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exclude a stranger from the co-parcenary, does not compel him to exercise his right, and he may relinquish it if he thinks proper. If, however, he does exercise it, then the obligation rests upon him to do so as to all that the stranger has purchased.

Hence, if a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale so far as the co-sharer-vendee is concerned, for it may well be that he has no desire to exclude such co-sharer. We think that the plaintiff-appellant was entitled to prefer his present claim in respect of the one-fifth purchased by Kanhya, upon payment of his proportion of the purchase-money. In this view of the case, we decree the appeal, and, reversing the decision of the lower appellate Court, remand the case for trial on its merits.

Appeal allowed.

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August 15.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

MUHAMMAD ZAKI AND OTHERS (DEFENDANTS) v. CHATKU (PLAINTIFF).*

Act XV of 1877 (Limitation Act), sch. ii., No. 132—Suit for money charged upon rents and profits—Suit for money charged upon immoveable property.

K borrowed from *C* a sum of Rs. 571, and at the same time executed a bond whereby he mortgaged usufructually to his creditor his "entire right and share" in a particular estate, in lieu of the above-mentioned sum; and it was agreed that *C* might realise the debt from the rents and profits of two years, and that, as soon as it had been realised, his possession should cease.

Held that the money borrowed by *K* was "money charged upon immoveable property", it being charged upon rents and profits *in alieno solo* which, in English Law, would be classed as "incorporeal hereditaments," but which by the law of India are included in immoveable property; and that therefore the limitation applicable to a suit for the recovery of the money was that provided in No. 132, sch. ii of Act XV of 1877 (Limitation Act). *Dalli v. Bahadur* (1) and *Pestonji Bezonji v. Abdool Rahiman* (2) dissented from. *Maharana Futtehsangji Jaswantsangji v. Desai Kullianraji Hukoomutraji* (3) referred to. *Lallubhai v. Naran* (4) followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

* Second Appeal No. 157 of 1884, from a decree of W. Barry, Esq., District Judge of Jaunpur, dated the 3rd October, 1883, reversing a decree of Maulvi Nasr-ulla Khan, Subordinate Judge of Jaunpur, dated the 14th June, 1883.

(1) N.-W. P. H. C. Rep., 1875, p. 55.

(3) 13 B. L. R. 254.

(2) I. L. R., 5 Bom. 468.

(4) I. L. R. 6 Bom. 719.

Munshis *Kashi Prasad* and *Hanuman Prasad*, for the appellants.

Pandit *Ajudhia Nath*, for the respondent.

The Court (STRAIGHT, Offg. C. J., and DUTHOIT, J.) delivered judgment as follows:—

DUTHOIT, J.—This is an appeal from a decree of the Judge of Jaunpur, reversing a decree of the Subordinate Judge of Jaunpur, and decreeing the plaintiff's (respondent's) suit for the recovery from the estate of Kazi Ahmad Husain, in the hands of the Kazi's heirs, the defendants (appellants), and from the profits of taluka Dandari, of Rs. 1,129-10-0, with costs and future interest.

The facts may be thus stated:—Chatku Misr acted as *karinda* of Kazi Ahmad Husain for the management of taluka Dandari, and the Kazi was in the habit of taking advances of money from him. On the 2nd October, 1874, Rs. 271 were found to be due to Chatku Misr. On that date the Kazi took a further loan of Rs. 300 in cash, and executed in favour of his creditor a bond by which he covenanted as follows:—

“ I mortgage usufructually to the aforesaid *karinda* my entire right and share in taluka Dandari, in lieu of the aforesaid amount (Rs. 571-1-0), that he may realise the same from the profits of the year 1282 fasli, and from the arrears due by the tenants during the time of his incumbency, the liability for which he has accepted. On a settlement of accounts, should any money be found to remain due after deduction of the aforesaid amount, he may recover it from the profits of the year 1283 fasli. As soon as it is recovered, the mortgage possession will cease, and no excuses or pretexts will be allowed.”

The Court of first instance (Subordinate Judge) held that the suit ought to have been brought within six years from the end of 1283 fasli (3rd September, 1876) and dismissed it as time-barred.

The finding of the lower appellate Court was in the following terms:—

“ Plaintiff says the mortgage-money was not redeemed by the end of 1283 fasli, and that he was evicted on the 14th November, 1876, after the end of the fasli year 1283, which finished on the end of *Bhadon, i. e.*, 3rd September, 1876, that is to say, that

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plaintiff remained in possession for nearly six weeks after the end of the fashi year 1283. I think that art. 132, sch. ii of the Limitation Act is applicable. It is clear that the mortgagor mortgaged his rights and interests:— '*Tamam wa kamal hak wa hissa rahn pat bandhak karte hain.*' I do not find that he mortgaged merely the profits. The explanation that the plaintiff may realise the mortgage-money from the profits of 1882 and 1283 is superfluous; if he were not to realise from the profits, what else could he realise from? And plaintiff was put in possession. I think the suit is not barred by limitation. The limitation is twelve years by art. 132."

It is contended in second appeal that the suit is time-barred, as not having been instituted (art. 116, sch. ii, Act XV of 1877) within six years from the 3rd September, 1876; and, in support of this contention, *Dulli v. Bahadur* (1) is cited. To which it is replied on behalf of the respondent:—

(a) That the bond of the 2nd October, 1874, created a charge upon immoveable property, and that art. 132, not art. 116 of sch. ii, Act XV of 1877, is therefore the limitation law applicable.

(b) That even if art. 116 be the limitation law applicable, the suit is still within time, having been instituted on the first day on which, after the expiry of six years from the 14th November, 1876, (the date of the cause of action) the Court was open.

The Civil Courts were closed in 1883 from the 15th October till the 26th November, both days inclusive, and the suit was therefore instituted on the first Court day after the vacation; but this fact will not assist the respondent's case unless the 14th November, and not the 3rd September, 1876, be the date of the accrual of the cause of action; or, in other words, only if, as is assumed in the plaint, but is denied by the defendants (appellants), the plaintiff (respondent) was, upon a true interpretation of the bond of the 2nd October, 1874, entitled, if the loan was not previously satisfied, to retain possession of the mortgaged property after the end of the year 1283 fasli.

Two points therefore arise for our decision, viz. :—

(i) Did, or did not, the bond of the 2nd October, 1874, convey to the plaintiff (respondent) a right to hold the mortgaged pro-

(1) N.-W. P. H. C. Rep, 1875, p. 55.

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perty subsequently to the 3rd September, 1876, if the debt should not have been previously satisfied from the usufruct ?

(2) Did, or did not, the bond of the 2nd October, 1874, create a charge upon immoveable property ?

As regards the former of these points, we see no reason to doubt that the terms of the bond have been rightly interpreted by the Subordinate Judge ; that the expression "*wa jis wakt pat jawe, bila hechak uzr dahkl murtahinana kalalam tasawar kiya jawe*" refers to an event contemplated as occurring before, not after, the end of 1283 fasli ; that no right to hold property after the 3rd September, 1876, was conferred upon the plaintiff by the bond ; and that the 3rd September, not the 14th November, 1876, was the date of the accrual of the cause of action.

As regards the latter point, we remark that the appellant's contention that the suit is not governed by the limitation provided in art. 132, sch. ii, Act XV of 1877, does certainly receive support from the decision of a Division Bench of this Court in *Dulli v. Bahadur* (1) and from a judgment of Sargent, J., in *Pestonji Bezanji v. Abdool Rahiman* (2). But we venture to doubt the soundness of the principle upon which the decision of the learned Judges of this Court (Pearson and Spankie, JJ. in *Dulli v. Bahadur* (1) proceeded ; and the decision of Sargent, J., in *Pestonji Bezanji v. Abdool Rahiman* (2) has been overruled by a Full Bench decision of the Bombay Court in *Lallubhai v. Naran* (3), to which Sargent, C. J., was himself a party. We follow and approve the view of the law taken by the learned Judges of the Bombay High Court in the case last cited. Their Lordships of the Privy Council in *Maharana Futtehsangji Juswantsangji v. Desai Kullianraiji Hakoomutraiji* (4) ruled that the expression "immoveable property;" as used by the Indian Legislature, comprehends certainly all that would be real property according to English law, and possibly more. "In some foreign systems of law," their Lordships go on to say, "in which the technical division of property is into moveables and immoveables, as e.g., the Civil Code of France, many things which the law of England would class as 'incorporeal hereditaments' fall within the latter category." And effect has been

(1) N.-W P. H. C. Rep., 1875, p. 55.

(2) I. L. R. 5 Bom, 4 63.

(3) I. L. R. 6 Bom. 719.

(4) 13 B. L. R. at p. 265.

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given to this *dictum* of their Lordships in the Explanation to art. 132, sch. ii, Act XV of 1877. Even, therefore, if the words "the whole of my right and share in taluka Dandari," used in the bond of the 2nd October, 1874, could be treated as mere surplusage—a position which we must by no means be taken to admit—we should still be of opinion that the money borrowed by Kazi Ahmad Husain on the date in question was "money charged upon immoveable property;" for it was undoubtedly money charged upon rents and profits *in alieno solo*, which, in English law, would be classed as "incorporeal hereditaments," but which by the law of this country are included in "immoveable property." We are of opinion, therefore, that the law of limitation applicable to this suit is that provided in art. 132, sch. ii, Act XV of 1877, and that, as having been instituted within twelve years from the 3rd September, 1876, it was not time-barred.

The appeal fails, and is dismissed with costs.

Appeal dismissed.

1884
August 15.

Before Mr. Justice Mahmood and Mr. Justice Duttoit.

RAMGHULAM AND ANOTHER (DEFENDANTS) v. JANKI RAI (PLAINTIFF).*

Contract—Consideration—Uncertified adjustment of decree—Civil Procedure Code ss. 214 (c), 258—Act IX of 1872 (Contract Act), ss. 2, 10, 23, 28.

The consideration for a mortgage consisted partly of the amount of two decrees held by the mortgagee against the mortgagor. The mortgagee having sued to enforce the mortgage, the mortgagor pleaded failure of consideration as a bar to the enforcement of the mortgage. This plea was based on the allegation that the mortgagee had not certified the adjustment of the decrees, as provided by s. 258 of the Civil Procedure Code, and they were still in force under the terms of that section.

Per DUTTOIT, J., that the failure of the mortgagee to certify the adjustment of the decrees did not constitute a failure of consideration, because he did not covenant to certify such adjustment, and it was not, in fact, necessary for him to do so; because he could not seek execution of the decrees on the ground that, though unsatisfied, they were still in force under s. 258 of the Civil Procedure Code, without becoming liable to penalties; and because, if the mortgagor considered the entering up of the adjustment of the decrees to be imperative, he had his remedy by application to the Court in the terms of s. 258.

* Second Appeal No. 1556 of 1883, from a decree of T. R. Redfern, Esq., Offg. District Judge of Ghazipur, dated the 3rd August, 1883, reversing a decree of Hakim Shah Rahat Ali, Additional Subordinate Judge of Ghazipur, dated the 19th December, 1882.