

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.
 RAMESHWAR MANDAL (PLAINTIFF) v. RAM CHAND ROY AND ANOTHER
 (DEFENDANTS).*

1884

July

Loan on verbal agreement to repay at a specified date—Limitation—Art. 115, Sch. II, Act XV of 1877.

A suit to recover money lent with interest upon a verbal agreement that the loan should be repaid with interest one year from the date of the loan, is governed by Art. 115 of Sch. II of Act XV of 1877, which virtually provides for all contracts, which are not in writing, registered, and not otherwise specifically provided for.

THIS was a reference to the High Court under s. 617 of Act XIV of 1882, made by the Judge of the Small Cause Court at Hooghly.

The suit was one to recover money lent, with interest on a verbal agreement.

The alleged loan was made in Falgoun 1287, without being secured by any written instrument, and the suit was brought to recover the money more than ~~two~~ years after that date; the plaintiff, however, proved that there was a verbal agreement to repay the money with interest within one year from the date of the loan, and contended that therefore his cause of action accrued from that specified date of payment. The defendant pleaded never indebted, and limitation, relying on Art. 57 of Sch. II of Act XV of 1877.

The Small Cause Court Judge was of opinion that it was not the intention of the Legislature, in cases of money lent unsecured by any instrument, that any specified date for payment would save limitation, and that limitation therefore should run from the date of the loan; he therefore dismissed the suit, as being barred under Art. 57 of Sch. II of the Limitation Act, and at the request of the plaintiff referred to the High Court the question: Whether in the case of a loan unsecured by any written contract, but regard-

* Small Cause Court Reference No. 9 of 1884 from the order made by Baboo Mahindra Nath Ghose, First Munsiff of Jehanabad, dated the 31st of May 1884.

1884 ing which a verbal agreement had been come to fixing a date certain for the repayment of the money, limitation would run from the date of the loan, or from the specified date of payment?

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No one appeared on the reference.

Opinions of the Court were delivered by GARTH, C.J., and BEVERLEY, J.

GARTH, C.J.—I think that in this case the Munsiff has hardly appreciated the nature of the contract.

The suit is not for *money lent* in the ordinary sense of that expression; it is not for a loan repayable *at once*, or, what is the same thing in point of law, repayable *on demand*. Articles 57 and 59 of the Limitation Act are only applicable, in my opinion, to cases of that kind.

The contract here set up by the plaintiff is one of a special nature. In consideration of a present advance by him, the defendant is said to have agreed to repay the money at the end of a year with interest.

This being the contract, it is clear that the plaintiff would have no right of suit until the expiration of the year; and therefore it would seem obvious, ~~and~~ contrary to the meaning of the Limitation Act, that limitation should run, not from the time when the plaintiff's right of action accrued, but from the time when the advance was made, which was the consideration for the defendant's promise.

Suppose that by a contract of this nature, instead of the money being repayable at the end of *one year*, it were repayable at the end of four years. It is clear, that if the Munsiff were right in his construction of Art. 57, the plaintiff, however honest and *bonâ fide* his bargain may have been, would never have a right to enforce it, because by the time when his right to sue accrued, it would be barred by limitation.

In England, by the Statute of Frauds, a contract which is not to be performed within three years from the making thereof must necessarily be in writing.

But here we have no Statute of Frauds; and in commercial affairs people are at liberty to make any verbal contracts they please.

And it seems to me, that it could never have been the intention of the Legislature to prohibit verbal contracts by means of an Act which was passed for a totally different purpose, and which merely professes to regulate the time within which different suits are to be brought.

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I think that this case is governed by Art. 115, which virtually provides for the case of all contracts which are not in writing, registered, and not otherwise specifically provided for.

BEVERLEY, J.—I have had some doubt in this case as to whether the suit is properly one for compensation; but, looking at what was decided in *Nobocoomar Mookhopadhaya v. Siru Mullick* (1), I am inclined to agree in the view taken by the learned Chief Justice. I quite think, that it cannot and ought not to be inferred that the Legislature intended to prohibit verbal contracts of this nature, merely because there is no express provision in respect to them in the Limitation Act. See the remarks in *Sheikh Akbar v. Sheikh Khan* (2).

PRIVY COUNCIL.

GOKALDAS GOPALDAS (DEFENDANT) APPELLANT AND RAMBAKSH
 SBOCHAND. (PLAINTIFF) RESPONDENT v. PURANMAL PREMSUKHDAS
 (DEFENDANT) RESPONDENT.

P. C.*
 1884
 February 19
 &
 March 22.

[On appeal from the Court of the Resident at Haiderabad.]

Effect of payment of prior mortgage by a subsequent incumbrancer, as against intermediate charge.

The mortgagor's right, title, and interest in certain immoveables in the Deccan, subject to a first and a second mortgage, were sold in execution of a decree to a purchaser, who afterwards paid off the first mortgage.

Held that, as he had a right to extinguish the prior charge, or to keep it alive, the question was what intention was to be ascribed to him; and that, in the absence of evidence to the contrary, the presumption was that he intended to keep it alive for his own benefit. Where property is subject to a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course, according to the English

* *Present*: SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH; and SIR A. HOBHOUSE.

(1) I. L. R., 6 Calc., 94.

(2) I. L. R., 7 Calc., 256 (261).