Sheo Lal And Anr. vs L. Devi Das And Anr. on 4 August, 1952

Equivalent citations: AIR1952ALL900, AIR 1952 ALLAHABAD 900

Author: V. Bhargava

Bench: V. Bhargava

ORDER

Raghubardayal and Agarwala, JJ.

1. This is a judgment-debtors' appeal against an order of the learned Additional Distri

2. The appellants judgment-debtors brought a suit for accounts under Section 33, U. P.

whole amount would become payable with interest allowed by law. The Hindustani expressio

3. Now, if regard be had to the default in payment of the first two instalments then th

4. The Munsif held that the application was time barred. Against that order the decree-

5. It has been contended before us by Mr. B.D. Gupta on behalf of the judgment-debtors-

6. We think that the question involved in this appeal is not free from difficulty and t

7. Now let us mention the case law bearing upon the point in chronological order. But b

Article 74:

On a promissory note or bond payable by instalments.

(3

years)

The expiration of the first term of payment as to the part then payable and for the other parts, 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.

(3 years)

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

Article 80:

Suit on bill of exchange, promissory note or rond not herein expressly provided for.

(3

years)		
When the bill, note or bond be-comes payable		
Article 120:		
Suit for which no period of limitation is provided elsewhere in this schedule.		
(6 years)		
When the right to sue accrues.		
Article 132:		
To enforce payment of money eharges upon immovable property.		
(12 years)		

When the money sued for becomes due.

Article 181:

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

(3 years)

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 o Civil P.O., 1908.

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

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

8. In Juneswar Das v. Mahabeer Singh, 1 Cal. 163, a case falling under Act 14 of 1859,

Clause 10, Limitation Act, (XIV [14] of 1859) applied to suits for money lent where the
"Their Lordships must not be supposed, in coming to this decision, to give any counten

The words "cause of action" should be noted. It is clear that although the mortgagee wa

9. In Gaya Din v. Jhumman Lal, 37 ALL. 400, a Full Bench of this Court had to consider
"If we fail to pay the interest aforesaid in any month, on the principal by the end of

It was held by Richards C.J. and Tudball J. that within the meaning of the article the

10. Gaya Din's case, 37 ALL. 400 was affirmed
by another Full Bench of this Court in Shib
Dayal v. Meharban, 45 ALL. 27.

11. In Ashiq Husain v. Chatarbhuj, 50 ALL. 328, Sir Grimwood Hears C. J. and Sen J. had

12. Their Lordships refused to extend the principle laid down in Gaya Din's (37 ALL. 40

13. As the Privy Council observed in Lasa Din v. Gulab Kunwar, (A. I. R. 1932 P. C. 207

14. In Pancham v. Ansar Husain, 53 Ind. App. 187 there was a default in payment of inte
"Applying certain previous decisions of that Court, and in particular a Full Bench dec

the mortgagors, without any act of election, cancellation or other form of response or a

The Board, however, did not decide the question finally and left it to be decided in so

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

Their Lordships did not mention the particular article which applied to that applicatio

16. This was followed by a Full Bench of this Court in Joti Prasad v. Sri Chand, 51 ALL

holder filed an application for execution more than three years after the first default.

17. In the Full Bench, Boys J. held that the instalments as individual instalments coul

If the application for execution is one for the remaining unpaid balance of the decreta

18. This was a case in which the terms of the decree were exactly similar to the case b

19. In our opinion this case lays down the following propositions:--(1) Where there is

vides that on the happening of a default the whole amount shall become due or payable. T

20. The matter which was left undecided in Pancham's case, (53 Ind. App. 187 P. C.) (ub

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 i

If the principal money is "due", and the stipulated term has gone out of the contract,

"Their Lordships are not greatly oppressed by the authority of Reeves v. Butcher, (1891

21. It will be observed that the reasoning upon which the decision was based was that w
"If in the Indian cases the question were did the mortgagee's cause of action arise? i

The words "there might be much to be said in support of the Allahabad decisions" are si

22. In Muhammad Husain v. Sanwal Das, (1934 ALL. L. J. R. 261) a Full Bench of this Cou

23. It was contended that since in Article 80 time began to run from the date when the

when the money first became payable by the mortgagor, that is. on the happening of the f
"I take the pronouncement of their Lordships to mean that a clause of this nature is e

King J. agreed with him. His Lordship observed that their Lordships of the Privy Counci
"stress upon the point that the provision enabling the mortgagees to sue before the ex

Niamatullah J., also held to the same effect. His Lordship held that in Lasa Din's case

His Lordship further considered the sentence relating to the accrual of the cause of ac

came payable" and not "when the money became due."

24. Nor in our opinion, this Full Bench decision is authority for the proposition that

25. Now there is no essential difference between the phrase "the amount becomes payable

26. In Ram Prasad Bam v. Jadunandan Upadhia, 1934 ALL. L. J. 772, however, there was a
"In the case of default in the payment of two successive instalments, the decree-holde

An application for execution was made more than three years after the first default in

This ruling was given in spite of the Full Bench decision in Joti Prasad v. Sri Chand,

27. In Jawahar Lal v. Mathura Prasad, 1934 ALL. L. J. 1035 (F. B.), the principle under

Din's case was not applied to a case falling under Article 75. It was held that the lang
or Article 80. Sulaiman C.J., and King J. observed that unless there was waiver the Arti
"To start with, I would like to mention that as a matter
of principle, what is given to a man for his advantage should not be turned into his dis

His Lordship referred to Lasa Din's case, (A. I. R. 1932 P. C. 207) and observed that t

28. As the language of Article 75 is peculiar we do not think that the present case is

29. In Buttan Singh v. Sakal Raj Singh, A. I. R. 1945 ALL. 161, Bennet J. had a case ex

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 consisti

holder to obtain a final decree on default of any one instalment when the entire amount

Their Lordships observed that Lasa Din's case did not lay down any general principle. T

32. It appears to us, therefore, that the decisions of this Court cannot be reconciled

1. Where a preliminary decree (or money allows instalment and provides that in case of

2. Whether in such a case the right to apply for a final decree in respect of the insta

3. Whether the answers to the above two questions would be affected if the default clau

We, therefore, order that the case may be laid before the Hon'ble the Acting Chief Just

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 applying on 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 very much 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 by non-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 the waiver 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 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.

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 the Courts 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 the language 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.
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> 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.
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> 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.