1932

Present: **Macdonell C.J. and Lyall Grant J.**

FERNANDO *v.* FERNANDO.

125—D. C. Negombo, 4,757.

Mortgage bond—Principal payable on demand—Interest payable in advance every six months—Acceptance of interest—Claim for principal—Waiver.

Where a mortgage bond, which provided for the payment on demand of the principal sum secured, also stipulated for the payment of the interest in advance every six months.

Held, that the acceptance of the interest by the mortgagee in advance for a priod of six months did not operate as a waiver of the right to demand payment of the principal sum during that period.

THE plaintiff sued the defendants for the recovery of a sum of Rs. 10,536 being principal and interest due on mortgage bond No. 253 dated July 6, 1929. The defendants admitted their liability to pay the principal sum due on the bond but contended that a sum of Rs. 770 had been paid as interest in advance for six months from July 6, 1930, and that in consequence the plaintiff had no cause of action at the date he filed the plaint, viz., September 11, 1930. The learned District Judge gave judgment for the plaintiff.

Croos-Da Brera, for defendants, appellants.—No demand was made before action was filed. There is therefore no cause of action (*7 Halsbury 24; Birks v. Trippet* [1]). The plaintiff has accepted six months' interest in advance and is precluded from coming into Court before the expiry of the six months. By accepting the interest the mortgagee has waived his right to sue. Two courses were open to him and having adopted one, he cannot go upon the other. He held out that he would not go to Court. The mortgagor may have raised the money and satisfied the debt. He was prevented from doing so by the mortgagee's conduct. The mortgagee could have accepted the interest with a reservation of the right to sue. The creation of a six months' period for payment of interest and the provision for payment in advance implies a suspension of the right to sue during such period. (*Spencer Bower on Estoppel, 214, 225; Wille on Mortgage, 311, 333, 337 to 341; Bisset and Smith, 1922; and Payne* [2]*; 2 Nathan 617.*)

E. F. N. Gratiaen and *Amerasekera*, for plaintiff, respondent.—The evidence discloses that a demand was, in fact, made before the action was instituted. In any event, no demand is necessary in the case of " on demand " bonds. The institution of the action constitutes a sufficient demand for payment. (*Halsbury's Laws of England, Vol. I., p. 23; Natal Bank, Ltd. v. Van Blommestein* [3]*; Wille on Mortgage, p. 337*).

[1] *1 Wms. Saund. 32; 85 E. R. 34.*

[2] *(1862) 7 L. T. 23.*

[3] *(1911) W. L. D. 185.*

Under the mortgage bond sued on, the defendant is bound by two separate and distinct covenants—to repay the principal amount on demand, and to pay interest on such amount until repayment. The acceptance of interest in advance by the plaintiff does not *per se* preclude him from demanding the principal during the period for which he has already received interest. The effect of such an interpretation would be to alter the character of an " on demand " bond (*vide* in this connection *Kadirasan Chetty v. Arnolis* [1]). Where a demand is made in such circumstances the debtor must pay the principal amount and claim credit for any sum overpaid by way of interest. Can the defendant be heard to argue that by the punctual payment of interest in advance he can prevent the plaintiff from ever recovering the principal amount due on the bond?

The doctrine of waiver has no application to the facts of this case. The plaintiff's right to demand the principal amount and to receive interest in advance until repayment are not alternative and mutually exclusive but co-existent rights under the bond (*vide Spencer Bower on Estoppel by Representation, p. 214*). The bond sued on must be distinguished from bonds under which the debtor's default in the payment of interest constitutes a condition precedent to the institution of an action for the recovery of the principal amount. (*Wille on Mortgage, pp. 341-343*). There is no evidence that the plaintiff either expressly or by implication represented that he would not demand the principal until the expiration of the period for which interest had been received in advance. Nor does the defendant suggest that he has altered his future line of conduct to his prejudice on the faith of such a representation. No estoppel has therefore been established against the plaintiff (*vide Bensten v. Taylor, Sons & Co.* [2]). In point of fact, the bond provides for a default rate of interest, and the defendant has therefore derived an advantage by paying interest in advance.

[MACDONELL C.J.—Can a penal provision of this nature be enforced?]

The defendant has not appealed against it. In any event our law, unlike the English law, allows a default rate of interest unless it is unconscionable (*vide Kailasam Chetty v. Fernando* [3]).

The learned District Judge has wrongly refused the plaintiff his costs in the lower Court.

Croos-Da Brera, in reply.

February 1, 1932. MACDONELL C.J.—

In this case the plaintiff-respondent sued the defendants-appellants for the recovery of Rs. 10,536.90 being the balance principal and interest due on mortgage bond No. 253 dated July 6, 1929. The defendants in their answer admitted their liability to pay the whole principal sum mentioned in the bond, viz., Rs. 11,000, but stated further that a sum

[1] *23 N. L. R. 162.*

[2] *(1893) 2 Q. B. 274 C. A.*

[3] *2 Browne 87.*

of Rs. 770 had been paid as interest thereon in advance for six months from July 6, 1930, and that by consequence the plaintiff had no cause of action at the time he filed the plaint, namely, on September 11, 1930. After hearing evidence and argument the learned trial Judge entered judgment for the plaintiff for the principal sum of Rs. 11,000 with interest. The mortgage bond sued on contains a promise by the defendants-appellants " to repay the sum of Rs. 11,000 (being the sum borrowed) to the said creditor or to his certain attorney, heirs, executors, administrators, and assigns on demand and until such payment to pay interest on the said sum of Rs. 11,000 at and after the rate of 14 per centum per annum to be computed from the date hereof (*i.e.*, the date of execution, July 6, 1929) and payable once in every six months in advance, to wit:— on or before July 6 and January 6 of each and every year and the first of such payments of interest to be made on July 6, 1929, provided, however, that if the payment of interest be not regularly made in manner aforesaid the said debtors and their respective aforewritten do hereby further agree to pay interest at the increased rate of 18 per centum per annum from the date of such default till payment in full anything herein contained to the contrary notwithstanding ".

The only facts in the case needing consideration are that the interest Rs. 770 due in advance on July 6, 1930, for the six months expiring January 6, 1931, had been paid by the debtors on July 9, 1930, that is to say, three days late; that the plaintiff-respondent had accepted this payment but had treated it as a payment in part discharge of the principal. The debtor-appellant maintains that he paid it as and for interest and not as a part payment of the principal debt, and the learned District Judge accepted that contention of the debtor-appellant. I do not think that we can differ from the learned District Judge on this finding and it must therefore be taken that the payment of Rs. 770 on July 9, 1930, was a payment of interest in advance up to January 6, 1931. But the learned District Judge was impressed with the argument for the debtors-appellants which argument was the main one raised on their behalf in this Court also, namely, that the plaintiff-respondent by accepting interest in July, 1930, must be taken to have waived his right to demand repayment of the principal and to have waived consequently his right to commence action at any time during the six months, July 6, 1930, to January 6, 1931, for which interest had been paid. He held in effect " That no cause of action accrued to the plaintiff at the time of the filing of this plaint, " *i.e.*, September 11, 1930, but he also held that to give effect to this contention and to dismiss the plaintiff-respondent's plaint " would only mean the filing of a fresh case on the same lines (with interest calculated as from January 12, 1931), it would also mean an order for costs in favour of the defendants in this case and possibly a little breathing time to the defendants. These ends will in my opinion be amply served by my exercising the discretion vested in me by section 839 of the Civil Procedure Code which is especially directed against the prevention of abuse of the processes of this Court and therefore against the prevention of further litigation (an aim already set out in section 33) and by directing that a mortgage decree be entered against the defendants as if the interest was not paid from January 12, 1931, on the principal amount of Rs. 11,000,

by ordering that the plaintiff do pay to the defendants their costs of filing answer and of trial, and by further ordering that no order to sell should be issued in this case for a period of six weeks from this date." The plaintiff-respondent brings a cross appeal against this order as to costs.

As has been said the question raised in this Court on appeal was whether the plaintiff-respondent by accepting interest in advance, *i.e.*, in July, 1930, for a period of six months expiring on January 6, 1931, had waived the right explicitly given to him in the mortgage bond to obtain repayment on demand. It was conceded in argument for the defendant-appellant that if the interest under the bond had been expressed as payable in arrear then the demand by the plaintiff, the mortgagee, could have been made at any time, that, in fact, the waiver argued for turned on the fact that the interest was to be paid in advance. I am not quite certain that this was a safe admission for the defendant-appellant to make, since the argument for him must go this length that it is an implied term of the bond that so long as no interest is in arrear, no demand for repayment of the principal shall be made. Now if the interest had been stated in the bond as payable at the end of each six-monthly period instead of at the beginning of such period, then as long as the time for payment named in the bond had not been exceeded no interest would be in arrear. Interest for the six months ending January 6 is by the bond payable in advance, *i.e.*, on July 6, so if payment is made on July 6, no interest is in arrear. But if the interest for the six months ending January 6 were by the bond payable on January 6 and were paid on January 6, then again no interest would be in arrear. On either supposition of fact, the mortgagor would not be *in mora* because he would have paid all the interest due; why then must it be an implied term in the bond that such payment is a waiver of the contractual right to be repaid the principal on demand because that payment of interest has been made in advance but that it would not be a waiver of that right if made in arrear, that is, when the interest actually fell due? The reason of the distinction is not clear to me.

But apart from this, waiver implies that either by law or by the terms of the contract an alternative is open to the party charged with the waiver. He has a right which he can enforce or which he can declare by words or conduct that he will not enforce; he has a choice of two rights. If he makes the other person believe that he, the party with the choice, is definitely adopting one alternative to the exclusion of the other whereon that other person alters his position to his detriment, then the party so making the choice is held to the choice which he has made. It is an illustration of the law of estoppel by representation.

Applying this rule to the present case, how does the mortgagor, the defendant-appellant, alter his position for the worse by paying on the due date in advance the interest which under the bond he has agreed to pay? It is something which by the bond he has contracted to pay and by paying it on the due date, he escapes any question of having to pay interest at the higher rate; so far then prompt payment of the interest is to his advantage and cannot possibly be an alteration of his

position for the worse. Where is the alternative before the mortgagee to adopt one of two courses? The bond says he is to receive interest, at one rate if paid for six months in advance, at a higher rate if not so paid, but the alternative, the choice, if there be one, lies with the mortgagor, not with the mortgagee. Admittedly there is nothing in the bond which says expressly that payment of interest in advance by the mortgagor shall for the next six months operate as a waiver of the mortgagee's right to payment of the principal on demand, and in the absence from the bond of any suggestion of choice or alternative as open to the mortgagee, it is not easy to see how such payment must operate as a waiver by implication. That element of waiver, a choice open to the person sought to fix with a waiver, cannot be discovered in the bond, and this must throw doubt on the argument that the mortgagee, by taking interest in advance as provided in the bond, waived his right of repayment on demand, a right also provided in the bond. Test the question in yet another way. The waiver contended for estops the mortgagee from legally demanding his principal so long as no interest is due. If this is an estoppel it should be mutual. Suppose on July 6 or January 6 when six months' interest became due in advance, the mortgagor were to say to the mortgagee that he proposed to allow the mortgagee the right to demand repayment at any time in return for his forbearing, or omitting, to pay interest in advance; "if I paid interest to-day, July 6, in advance, this would deprive you of the right of repayment on demand, so I will secure to you that right by not paying the interest to-day, in advance, but propose to do so in six months' time when it actually falls due"—could he be heard to say this? Clearly not, for by the bond he has to pay interest at a higher rate if he does not pay it in advance; that is a factor which the mortgagor, in making the offer, has left out of account. Then though he can deprive the mortgagee of the right to repayment on demand, by himself paying interest in advance, he cannot secure him that right simply by paying the interest in arrear when it falls due, for one reason, because the right is already secured to the mortgagee by the terms of the bond, and for another because the offer could not be made *simpliciter* at all, it would take no account of the obligation to pay interest at the higher rate. Then the estoppel is not mutual, and this must cast doubt on whether an estoppel, and the waiver from which it arises, can be implied in the bond.

No local case was cited in support of this argument for the appellant of an implied waiver, and the South African authorities cited in illustration do not support it either. "A summons or demand may not be issued until the date when the first payment of interest falls due, for there is a presumption that the bond is to run till that date or until a period has elapsed since the passing of the bond equal to the interval between two consecutive dates for payment of interest" (*Wille's Mortgage and Pledge in South Africa (1920) p. 337*, citing a case which is not available). But this South African rule, even if binding on this Court, would not avail the appellant. The bond here was executed on July 6, 1929, interest to be payable half-yearly; then "the first payment of interest fell due on January 6, 1930," and "a period had elapsed since the passing

of the bond equal to the interval between two consecutive dates for payment of interest" at latest on July 6, 1930. Then, no authority, Roman-Dutch or other, has been cited to us for the appellant.

The wording of the mortgage bond seems tolerably clear. The mortgagor convenanted to do two quite separate and distinct things. One of these was to repay the principal Rs. 11,000 on demand and the other was to pay interest every six months on certain terms named in the bond. The two things are not expressed as being dependent one upon another, nor are they naturally so dependent; on the contrary they are separate and independent. The right of the mortgagee to have repayment on demand is one thing, his right so long as that principal sum has not been repaid to receive interest at a certain rate is quite another. I have gone through the difficulties against the argument that the waiver contended for is an implied term in the bond and, as I read it, the wording of the bond rather seems to imply the contrary.

If, as in the present case, interest had been paid for six months in advance and during the currency of those six months a demand was made by the mortgagee, then the mortgagor in paying the principal sum so demanded could deduct therefrom an amount proportionate to the period not yet expired for which he had paid interest—pecuniarily then, he would not lose by paying the principal on demand.

In his evidence defendant-appellant, the only witness called in this case, denied that the plaintiff had made any demand, but in cross-examination he had to admit a demand, or several, and the learned District Judge finds as a fact that demand was made. The point however is not really material; " where a mere duty is promised to be paid upon request, as if in consideration of all monies lent to the defendant, he promised to pay them again on *request*, no actual request is necessary but the bringing of the action is a sufficient request " (*1 Wms. Saund. 33, 85 E. R. 37*), and this seems to be the law with us, as it certainly is in Africa (*Natal Bank, Ltd. v. Van Blommestein* (*supra*)).

On this view of the matter, the appeal must fail, and as the plaintiff-respondent must be held to have had the right to bring this action when he did, the reason for mulcting him in costs disappears, and cross appeal on that point must be allowed, and the decree below amended by giving plaintiff-respondent his costs there. The decree appealed from allows the plaintiff mortgagee interest from January 12, 1931, at the higher rate of 18 per cent. No point was made in argument before us that this higher rate of interest was a penalty against which relief could be had, and as it was not raised it seems unnecessary to raise it oneself, so I express no opinion on the question whether any and, if so, what relief could have been had against the higher rate of interest stated in the bond. Appeal dismissed, cross-appeal allowed, with costs in each.

LYALL GRANT J.—I concur.

Appeal dismissed.