from the language of Article 80. Sulaiman C. J. observed :

'I take the pronouncement of their Lordships to mean that a clause of this nature is exclusively for the benefit of the mortgagee and gives him a perfect option or liberty to sue for his money or to stand by his investment for the full term of the mortgage and so long as the mortgagee does not, by means of any act of election, cancellation or other form of response or acceptance make the money become due, time does not begin to run against him'

King J. agreed with him. His Lordship observed that their Lordships of the Privy Council in Lasa Din's case laid

'stress upon the point that the provision enabling the mortgagees to sue before the expiry of the stipulated period is inserted exclusively for the benefit of the mortgagees' giving them an option either to enforce their security at once, or, to stand by their investment for the full term. I take this to mean that the mortgagee has an option of treating the money as having 'become due' by demanding or suing for it, and it does not become due unless he exercises his option, even though the mortgagor may already have a right to redeem in accordance with the terms of the mortgage contract. If we hold that time begins to run for a suit to enforce the mortgage from the date of the first default that gives an optional cause of action, then it could not be said that the provision is inserted exclusively for the mortgagee's benefit. He would have to sue within twelve years from the date of the first default although he might prefer to stand by his investment for the full term and then sue within twelve years from the expiry of that term. He might indeed be compelled to sue before the expiry of the full term, if the term were 13 years or more. In my view, therefore, the question whether the mortgagor has a right to redeem before the expiry of the stipulated period is immaterial. Time does not begin to run against the mortgagee before the expiry of that period unless he avails himself of the option inserted exclusively for his benefit'

Niamatullah J., also held to the same effect. His Lordship held that in Lasa Din's case, their Lordships of the Privy Council intended to rest their conclusion on two grounds either of which supported it. These two grounds were money does not 'become due unless (1) mortgagor is at liberty to pay and the mortgagee is at liberty to sue, and (2) the mortgagee having an option to claim immediate payment avails himself of the option by claiming it before the expiry of the term. His Lordship held that either ground was independent of the other and even if the first ground was absent, the

second ground was enough for a decision in favour of the mortgagee.

His Lordship further considered the sentence relating to the accrual of the cause of action in Lasa, Din's case, beginning 'If in the Indian cases the question were ...' and observed that it did not affect the decision even though the language of the statute was 'when the money be-came payable' and not 'when the money became due.'

24. Nor in our opinion, this Full Bench decision is authority for the proposition that the real ratio decidendi of Lasa Din's case, (A. I. R. 1932 P.C. 207) was that whenever a default) clause is intended exclusively for the benefit of the mortgagee the mortgagor cannot take advantage of his own default in payment and the mortgagee can stand by his investment for the full term and his right to realise the amount will not be affected by his inaction. This case further lays down that there is no particular difference between the words 'becoming due' and 'money becoming payable,' and that the sentence in the judgment in Lasa Din's case beginning 'If in the Indian case . . . .' does not affect the matter.

25. Now there is no essential difference between the phrase 'the amount becomes payable' and 'the right to sue or to apply accrues.' In the case of a decree for payment of money 'the right to apply accrues' when 'the money becomes payable.' The considerations that weighed with their Lordships in the above Full Bench case, to our minds, equally apply to the present case.

26. In Ram Prasad Bam v. Jadunandan Upadhia, 1934 ALL. L. J. 772, however, there was a compromise decree fixing payments of certain instalments on specified dates. It provided further that:

'In the case of default in the payment of two successive instalments, the decree-holder would be entitled to realise the entire balance of his decretal amount, irrespective of the fact whether or not instalments have fallen due, by execution of the decree.'

An application for execution was made more than three years after the first default in the payment of two successive instalments. Sulaiman C. J. and Mukerji, J. held that the decree-holder's right to receive the instalments as and when they fell due was not barred but that his right to enforce the payment of all the instalments that might remain unpaid, in the event of two successive instalments remaining unpaid was time barred. The application was made more than three years after the right to apply first accrued on the default of first two instalments.

This ruling was given in spite of the Full Bench decision in Joti Prasad v. Sri Chand, 51 ALL. 237. Their Lordships felt not bound to follow that Full Bench ease on account of the observations of the Privy Council in Lasa Din's case, (A. I. R. 1932 p. c 207) in the sentence, 'If in the Indian cases etc. ...' already referred to. Their Lordships seem to have held in this case that even where the mortgagee was given an option to realise the Full amount on default of any two successive instalments even then he was bound to apply within three years of the first default in the payment of two successive instalments.

27. In Jawahar Lal v. Mathura Prasad, 1934 ALL. L. J. 1035 (F. B.), the principle underlying LasaDin's case was not applied to a case falling under Article 75. It was held that the language of the Article was quite different from that of Article 132or

Article 80. Sulaiman C.J., and King J. observed that unless there was waiver the Article became applicable on the first default. Mukerji J., however, gave a dissenting judgment in which he observed :

'To start with, I would like to mention that as a matterof principle, what is given to a man for his advantage should not be turned into his disadvantage. That is a matter of simple justice.'

His Lordship referred to Lasa Din's case, (A. I. R. 1932 P. C. 207) and observed that the Privy Council had remarked with reference to a suit on a mortgage that a contract which had been entered into for. the benefit of the mortgagee could not be converted into a contract as if it were for the benefit of the mortgagor and held that the same principle should apply to Article 75.

28. As the language of Article 75 is peculiar we do not think that the present case is governed by Jawahar Lal's case, (1934 ALL. L. J. 1035 F. B.)

29. In Buttan Singh v. Sakal Raj Singh, A. I. R. 1945 ALL. 161, Bennet J. had a case exactly similar to the present. There was a preliminary mortgage decree directing payment by instalments and farther that on default in payment of three instalments the decree-holder was entitled to apply for a final decree. It was held that the cause of action to apply for a final decree accrued not only on default of payment of the third instalment but also on subsequent breaches and an application for final decree made more than three years after the first default of three instalments was within time. Ram Dutta v. Mahpal Singh, A. I. R. 1938 Oudh 112 and Gopal Naicker v. Alagirisami Naicker, A. I. R. 1942 Mad. 581 were relied upon. The basis of the decision was that the right to apply accrued on every fresh default and not only once on the occurrence of the first default.

30. This leads us to a consideration of the last case in this series.

31. In Mt. Bhagwati v. Sant Lal, A. I. R. 1946 ALL. 360, a Bench of this Court consisting of Verma and Pathak JJ. had a case very much similar to the present case. In that case the preliminary decree for sale provided that the decretal amount would be paid in instalments and in case of non-payment of any three instalments the entire amount would be payable in a lump sum. It was held that the expression 'When the right to apply accrues' in Article 181 meant 'when the right to apply first accrued'. Their Lordships relied upon the sentence in Lasa Din's case, (A. I. R. 1932 P.c. 207) so often quoted by us already. Their Lordships held that the Privy Council case in Maung Sin v. Ma Tok, 54 Ind. App. 272, was different. They distinguished the case in Sam Dutta v. Mahpal Singh, A. I. R. 1938 Oudh 112 on the ground that in that case the preliminary decree conferred an option on the decree-holder to obtain a final decree on default of any one instalment when the entire amount unpaid became payable, and observed that if there was anything in the judgment of the Chief Court which may be said to be in conflict with the view that the expression 'when the right to apply accrues' meant 'when the right to apply first accrues' they would dissent from that decision.

Their Lordships observed that Lasa Din's case did not lay down any general principle. They distinguished the Full Bench case reported in Joti Prasad v. Sri Chand, 51 ALL. 237 (F.B.), on the ground that it was a case not for preparation of a final decree but for the execution of a decree and also upon the ground that the terms of the decree in

that case were essentially different from the terms of the decree in the case before them. Their Lordships emphasised that in the case before them there was no option contained in the decree and it was for that reason that they held that the application for a final decree was time-barred. Thus it would seem that although their Lordships emphasised the fact that under Article 181 'when the right to apply accrues' mean 'when the right to apply first accrues,' their Lordships were of the opinion that where there was an option in the decree-holder to take advantage of the default clause or not to take advantage of it, he could stand by his investment for the full term, but where there was no option for the decree-holder he could not wait and limitation would start to run from the first default.

32. It appears to us, therefore, that the decisions of this Court cannot be reconciled and, in our opinion, the case should be referred to a larger Bench in order that a final and authoritative decision may be given on the following questions:

1. Where a preliminary decree (or money allows instalment and provides that in case of default in payment of any specified number of instalments, the entire amount then remaining unpaid would become payable, whether the words 'when the right to apply accrues' in the third column in Article 181, Limitation Act are confined to the first default or include every fresh accrual of the right to apply upon the happening of each successive default and limitation for applying for a final decree for the balance then due may be counted from the accrual of the last default?

2. Whether in such a case the right to apply for a final decree in respect of the instalments not barred by limitation as individual instalments, remains intact in spite of the omissions to take advantage of the default clause?

3. Whether the answers to the above two questions would be affected if the default clause instead of being worded as 'the decree-holder shall have a right to apply,' or 'the decree-holder shall have the option to apply', is worded as 'the entire decretal amount shall become payable,' or 'the entire decretal amount shall become due', or, 'the judgment-debtor shall pay the entire decretal amount', even though in all these cases the default clause be intended for the benefit of the decree-holder?

We, therefore, order that the case may be laid before the Hon'ble the Acting Chief Justice for the constitution of a Full Bench for a decision of the above questions.

Opinion of the Full Bench

Agarwala, J.

33. The following questions have been referred to us for decision by a Bench of the Court: [After stating the questions referred his Lordship continued].

34. The appellant judgment-debtors brought a suit for accounts under Section 33, U. P. Agriculturists' Belief Act. On 6-10-1936, a decree-was passed in favour of the creditor-respondent. The amount found due was made payable in 12 sis-monthly instalments. It was provided that on failure of payment of two instalments the whole amount would become payable with interest allowed by law : (kul mutalba ek musht mal sood qanuni lagaya jawe). The first instalment was made payable on 23-6-1937, and the last on 23-12-1942. No instalments were paid. An application for the preparation of a final decree in respect of all the twelve instalments was made on 26-

7-1943. An objection was taken to the preparation of the final decree by the judgment-debtors on the ground that the application was time-barred because on failure of payment of two instalments a right to apply for the preparation of final decree had accrued, to the decree-holder on 23-12-1937.

35. The execution Court held that the application for the preparation of a final decree was time-barred but as in its opinion, the decree was a final decree and no application for preparation of a final decree was necessary, it held that the decree-holder may apply for execution. Later, however, the execution application was also dismissed upon the ground that the decree-holder ought to have applied for the preparation of a final decree. The decree-holder appealed against both these orders. The lower appellate Court dismissed the appeal against the dismissal of the execution application on the ground that the memorandum of appeal was not properly presented. It, however, allowed the appeal in part against the order dismissing the application for preparation of a final decree.

It held that the application for preparation of a final decree was within time so far as the five instalments which were within three years of the making of the application were concerned and remanded the case to the lower Court for the preparation of a final decree in respect of those five instalments. The decree-holder submitted to this order, but the judgment-debtors appealed to this Court, and the only question urged before the Bench which made the reference to this larger Bench was, whether the application for preparation of a final decree was time-barred. A further point was urged before us to the effect that no application for the preparation of a final decree could be made, because the decree was a final decree and not a preliminary decree. As this point was not raised before the Bench and has not been referred to us, we have not entertained it.

36. The relevant case law has been discussed in the referring order and it is not necessary to repeat what has been stated therein.

37. The Article of the Indian Limitation Act applicable to an application for the preparation of a final decree is 181. The period of limitation for the application is three years and it begins to run from the time 'when the right to apply accrues.' The right to apply may occur only once or may occur more than once. It will all depend upon the cause of action. It is an error to suppose that in all cases the right to apply can accrue only once. No doubt, for one particular cause of action the right to apply can accrue only once. But where there are different causes of action, or where after the accrual of one cause of action, another cause of action arises by reason of a change in the circumstances the right to apply can be said to arise upon the accrual of each of the causes of action.

For example, in respect of a preliminary decree payable by instalments when there is no defaults clause, as many applications for the preparation of a final decree can be made as there are instalments to be recovered. It cannot be that in such a case there should be only one final decree, for if an application for the preparation of a final decree is made after default is made in the last instalment, some of the earlier instalments may have fallen due more than three years earlier. Thus the first principle to be remembered is that when we speak of 'the right to apply', what is intended is the right to apply for a particular cause of action bearing in mind always that there may be more than one causes of action under one decree.

38. Let us take a case in which the decree is for the payment of a certain amount by instalments, with a condition that if a certain number of instalments say, two, are not paid in time, the whole amount will become payable forthwith. If the first instalment is not paid, there can be no doubt that before the second instalment has fallen due, the decree-holder can apply for the preparation of a final decree in respect of the first instalment.

39. Now, let us assume that the second instalment is also not paid. The decree-holder is entitled to apply for the preparation of a final decree for the whole of the amount then due. But when the whole of the amount has fallen due, can the decree-holder apply for the instalments alone ignoring the fact that the whole amount has fallen due by reason of the breach of the condition To my mind the answer must depend upon whether the condition gives an option to the decree-holder or not. If he has no option at all, then the provision for payment by instalments ceases to exist and no longer is there any right in the decree-holder to apply in respect of the instalments and he must apply for the enforcement of the condition alone. But if the decree-holder has an option to enforce the condition or not to enforce it, there is no reason why he should not be able to waive the condition and enforce payment of the instalments as and when they fall due.

40. Again, if there is no option with the decree-holder to waive or condone the default made in payment of the instalments so that the condition comes into operation in spite of his desire to the contrary, there can be only one cause of action for applying on the basis of the condition and he cannot waive one default and apply on the basis of a second or subsequent default. But when the condition gives an option to the decree-holder whether to enforce it or not to enforce it and entitles him to waive or condone the default, the question is whether even in such a case the decree-holder is bound to apply for the recovery of the whole amount due under the condition on the very first default or he can waive the default and apply on the basis of a subsequent default. To my mind, the decree-holder can waive the first or subsequent default and apply for the preparation of a final decree on the basis of the default not waived. Of course, in such a case he cannot claim to recover instalments already barred by time. To hold that he is bound be apply on the very first default is to hold that he has no option which would be to deny the very hypothesis upon which the question is posed.

It is said that the right to apply must mean the first right to apply, and that, therefore, even though there is an option in the decree-holder to enforce the default clause or not to enforce it, still he must apply upon the very first default. I cannot accept this argument. It seems to me that if the decree-holder has a right to waive or condone the default he can avail of the second default and then apply, because his right to apply upon each subsequent default when the previous defaults have been waived is based upon a different cause of action. The first cause of action arose when there was default in the payment of the first two instalments. That having been waived or condoned, it is washed out and it will be treated as if it had never arisen. In other words it may be said that when a default is waived or condoned, no cause of action arose at all on the first default and, therefore, no right to apply accrued. In the circumstances, the second default gives the decree-holder a different cause of action.

A cause of action, as is well known, is a bundle of all the material facts upon which a right of action is based. When the first default is waived, the cause of action based on the second default comprises of a different set of facts. It may be that when the first default is condoned and an application is made on the basis of a second or

subsequent default, the relief claimed is the same as would have been the ease if the applications were made on the basis of the first default and it is also true that in both cases, whether applyingon the basis of the first default or applying on the basis of the second default the same condition is being enforced. But this is wholly immaterial as a cause of action does not depend on the relief claimed, vide Mt. Chand Kour v. Pratab Singh, 10 cal. 98 (P. c.) at p. 102.

41. In my opinion, the principle enunciated by the Privy Council in Lasa Dm v. Gulab Kunwar, 1932 ALL. L. J. 913 (P.C.) is a principle which is applicable not only to a case falling under Article 132, but to all cases wherever there is an option given to a creditor or decree-holder to waive a default because it is based on equity and justice. Adopting the observations of their Lordships to the case in hand it may be said that the condition being exclusively for the benefit of the decree-holder, it purports to give him an option either to enforce it at once or not to enforce it and to recover the instalments as stipulated. If on the default of the judgment-debtor by the breach of the terms of the decree providing for payment of instalments the right to apply for the final decree accrues once and for all, it is clear that the intention of the parties is defeated and what was intended to be for the benefit of the decree-holder is turned to his disadvantage and leaves no option to him.

42. The observations of their Lordships that:

'If In the Indian cases the question were 'when did the mortgagee's cause of action arise?' i.e. when did he first become entitled to sue for the relief claimed by his suit--their Lordships think that there might be much to be said in support of the Allahabad decision'

should not be taken to mean that their Lordships finally decided that the mortgagee's cause of action arose on the first default even though the mortgagee had a right to waive or condone the first default. To my mind the decision of the Privy Council in Maung Sin v. Ma Tok, 54 Ind. App. 272: 5 Rang. 422: A. I. R. 1927 P. C. 146 is decisive upon the question under consideration. In that case there was a decree against the husband in favour of the wife directing the husband to pay Rs. 2,000 annually to the wife and to remain in possession of the disputed property. It further provided that in case of default of payment, the wife would be entitled to take possession of the property. There was default on several occasions. More than three years after the first default, the decree-holder applied on the basis of a fresh default for recovery of the amount then due and also for the recovery of possession over the disputed property.

It was held, that the decree-holder was entitled not only to the instalments claimed but also to the delivery of possession of the disputed property and that the application for delivery of possession was made within time. The application for delivery of possession of the property could only be under Article 181, Limitation Act, and this case, therefore, is a direct authority upon the points arising in the present case. This was the view taken of this Privy Council case and a Full Bench of this Court, Joti Prasad v. Sri Chand, 51 ALL.237 (F.B.) and I respectfully agree with what was held in that case. The principles I have discussed above would apply not only to Article 181 but also to other Articles in the Limitation Act in which the amount is payable by instalments and there is a default clause, e. g., Arts. 80 and 132.

The same view was taken by a single Judge of this Court in Buttan Singh v Sakal Raj

A. I. R. 1945 ALL. 161, by the Oudh 'Chief Court in Earn Dutta v. Mahpal Singh, A. I. R. 1938 Oudh 112 and by the Madras High Court in Gopal Naicker v. Alagirisami Naicker, A. I. R. 1942 Mad. 581. In these two cases when the learned Judges stated that the cause of action arose on each subsequent default, I have no doubt that they had the principle of waiver in their minds. The non-exercise of the option on the previous defaults was considered by them to be enough to show that the default was condoned or waived.

43. The question of construction of a condition clause does not present much difficulty. When a debtor agrees to make payment by instalments or when the decree directs payment by the judgment-debtor in instalments, the direction is for the benefit of the debtor or the judgment-debtor. The default clause is inserted to ensure regular payment of the instalments and is solely for the benefit of the creditor. It may be expressed in a hundred ways, but the object in all cases is the same. Therefore, even if in the default clause instead of expression 'the decree-holder or the creditor shall have the option of realising the whole amount', the expression used is 'the whole amount shall become due or shall become payable', it is not intended that the creditor has no option in the matter.

This was so held in Joti Prasad's cast already referred to, 51 ALL,. 237 F. B. The view taken by the Full Beach is further fortified by a reference to the language of Article 75, Limitation Act. In the default clause therein prescribed the words used are 'the whole shall be due' and no option is expressly mentioned, and yet it is clear that the Legislature treats this clause also as giving an option to the creditor which he can waive, vide the third column of the Article.

44. In Shib Dat v. Kalka Prasad, 2 ALL. 443 and in Dulsook Rattanch Ind v. Chugon Narrun, 2 Bom. 356, the Courts held that a provision similar to the provision in the present case implied that the instalment arrangement ceased to exist. With respect, I am unable to agree with this construction of the default clause. There was no express statement that the instalment arrangement shall cease and there was nothing to show that the default clause was not for the benefit of the creditor but was equally intended for the benefit of the debtor.

45. In my opinion the ease of Mt. Bhagwati v. Santlal, A. I. R. 1946 ALL 360, was not correctly decided. In that case a Bench of this Court construed the default clause which was in verymuch similar terms to the default clause in the present case as if it extinguished the instalment arrangement and left no option to the decree-holder. This was contrary to the Full Bench decision in Joti Prasad's case, 51 ALL. 237. Further when the learned Judges observed that 'when the right to apply accrues' under Article 181 means 'when the right to apply first accrues', they overlooked that even so the right to apply may accrue more than once upon different causes of action under the same decree or bond.

46. There is only one more case, Chuni Lal Motiram v. Shivram Naguji Ghule, A. I. R 1950 Bom. 188 : I. L. R. 1951 Bom. 65 which needs consideration as it was decided after the referring order was made. In that case there was an award decree payable by instalments of Rs. 1,000 with interest. The first of such instalments was made payable in March or April 1932, and each subsequent instalment on the succeeding March or April, of every year. It was also provided that in default of payment of any two instalments the plaintiffs might recover the whole balance that would remain over after the deduction of payments received in one lump sum by sale of the

mortgaged property. A sum of Rs. 1,195 was paid by the judgment-debtor on 24-11-1931. A further sum of Bs. 1,260 was paid on 14-11-1932. On 17-4-1933, a sum of Rs. 105 was paid by the judgment-debtor. On 5-10-1936, the decree-holder filed an application for execution of the whole amount then due on the ground that there has been a default in payment of the first and second instalments. The question was whether this application was within time. As the application was made on the basis of the default of the first two instalments the application was clearly time-barred.

It will be observed that the application was not based on the default in payment of any subsequent instalments which defaults were within time. With respect, the decision in that case was right, but there are certain observations which require comment. Said their Lordships,

'In would of fallacious to argue that in case of each default there is a separate right which accrues to the decree-holder There may be subsequent defaults, but the right having once accrued to the decree holder, limitation would run notwithstanding the subsequent default and subsequent default would not give him further rights, the right having already accrued to him when the first default took place.'

Then their Lordships added :

'The only exception to this proposition is a question of waiver or condonation on the part of the decree-holder. It would be open to the decree-holder not to treat the non-payment of the instalments on the due date as a default at all. He may waive or condone the default, in which case limitation would not run from the def alt which was condoned or waived but from the default which the decree-holder treated as a default under the decree.

47. After making these observations the learned judges pointed out that in the case before them no question of waiver or condonation arose as the decree-holder treated the first default made bynon-payment of two instalments as a default under the decree and it was on the basis of that default that he filed his darkhast of 1936 claiming the whole amount due under the decree. It is, therefore, clear that the learned Judge held that if the decree-holder 'waived or condoned the default' or, in other words, exercised his option not to enforce the default clause on the first default, limitation would not begin to run against him. This is precisely what I have stated above. The learned judges, however, seem to have been of the opinion that there must be an agreement of both parties in order that waiver or condonation may take effect. Say they :

'Where the parties agree not to treat failure on the due date as a default then in the eye of law there is no default at all and limitation does not begin to run and the parties will be estopped from saying that there was default when they did not in fact treat it as such.'

48. With all respect there is a contradiction in terms in saying that a party has an option to waive or condone a default, and yet he cannot exercise his right without the consent of the debtor or judgment-debtor. The option to waive a default or to condone a default is a right exclusively vested in the creditor which can be exercised by him at will. Its exercise does not depend upon the agreement of the debtor. A debtor may induce the creditor to exercise his option and waive a default in various ways. But the waiver or condonation is by the creditor himself. The learned judges seem to have

used the word 'agree' in the above quotation by reason of the observations of Sir Lawrence Jenkins C. J. in Kashi Ram v. Pandu, 27 Bom. 1 at p. 10, to the following effect:

'The true view appears to me to be, that though there may be a failure to pay punctually under an instalment decree, still the subsequent conduct of the parties may preclude either of them from afterwards asserting that payment was not made regularly and in satisfaction of the obligation under the decree.'

49. Sir Lawrence Jenkins was referring to the conduct of both the parties because he was laying down that both of them are precluded from afterwards asserting the contrary of what would be the justifiable inference from their conduct. The case before his Lordship was a case in which payment of an instalment had been offered by the judgment-debtor after the default had been made and had been accepted by the decree-holder. The acceptance of the payment amounted to a waiver or condonation of the default by the decree-holder and the payment of the amount precluded the judgment-debtor from asserting that there was no such waiver or condonation. His Lordship never laid down that waiver or condonation of a default could only be made by an agreement with the judgment-debtor.

50. Sometimes, no doubt, it is said that waiver is based either on fresh contract or estoppel, vide Halsbury's Laws of England, Vol. VII, p. 204. But the waiver which in order to be effective must be based on fresh contract or estoppel is not thewaiver of an advantage under an optional clause. It is the waiver of the very right of the performance of the contract in a particular manner and that manner alone. If a debtor pleads that he is released from the performance of a contract because the creditor has waived his rights under the contract, he has to show that the waiver of the right to have the contract performed or a release from the obligation of the performance of a contract was such as would be binding upon the creditor, e.g. either by reason of estoppel or by reason of a fresh agreement (which must be under the Indian Law for consideration and which may be under the English Law for consideration or under seal) vide Halsbury's Laws of England, Vol. VII, p. 250.

This principle is not applicable to the exercise of an option by a creditor. No fresh agreement or estoppel is required for the effectiveness of the exercise by a creditor of the option to waive or condone a default. The distinction between the two classes of cases should always be borne in mind when dealing with a question of waiver.

51. Proof of waiver or condonation of a default will depend upon the circumstances of each case. Where a creditor asserts that he has waived or condoned previous defaults and applies to enforce the default clause upon the happening of a subsequent default, he is entitled to do so unless it could be shown by his previous conduct that he has already exercised his option in a different, manner.

52. Upon the facts of the present case the decree-holder must be deemed to have waived his right of action when defaults were made and was, therefore, entitled to enforce the decree, but in doing so he could not claim instalments that had already become time-barred.

53. I would, therefore, answer the questions referred to us as follows:

1. The words 'when the right to apply accrues' in Col. 3 in Article 181, Limitation Act

must mean the first default giving rise to the 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' would mean the next succeeding default which is not waived but the decree-holder will have a right to apply for realisation of each successive instalment as it falls due, provided the decree is not so worded that the only right left to the decree-holder after the first default is to realise the whole decretal amount.

2. My answer to the second question is the same, that is, the right to apply for a final decree in respect of the instalments not barred by limitation as individual instalments would remain intact in spite of the omission to take advantage of the default clause provided the default clause is not so worded that the decree-holder has aright to rely on that alone and the decree after the default ceases to be an instalment decree.

3. It is immaterial that the default clause is worded as 'the decree-holder shall have a right to apply', or as 'the decree-holder shall have the option to apply' or as 'the entire decretal amount shall become payable', or as 'the entire decretal amount shall become due', or as 'the judgment-debtor shall pay the entire decretal amount', as in all such cases the default clause is to be interpreted liberally and for the benefit of the decree-holder and the rights of the decree-holder mentioned by us in our answers to questions 1 and 2 will not be affected.

Malik, C.J.

54. I have had the advantage of going through the judgment prepared by brother Agarwala and it is not necessary for me to deal with the questions at length.

55. To my mind in an instalment decree with a default clause the question for consideration is whether on a true interpretation of the decree after a default is made the only cause of action surviving to the decree-holder is the cause of action based on the default clause or the causes of action for payment of instalments on the dates fixed survive even though default may have been made and the whole amount may have become recoverable. If the decree ceases to be an instalment decree on default and the only relief avail, able to the decree-holder is the relief for realisation of the whole amount, the application must be made within three years of the date on which the default was made giving rise to a right to recover the whole amount. If, however, the default clause gives the decree-holder a mere right or an option, there appears to be no reason why he should not avail himself of the option and choose his remedy. In my opinion, the question must depend upon the interpretation of the decree itself.

56. would probably clarify matters if I were to give a few illustrations. If an instalment decree provided in clear terms that on default of two instalments being made the decree shall cease to be an instalment decree and the whole amount would become payable at once, the only cause of action available to the decree-holder after the second default must be to apply for a final decree for the whole amount in accordance with the provisions of the default clause. If, however, the decree provided that it would be payable by instalments but in case of default of two instalments the decree-holder will have the further right to recover the whole amount at once or to let the judgment-debtor pay by instalments fixed in the decree, the decree-holder will have clearly the right to apply for a final decree for the whole amount on the date of the second default or he can apply for a final decree for each amount remaining unpaid as it fell due. In between these two extreme cases are the large variety of

cases where the meaning is not clear and it is for theCourts to interpret the decree and come to the conclusion what it was really meant to provide.

57. When interpreting a decree in such a casa I would, unless the terms of the decree clearly rule out such an interpretation, rather hold that it was an option given to the decree-holder than that the instalment decree had ceased to be an, instalment decree and the decree-holder was compelled to realise the whole amount in a lump sum. It must, in this connection, be remembered that instalments are fixed for the benefit of the judgment-debtor while the default clause is for the benefit of the decree-holder and unless the terms of the decree clearly provide to the contrary what was given as a benefit to a decree-holder should not be interpreted as an obligation placed on him,

58. It must further be remembered that on a claim being time barred it does not get extinguished unless such a claim comes under Section 28, Limitation Act which applies to suits for possession of property and provides that on the determination of the period fixed for such a suit the right to such property is extinguished. If therefore, there are a number of causes of action given to a decree-holder and those causes of action are not extinguished by the terms of the decree, there is no reason why for the relief appropriate to the cause of action the decree-holder cannot come to Court within three years of the date when the right to apply for the particular relief claimed accrued to him.

59. I may, however, make it clear that when a right to apply on the basis of a particular cause of action arises, it is the first date of the arising of the cause of action that is material for an application under Article 181. Subsequent breaches in payment of instalments cannot be relied upon to give each time a fresh right to rely on the default clause and to claim the whole decretal amount.

60. A case may arise, however, in which defaults have been made in payment of instalments giving rise to a right in the decree-holder to claim the whole amount, but before the decree-holder could bring such a claim the judgment-debtor had paid up the instalments with reference to which he had defaulted and the decree-holder had waived the default with the result that he had no longer the right to rely on the default clause, thereafter if on a later date fresh defaults are made, would the decree-holder have the right to rely on the fresh defaults and bring a suit for realisation of the whole amount then due? As at present advised I consider that the decree-holder having waived the default the cause of action on the earlier defaults had ceased to exist and the decree-holder can rely on the subsequent defaults, claim that there was a fresh cause of action and apply within three years from the date when the fresh cause of action accured in his favour.

61. In this connection I would like to point out that though there is a difference in thelanguage of Article 75 and Article 181, and while under Article 75 a creditor can waive a default and the cause of action would then arise on the date the next default not so waived is made, Article 181 provides for three years from the date when the right to apply arises and makes no mention about waiver of a right to apply, to my mind, the difference in the language does not make any difference in the case of decree payable by instalments.

62. Coming back to the terms of the decree before us I can find nothing in it which would compel me to hold that the decree had ceased to be an instalment decree on failure of payment of two instalments. The last instalment was payable on 23-12-1942,

but no instalments were paid. After 23-12-1942, there was no question of the plaintiff being able to rely on the default clause. If the decree is interpreted in the sense that it had not ceased to be an instalment decree and it was, therefore, open to the decree-holder not to avail himself of the option given to him to rely on the default clause and claim the whole amount, the application for preparation of a final decree made on 26-7-1943, would not be time-barred about the instalments which fell due within three years from the said application.

63. I, therefore, agree with my learned brother that the decree-holder was entitled to have a final decree passed in his favour for the instalments which had not already become time-barred and would answer the questions referred to us in the manner proposed by him.

Y. Bhargava, J.

64. I entirely agree with my Lord the Chief Justice.

65. By the Court--The answers to the questions referred to the Full Bench are as below:

1. The words 'when the right to apply accrues' in the third column in Article 181, Limitation Act must mean the first default giving rise to the 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' would mean the next succeeding default which is not waived, but the decree-holder will have a right to apply for realisation of each successive instalment as it falls due, provided the decree is not so worded that the only right left to the decree-holder after the first default is to realise the whole decretal amount.

2. The answer to the second question is the same, that is, the right to apply for a final decree in respect of the instalments not barred by limitation as individual instalments would remain intact in spite of the omission to take advantage of the default clause provided the default clause is not so worded that the decree-holder has a right to rely on that alone and the decree after the default ceases to be an instalment decree.

3. It is immaterial that the default clause is worded as 'the decree-holder shall have a right to apply', or as 'the decree-holder shall have the option to apply', or as 'the entire decretal amount shall become payable', or as 'the entire decretal amount shall become due', or as 'the judgment-debtor shall pay the entire decretal amount', as in all such cases the default clause is to be interpreted liberally and for the benefit of the decree-holder and the rights of the decree-holder mentioned by us in our answers to questions 1 and 2 will not be affected.

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