## ORIGINAL CIVIL.

*Before Lort-Williams J.*

# CHAND BIBI

*v.*

# SANTOSHKUMAR PAL.*

1932

*Nov.* 23, 24; *Dec.* 8;

1933

*Jan.* 18.

*Conveyance—Covenant by purchaser to discharge the mortgage debt of the vendor—Construction of the deed of conveyance—Breach of contract—Damages, when recoverable—Jurisdiction—Suit for land—Limitation—Indian Limitation Act (IX of 1908), Arts. 113, 116.*

Where the purchaser of an undivided share of a mortgaged property covenanted with the vendors, to pay their proportionate share of the mortgage debt to the mortgagee and procure a release of that and other properties subject to the mortgage, and the vendors sued the representative of the purchaser upon the covenant in the conveyance,

*held*: (*1*) that although the other co-sharer had failed to pay her proportionate share, yet the purchaser was bound by the covenant to get a release of the mortgaged properties;

(*2*) that this cause of action arose either at the time expressly agreed upon for fulfilment or thereafter on demand, and was barred by limitation;

(*3*) that no trust had been created;

(*4*) that the covenant amounted to an indemnity only;

(*5*) that no cause of action had yet arisen in respect of the indemnity, because no payment had been made by the vendors to the mortgagee and they had not yet suffered any loss. Therefore the suit was premature.

ORIGINAL SUIT.

Relevant facts of the case appear from the judgment.

*B. C. Ghose* (with him *I. P. Mukherjee*) for the plaintiffs. The mortgagee is threatening to take legal proceedings for recovery of the mortgage debt and one of the properties, belonging to the plaintiffs absolutely, is liable to be sold in execution of the mortgage decree that may be passed. So the plaintiffs have a cause of action.

By the conveyance, the defendant became a trustee for the money the defendant's father kept for

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payment to the mortgagee. Section 10 of the Limitation Act applies and the suit is not barred.

*S. N. Banerjee (Jr.)* for the defendant. The Court is not competent to try the suit, as the properties are situated outside its jurisdiction. The decision of the case involves adjudication of title.

The plaintiffs have no cause of action, as, until they pay the money to the mortgagee, they cannot recover it. That is the covenant in the conveyance.

In the alternative, if the plaintiffs have a cause of action, it is time-barred. There is no time limit in the conveyance within which the money had to be paid, therefore the cause of action arises from the date of the conveyance: *Raghubar Rai* v. *Jaij Raj* (1)

The contract should have been performed within a reasonable time: section 46 of the Indian Contract Act. The reasonable time is passed.

It is not a question of trust, but a contract of indemnity and either Article 113 or 116 of the Limitation Act applies. In either case the suit is barred: *Daswant Singh* v. *Ramjan Ali* (2).

*B. C. Ghose* in reply. The suit is not barred. The cause of action arises from the date when the plaintiffs are damnified and they are damnified as soon as the mortgagee demands payment.

*Cur. adv. vult.*

LORT-WILLIAMS J. On the 29th September, 1920, a Bengali *kabâlâ* or deed of sale to Akhilchandra Pal was executed by Chand Bibi, Alifjan Bibi, Sheikh Badruddin and Mahabunnessa Bibi, which stated *inter alia* as follows: That, in 1892, one Nawabjan executed a deed of *wâkf* in respect of certain properties; that, on the 1st May, 1914, Alifjan Bibi as *mutâwâlli* mortgaged the properties, including the scheduled properties, to Haripada Ray and subsequently sold some of them to pay off part of

(1) (1912) I. L. R. 34 All. 429. (2) (1907) 6 C. L. J. 398.

the mortgage debt; that, in 1919, Badruddin, one of the heirs of Nawabjan, filed a suit for partition of the whole property left by Nawabjan including the *wâkf* property, which suit was decreed on the 11th June; that—

we have all agreed to repay the debt of said Haripada Ray. We have also admitted that certain properties were sold for the repayment of the said debt.

That by the decree the executants obtained an 11 annas share, and one Izatunnessa Bibi a 5 annas share in certain property, including the property covered by the deed of sale; that about Rs. 4,000 was still due on the mortgage, of which Rs. 2,700 was the share payable by the executants, and Rs. 1,300 by Izatunnessa; that Haripada was not willing to take these amounts separately or to execute separate reconveyances; that—

we are conveying to you our undivided 11 annas share in the scheduled properties, subject to a payment of Rs. 2,700 for principal and interest on receipt of Rs. 1,300, and you shall have the said share released, and by releasing our other properties along with the same, return to us title deeds relating thereto. We admit receipt of the amount of consideration. . . . . We have made over possession of our share sold to you. By being *mâlik* with right of sale or gift you shall go on enjoying the same. Any amount of interest payable from to-day shall be paid by you. If we are made liable for the said debt, then you remain bound to make good the loss sustained by us. . . . . Mortgage debt Rs. 2,700 and cash Rs. 1,300, total Rs. 4,000. . . . . We jointly received Rs. 1,300.

On the 19th January, 1920, Nurul Huq, the husband of Chand Bibi, had purchased from Badruddin and Mohabunnessa Bibi their share in one of the properties other than those included in the schedule.

On the 29th June, 1920, the purchaser's solicitor had written to the executants saying:

The purchaser of your 11 annas share in 5-1B, Ismail Street, will get a reconveyance of the mortgage in favour of Haripada Ray by the 15th October, 1920. I will personally see that this is done within that time. You have paid Rs. 30 for out-of-pocket costs for the reconveyance. All the costs will be paid by the purchaser.

On the 21st May, 1921, Nurul Huq for Chand Bibi wrote a registered letter to Babu Akhilchandra Pal, saying:

11 annas share of our land in 5-1, Maulvi Ismail Street, was purchased by you through Manmatha Babu subject to the mortgage of Babu Haripada

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Ray. Our other properties are included in that mortgage and we cannot deal with the same until you get a release for us for our properties. We did not write to you so long because Manmatha Babu was ill. Now please get us the release and oblige.

On the 22nd September, 1921, a pleader on behalf of the executants wrote to the purchaser's solicitor asking him to get a reconveyance of the mortgage as promised in his letter of the 29th June, 1920.

On the 13th December, 1922, an attorney wrote to Babu Akhilchandra Pal, on behalf of Nurul Huq, threatening proceedings unless he got a release of the property.

But A. C. Pal did nothing and, subsequently, Alifjan, Mohabunnessa, Izatunnessa and A. C. Pal all died. Later on, the mortgagee began to press the surviving executants for payment, and, on the 26th April, 1928, the solicitor, now acting for the plaintiffs in this suit, wrote on behalf of Chand Bibi and Badruddin to Santoshkumar Pal, the present defendant, as legal representative of his father A. C. Pal, telling him that the mortgagee had been pressing for payment and threatening proceedings, and asking him either to pay off the mortgage debt, or refund the sum of Rs. 2,700 retained by his father out of the purchase price, with interest. On the 27th March, 1929, the mortgagee again pressed for payment and threatened Badruddin, Nurul Huq and S. K. Pal with proceedings.

On the 5th September, 1929, the present suit was instituted, asking that the defendant be ordered to pay the said sum of Rs. 2,700 with interest for payment to the mortgagee and to get a reconveyance at his cost, or alternatively the sum of Rs. 2,700 and interest and the cost of obtaining such reconveyance by way of damages. Subsequently, by way of amendment, the plaintiffs asked for specific performance of the contract.

By his written statements, the defendant said that the only effect of the deed was that his father bought the equity of redemption in the 11 annas share for

Rs. 1,500, that the claim (if any) was barred by limitation, that the legal representative of Alifjan ought to have been joined as plaintiff, that it was understood and agreed that A. C. Pal would get a release of the properties only if and when Izatunnessa paid her share of the mortgage debt, *viz.*, Rs. 1,300, and that the Court had no jurisdiction to try the suit which was in respect of land outside the jurisdiction.

Izatunnessa's share of the mortgage debt has not been paid, and of her five annas share of the property, part has been sold and the rest is now in the hands of her grandson. The plaintiffs' properties have not been released.

Alifjan's legal representatives ought to have been joined as such, but, as Badruddin is her legal representative, the objection is only technical, and I allow the plaint to be amended so as to show that he sues as legal representative of Alifjan as well as of Mahabunnessa.

This is not a suit for land within the meaning of Clause 12 of the Letters Patent, and the Court has jurisdiction to try it. Nor is it a suit to enforce a trust.

In my opinion, the meaning and effect of the deed was that A. C. Pal bound himself absolutely to get a release of the properties and cannot plead Izatunnessa's default as an excuse. He agreed also to indemnify the plaintiffs.

But the plaintiffs' cause of action on the first part of the contract arose either in 1920, fourteen days after the execution of the deed, or in any case not later than 1922, when the plaintiffs called upon A. C. Pal to fulfil it. It is, therefore, barred by limitation under Article 116 of the Limitation Act, or if for specific performance under Article 113.

No cause of action under the second part of the contract has yet arisen. The plaintiffs have not yet had to pay anything in respect of the mortgage,

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though they have been called upon to do so. The mortgagee has not yet taken any proceedings on the mortgage, and the plaintiffs have not yet suffered any damage. The suit is premature so far as this cause of action is concerned.

Consequently there must be judgment for the defendant. I regret to have to give this decision. Owing to the obstinacy of the defendant in refusing to accept my suggestion of compromise, unnecessary costs may be incurred by all the parties. I trust that common sense will be applied even now, and that some amicable arrangement will be made to avoid further litigation. There will be no order for costs.

*Suit dismissed.*

G. K. D.