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money which had been paid in by the mortgagor, although the mortgage-debt at the time might exceed the money paid in. It provides that the mortgagee "on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage and his willingness to accept the moneys deposited in full discharge of such amount and on depositing in the same Court the mortgage-deed," &c. It appears to us immaterial that the plaintiffs here added a paragraph to their petition stating that they reserved their rights in respect of the money paid for arrears of revenue. The result is, we are of opinion that this suit cannot be maintained and we dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Mahmood and Mr. Justice Young.

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July 3.

NAUBAT SINGH AND OTHERS (DEFENDANTS) *v.* INDAR SINGH AND ANOTHER (PLAINTIFFS.)*

Limitation—Suit by mortgagor to recover money due on a registered mortgage-deed—Act XV of 1877 (*Limitation Act*), *sch. ii, Nos.* 113 *and* 116.

A suit by a mortgagor to recover money due on a registered mortgage-deed, together with damages for non-payment, is not a suit to which the period of limitation prescribed by the Limitation Act (Act XV of 1877), sch. ii, No. 113 (for specific performance of a contract) is applicable. The period of limitation applicable to such a suit is that prescribed by No. 116 of sch. ii. of the said Act (for compensation for the breach of a contract in writing registered); and the time from which limitation will run against the mortgagor is, in the absence of any specific provision to the contrary, the date of the execution of the mortgage-deed. *Gauri Shankar* v. *Surju* (1); *Husain Ali Khan* v. *Hafiz Ali Khan*, (2); *Nobocoomar Mookhopadhaya* v. *Sirn Mullick* (3); *Vythilinga Pillai* v. *Thetchanamurti Pillai* (4); and *Ganesh Krishn* v. *Madhavrav Ravji* (5) referred to.

The facts of this case are fully stated in the judgment of Mahmood, J.

Hon. *T. Conlan* and Munshi *Sukh Nandan Lal*, for the appellants.

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* First appeal No. 161 of 1888 from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Moradabad, dated the 26th June 1888.

(1) I. L. R., 3 All. 276.
(2) I. L. R., 3 All. 600.
(3) I. L. R., 6 Calc. 94.
(4) I. L. R., 3 Mad. 76.
(5) I. L. R., 6 Bom. 75.

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Mr. *Amiruddin*, for the respondent.

MAHMOOD, J.—The facts of this case are very simple, as also the evidence upon which the determination of them depends.

The plaintiffs, Indar Singh and Basant Rai, executed an usufructuary mortgage-deed on the 3rd April 1882, in favour of Naubat Singh and others, the defendants-appellants before us. Under the terms of that deed the amount of the mortgage-money advanced was Rs. 9,000, and in regard to that sum the mortgage-deed mentioned that the money had already been received from the mortgagees by the mortgagors. At the time when the deed was presented to the Registrar for registration, Indar Singh and Basant Rai, both of whom appeared before the Registrar, made a statement to the effect that they had executed the deed, and that the deed was to be given to them, as they would get the money on delivering the document to the mortgagee. This statement was made to the Registrar and is incorporated by him in the endorsement which he made on the document.

It appears then that, in consequence of certain disputes which arose between the parties, the present defendants, mortgagees, filed a suit against the present plaintiffs for recovery of possession of the mortgaged property upon the allegation that they had been wrongfully kept out of possession by the mortgagors. The suit was filed on the 11th October 1882, and it was met principally by the plea that, as a matter of fact, the mortgagees, plaintiffs, had never paid the sum of Rs. 9,000 for which the mortgage had been executed, and that they were therefore not entitled to sue for possession, and there were other pleas also which need not be noticed here.

Upon the trial of that case by the Subordinate Judge of Moradabad, that officer, in his judgment dated the 11th May 1883, decreed the suit for possession, and in the course of his judgment he gave expression to the view that the plea of the mortgagors as to the total non-payment of the mortgage-money was unfounded, and that the mortgagees, plaintiffs before him, had paid at least a sum of Rs. 5,801-6-9, which was the amount of the debts due to

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them by the mortgagors on former accounts. The Subordinate Judge, as to the balance, went on to say:—"As regards the remainder of the mortgage amount there is no sufficient proof about it, nor is it necessary to settle this point at present."

As I have already stated, the general effect of the Subordinate Judge's decree was to decree the plaintiffs' suit for possession in favour of the mortgagees. But, although the decree was in their favour, they seem to have been dissatisfied with so much of the finding of the Subordinate Judge as gave colour to the view that only a sum of Rs. 5,801-6-9 had been paid by them, and that the payment of the remainder was not proved, and in respect of this finding they seem to have preferred an appeal to this Court on the 3rd of December 1883. The appeal came on for hearing before Petheram, C. J., and Duthoit, J., on the 12th December 1884, and the learned Judges then passed a judgment in the case which may be quoted *verbatim*, as it is short:—"All that is decided is that the plaintiff is entitled to a decree, as he was entitled to have possession of the security; whether the entire consideration of the bond had or had not passed was not a point directly in issue between the parties, and nothing has, therefore, been decided regarding it in this suit."

Upon this ground this Court dismissed the appeal before it. Matters seemed to have stood thus till the lapse of three years from the judgment of the High Court, when, on the 12th December 1887, this suit was instituted by the mortgagors, plaintiffs. The object of the suit was to obtain payment of the balance of the mortgage-money on the mortgage-deed of the 3rd April 1882, but the plaintiffs' case was not exactly the same as their defence in the former action. In this suit they have acknowledged the receipt of Rs. 5,801 out of the Rs. 9,000, the mortgage-money, thus accepting the finding of the Subordinate Judge in his judgment of the 11th May 1883, and they claim a sum of Rs. 3,199, the balance of the principal mortgage-money, and Rs. 3,300, interest thereon as damages, thus making a total claim of Rs. 6,499.

The suit was resisted mainly upon two grounds, *first*, that it was barred by limitation, and *secondly*, that, as a matter of fact, the

money payable by the defendants, mortgagees, to the plaintiffs-appellants as consideration of the mortgage-deed of the 3rd April 1882 had been duly paid by them, the defendants, mortgagees, and that therefore the suit should be dismissed. Now, upon the first of these points, *viz.*, that of limitation, the learned Subordinate Judge seems to have been of opinion that the cause of action which accrued to the plaintiffs for maintaining this suit, was the date of the High Court's judgment and decree of the 12th December 1884, and not any other date, and that the suit being just within time by one day, was not barred by limitation. This view is not clearly expressed in the judgment of the lower Court, and Mr. *Conlan* for the appellants has endeavoured to place an intelligible construction upon it by suggesting that probably the Subordinate Judge imported considerations such as those contemplated by s. 14 of the Indian Limitation Act (XV of 1877), when he allowed the whole of the litigation in the former suit to be excluded from the computation of the period of limitation. Mr. *Conlan* addressed a long argument to show that s. 14 of the Limitation Act did not cover the circumstances of this case, and was therefore inapplicable. But this contention was regarded by us as one not requiring any determination in this case, because the suit is within limitation, even if the contention were to be allowed.

Mr. *Conlan's* argument was that the article which governed this case was No. 113 of the Limitation Act (XV of 1877), which provides a period of only three years for suits for specific performance of a contract, and that period is to run from the date fixed for the performance or, if no such date is fixed, when the plaintiff has notice that performance is refused. The learned counsel argued that in this case the mortgage-deed having been executed on the 3rd April 1882, and containing in itself a necessary covenant that the mortgage was executed in lieu of the money to be advanced by the mortgagees to the mortgagors, the present suit for the recovery of the balance of such mortgage-money was a suit for specific performance of the contract, and that therefore the date of the mortgage itself was the date upon which the whole mortgage-money should have

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been paid, and default in such payment amounted to such a cause of action as would make limitation run against the plaintiffs.

Mr. *Amir-ud-din*, on behalf of the plaintiffs-respondents, resisted this contention by arguments which, again, we do not think we need notice at length, because, in our opinion, No. 113 of the Limitation Act does not govern the suit, because it is not a suit for specific performance of contract.

In my opinion the nature of the suit falls under the purview of No. 65 of the Limitation Act, because it is a suit for compenastion for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency, and for such a suit the limitation of time is a period of three years, calculated from the time when the time specified arrives or the contingency happens. This would have been the limitation applicable to this case if the mortgage-deed of the 3rd April 1882 had been a single unregistered document, but the document on which the plaintiffs sue is a registered instrument, and for that reason, in my opinion, No. 116 of the Limitation Act applies, which article provides generally for suits for compensation for the breach of a contract in writing registered the period of six years to be calculated from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered.

The covenant in the contract of the mortgage-deed of the 3rd April 1882, was that the mortgagees would pay the money to the mortgagors as a loan advanced on security of landed property, and, in the absence of any words or indications to the contrary, that covenant must be taken to mean that the money would be paid down at the time of the execution of the document. This being so, the mere witholding of the payment of the mortgage-money by the mortgagee to the mortgagor would amount to a breach of contract in writing registered, as in this case, and a suit to recover the balance would be nothing other than a suit for compensation or damages caused by the breach of contract. There is really no distinction between a suit for compensation under these circumstances and a suit such as this, in which the mortgagor sues the mortgagees for

obtaining payment of the mortgage-money. The breach of contract having caused damages, the assessment and the measure of those damages would naturally be the amount of money contemplated by the covenant, that is to say, the sum which that covenant mentioned as the amount to be advanced, together with such other loss as the plaintiff may prove to have sustained in consequence of the breach of such covenant. This view is in principle in accord with the rulings of the various High Courts, *Vide—Nobocoomar Mookhopadhaya* v. *Siru Mullick* (1); *Vythilinga Pillai* v. *Thetchanamurti Pillai* (2); *Ganesh Krishn* v. *Madhavrav Ravji* (3); *Gauri Shankar* v. *Surju* (4); and *Husain Ali Khan* v. *Hafiz Ali Khan* (5).

There remains the second question which relates to the merits, namely, whether the amount mentioned as the mortgage-money in the deed of the 3rd April 1882, was actually paid by the defendants, mortgagees, to the plaintiffs, mortgagors. Upon this point the learned Subordinate Judge has expressed his finding in the following terms:—

"In short, the plaintiffs themselves admit the receipt of Rs. 5,801, out of the said mortgage-money Rs. 9,000, and, after deducting that, they claim in this suit Rs. 3,199 as balance of the principal mortgage-money. Now it is proved from the evidence on the record in this case that the following items have also been paid by the defendants, that is, Rs. 150, before the execution of the mortgage deed for purchasing the stamp paper of the mortgage-deed and for purposes of registration, &c., Rs. 630, which the plaintiffs received from the defendants on the 4th April 1882, and deposited in the Collectorate, and Rs. 200 paid to Shib Lal on account of the debt due from the plaintiffs. The total of these three items is Rs. 980. Therefore the items admitted to have been received and the items proved amount to Rs. 6,781."

This finding is not contested by the plaintiffs-respondents in this Court, and it shows that, even in this suit, their allegation as to the non-receipt of the mortgage-money was found by the lower

(1) I. L. R. 6 Calc. 94. (3) I. L. R., 6 Bom. 75.
(2) I. L. R., 3 Mad. 76. (4) I. L. R., 3 All. 276.
(5) I. L. R., 3 All. 600.

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Court to be untrue to the extent of Rs. 980, the payment of which by the defendants was proved to the satisfaction of that Court. As to the balance of Rs. 2,219 (or rather, to be more accurate, Rs. 2,218-9-3) the lower Court has found that its payment by the defendants, mortgagees, to the plaintiffs, mortgagors, was not satisfactorily established. The main reasons why the lower Court arrived at this conclusion, are stated to be the non-production of a separate receipt by the defendants, and the fact that certain debts due by the plaintiffs-mortgagors to other creditors were not paid off. The Subordinate Judge sums up his conclusions in the following words :—

"The Court is of opinion that when the plaintiffs received the mortgage-deed after it had been registered, the defendants held out a temptation to the plaintiffs that, if the latter made over the mortgage-deed to the defendants and got the mutation of names effected regarding the mortgaged property by admitting that the whole mortgage-money had been paid, they would get a good sum in cash from the defendants out of the mortgage-money. Being tempted by this, the plaintiffs did what the defendants told them. But at last there arose a dispute between the parties regarding the possession and enjoyment of the *sir* lands, and the defendants did not pay any money in cash to the plaintiffs, and suits, &c., had to be instituted in the Court for possession of the mortgaged property. The present suit is the last of the series of cases which have resulted from all those disputes. I hold without any hesitation that the defendants have paid only Rs. 6,781-6-9 out of Rs. 9,000, the mortgage-money. It is by no means proved that the remaining Rs. 2,218-9-3 have been paid by the defendants."

Mr. *Conlan* for the defendants-appellants argues that these conclusions are purely conjectural and proceed upon a misapprehension of the rule of *onus probandi* as applicable to such cases. The learned counsel has invited our attention to a passage in Macpherson's work on mortgages (7th ed., p. 174) where the rule is stated to be that "when a person admits having executed a written instrument which contains a recital that the consideration has been

received, but seeks to avoid liability by pleading that full consideration according to the terms of the contract has not been received by him, the proof of such non-receipt rests upon him, and in the absence of such proof he must be held to the terms of the document to which he has affixed his signature. The written instrument is *primâ facie* evidence that the consideration has been received as recited, but it is not conclusive, and this *primâ facie* evidence may be rebutted."

This view is supported by many rulings cited in a footnote to the passage, and I have no doubt that the passage lays down a sound doctrine of law, namely, the broad principle that where a person makes admissions against his own interest, whether orally or in recitals in written instruments, the burden of explaining away those admissions in order to get rid of their effect in evidence rests upon him. This, indeed, is a well-established rule of our law and has received the sanction of the Lords of the Privy Council in many cases. The rule so far as it relates to admissions contained in deeds, is much less stringent in India than in England; for here such admissions are rebuttable, estoppels by deeds being unknown to our law in the Mofussil. Now what happened in the present case is best stated by the plaintiff, Indar Singh himself, who was examined as a witness in this case. The witness said:—"The mortgage-deed, dated the 3rd April 1882, for Rs. 9,000, executed by me and my brother Basant Rai, was presented in the registration office on the same day, *i. e.*, the 3rd April 1882, and was, on my and Basant Rai's declaration, registered in the *tahsíl* of Chandpur. After the completion of the registration, the registered mortgage-deed was given to me. I had caused it to be written in the registration office that the deed might be given to me in order to enable me to realize the money on delivering the deed. Both I and Basant Rai made the said statement. I and my brother Basant Rai got the registered mortgage-deed from the registration office." The witness, after some prevarication admitted that a portion of the mortgage-money was to be received in cash from the mortgagees at the time of the delivery of the mortgage-deed to them. He then

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went on to say :—"When I and Basant Rai got the mortgage-deed from the registration office, I and Basant Rai handed it to Naubat Singh after about ten or twenty days. I made statement in the mutation department also, namely, I stated that I had received the *whole* amount of the mortgage-money. I did all that trusting in him," that is, the mortgagee.

It appears to me that this statement is destructive to the plaintiffs' case as to the non-payment of the mortgage-money. The mortgage-deed itself contains an admission as to the full receipt of the mortgage-money, and that admission is only partially explained by the circumstance that the plaintiffs asked the registration officer to return the deed to them after registration, as they would themselves deliver the deed to the mortgagees on receiving the mortgage-money from them. The force of this precaution proves that the plaintiffs were far from being trustful of the mortgagees as Indar Singh, plaintiff, would have it in his deposition. This being so, we find, according to Indar Singh's own evidence, that the mortgage-deed was delivered to the mortgagees shortly after the registration. That was a contingency which, according to the plaintiffs' own statement, was to take place upon receipt of the mortgage-money from the mortgagees. Beyond the vague theory of trustfulness there is no explanation why the plaintiffs, mortgagors, after having expressly stated in the registration office that they would deliver the deed to the mortgagees on receipt of the mortgage-money, actually delivered the deed to them without receiving full payment. Nor does the case against the plaintiffs stop here, for we find that on the 27th April 1882 the plaintiffs, mortgagors, appeared before the revenue authorities and prayed for mutation of names in favour of the mortgagees, alleging that they had received full payment of the mortgage-money. There is no satisfactory explanation why the plaintiffs did so, if they had not received the mortgage-money in full.

The learned Subordinate Judge has not given due weight to the evidential effect of the plaintiffs' conduct in delivering the mortgage-deed to the mortgagees, and in solemnly admitting before the

revenue officer that they had received full payment of the mortgage-money. The Subordinate Judge has accepted the vague and feeble theory of trustfulness, and has rejected the defence as to payment, upon the ground that the defendants did not obtain a separate receipt for the balance of the mortgage-money (namely Rs. 2,218-9-3), but it seems to me that if the theory is to be accepted it would equally apply even if such a receipt were produced.

I am of opinion that, under the circumstances of this case, it rested entirely upon the plaintiffs to prove by cogent evidence that their conduct in delivering the mortgage-deed to the mortgagees and in solemnly admitting the receipt of the full mortgage-money before the revenue authorities in the mutation department was explainable on the ground of undue influence, fraud, or other circumstances which would explain away such conduct. They have not even attempted to produce any such evidence.

On the other hand, the defendants' case as to payment is supported, not only by the admissions and conduct of the plaintiffs themselves, but by direct evidence. They have produced their *karinda* or managing agent, Misri Lal, and also Ganga Ram, the patwâri, who both state on oath that Rs. 2,029-8-0 were paid by the mortgagees, defendants, after settling the account with the plaintiffs, mortgagors, and that after receiving such payment the latter delivered the mortgage-deed to Naubat Singh, one of the mortgagees. The Subordinate Judge has also assigned no reason for disbelieving such evidence, and his judgment seems to have been too much influenced by the absence of a separate receipt. In my opinion the delivery of the mortgage-deed to the mortgagee and the plaintiffs' admission in the mutation department are quite sufficient to amount to evidence as good as, if not more cogent than, a separate receipt would have been, and the oral evidence in the case, taken with the plaintiffs' own conduct and admissions, proves the full payment of the mortgage-money.

It seems to me that the plaintiffs' conduct throughout the disputes relating to this mortgage has been blameable and prevaricating. In the former suit they denied the receipt of the mortgage-money

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altogether, but it was found that they had received at least Rs. 5,801. In the present case they admitted the receipt of that sum of money, but denied that they had received anything more. Even the Subordinate Judge, notwithstanding his misapprehension of the burden of proof in this case, found that Rs. 980 had been received by the plaintiffs over and above the sum of Rs. 5,801 which they admitted. This finding the plaintiffs do not dispute in this appeal, and their case as to the balance of the mortgage-money rests entirely upon the theory of trustfulness in the mortgagees, which theory, as I have already said, is feeble, vague and worthless under the circumstances of this case. There is only one more point which requires disposal. In the course of his argument Mr. *Amir-ud-din*, on behalf of the plaintiffs-respondents, contended that, inasmuch as in the former litigation the Subordinate Judge in his judgment of the 11th May 1883 held that only Rs. 5,801 had been proved to have been paid by the mortgagee, and inasmuch as that judgment was upheld in appeal by this Court in its judgment of the 12th December 1884, the finding in the former case operated as *res judicata* barring the defendants from pleading that any sum of money beyond that amount was ever paid by them to the plaintiffs as consideration of the mortgage. We intimated in the course of the hearing of this case that this plea has no force. I have already quoted from the judgment of this Court, dated the 12th December 1884, and it leaves no doubt that all that was intended to be decided in the former litigation was whether a portion of the mortgage-money had been paid by the mortgagees entitling them to possession, and that no definite finding was intended to be arrived at as to the exact amount which had been advanced by the mortgagees.

For these reasons I would decree the appeal, and, setting aside the decree of the lower Court, dismiss the suit with costs in both Courts.

YOUNG, J.—The facts of the case have been so fully set forth by my brother Mahmood, that it is unnecessary for me to say more than that I fully concur with him in the conclusions at which he has arrived. The issue of limitation discussed in the former part

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of his judgment was one which occupied us for some time. I have no doubt that the suit is not barred by limitation. But the fact of the plaintiffs' having delivered the mortgage-deed to the mortgagees, notwithstanding their clear perception that after having done so further payments from the mortgagees were not likely to be made, and the fact that only a few days previously the plaintiffs had stated before the registering officer that they would retain the mortgage-deed till they had received the balance of the consideration-money, and further, the fact that the plaintiffs themselves in the mutation department clearly acknowledged the receipt of the balance of the consideration-money, leave in my mind no doubt whatever that the plaintiffs cannot now come into Court and set up an allegation of the non-receipt of the consideration-money. It would be impossible for Courts of Justice to come to any definite conclusions if conduct so unequivocal and admissions so distinct are to be treated as wholly meaningless. For these reasons I concur with my brother Mahmood, and would dismiss the plaintiffs' suit and decree the appeal with costs.

Appeal decreed.

Before Mr. Justice Young.

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November 4.

BANSI (JUDGMENT-DEBTOR) *v.* SIKREE MAL (DECREE-HOLDER.)*

Execution of decree—Step in aid of execution—Application by decree-holder for leave to bid at sale—Act XV of 1877 *(Limitation Act) sch. II, No.* 179, *cl.* (4).

The making of an application by the decree-holder for leave to bid at the sale in execution of his decree is "a step in aid of execution" within the meaning of cl. (4), No. 179, sch. ii of the Limitation Act (Act XV of 1877).

THE facts of this case sufficiently appear from the judgment of Young, J.

Munshi *Madho Prasad*, for the appellant.

The respondent was not represented.

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* Second Appeal No. 362 from an order of A. Sells, Esq., District Judge of Meerut, dated the 14th December 1889, confirming the order of Munshi Jafar Husain, Munsif of Meerut, dated the 22nd of March 1889.