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July 7.

Before Sir Louis Kershaw, Kt., Chief Justice and Mr. Justice Banerji.

CHATTAR MAL (DECREE-HOLDER) v. THAKURI AND ANOTHER (JUDGMENT-DEBTOR).*

Act No. IV of 1882 (Transfer of Property Act) section 90—Mortgage—Personal covenant to pay—Application to sell non-hypothecated property—“Balance legally recoverable”—Cause of action—Limitation.

A mortgage bond securing a debt payable on demand provided that for the payment of the amount of mortgage debt the immovable property mentioned in it should be held as collateral security, and that “in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property.” *Held*, that no separate cause of action for the personal remedy accrued after the mortgaged property was found on sale to be insufficient to satisfy the mortgage debt, but that the cause of action for both remedies was one and the same and accrued when the covenant to pay was broken. Hence, the suit for sale of the mortgaged property having been brought more than ten years after the date of the mortgage, the balance due upon the mortgage was not legally recoverable otherwise than out of the property sold and an application for a decree under section 90 of the Transfer of Property Act was not maintainable: *Musahab Zaman Khan v. Inayat-ul-lah* (1), *in re McHenry: McDermott v. Boyd* (2) and *Miller v. Runga Nath Moullick* (3) referred to.

In this case the appellant held a mortgage over certain property of the respondents under a bond dated the 24th of October 1880. The amount secured by the bond was Rs. 300 payable with interest on demand. The bond provided that for payment of the amount the immovable property mentioned in it should be held as collateral security, and that “in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond, the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property.” On the 22nd of June 1891, the mortgagee brought a suit for sale upon his bond. He obtained a decree under section 88 of the Transfer of Property Act on the 6th of August 1891. Under that decree the mortgaged property was brought to sale on the 23rd of

* Second Appeal No. 503 of 1896 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 14th May 1896, confirming an order of Babu Bipin Bihari Mukerji, Subordinate Judge of Aligarh, dated the 27th November 1895.

(1) I. L. R., 14 All., 513.

(2) (1894) L. R., 3 Ch., 290.

(3) I. L. R., 12 Cal., 389.

June 1893. The proceeds of the sale being insufficient to satisfy the mortgage debt, which by that time had reached the sum of Rs. 3,239, the mortgagee decree-holder applied on the 2nd of February 1895 for a decree under section 90 of the transfer of Property Act.

The Court of first instance (Subordinate Judge of Aligarh) held that the decree-holder's application for a decree under section 90 was time-barred, and dismissed it. The decree-holder appealed, and his appeal was dismissed upon the same ground by the lower appellate Court (District Judge of Aligarh). The decree-holder thereupon appealed to the High Court.

Babu *Durga Charan Banerji* for the appellant.

Pandit *Madan Mohan Malaviya*, for the respondents.

KERSHAW, C. J., and BANERJI, J.—This is an appeal from the decree and order of the Court below refusing to grant to the appellant a decree under section 90 of the Transfer of Property Act. The appellant held a mortgage over certain property belonging to the respondents under a bond dated the 24th of October 1880. The amount secured by the bond was Rs. 300 payable with interest on demand. The bond provided that for the payment of the amount the immovable property mentioned in it should be held as collateral security, and that "in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property." On the 22nd of June 1891, the mortgagee brought a suit for sale upon that bond. He obtained a decree under section 88 of the Transfer of Property Act on the 6th of August 1891. Under section 89 of that Act he obtained an order for the sale of the mortgaged property, and on the 23rd of June 1893, the said property was sold. The proceeds of the sale not being sufficient for the discharge of the mortgage debt, which had swelled to the large sum of Rs. 3,239, the present application was made on the 2nd of February 1895, for a decree under section 90. That section empowers a Court to grant to a

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mortgagee a decree for the recovery of the balance due to him after the sale of the mortgaged property from the mortgagor and his other property, provided that the balance is legally recoverable otherwise than out of the mortgaged property. The Courts below have held that on the date on which the plaintiff brought his suit upon his mortgage, his claim for a personal decree against the mortgagor was time-barred, and therefore the balance of the amount of the mortgage was not legally recoverable on the date of the application for a decree under section 90. The correctness of this decision has been challenged in this appeal. It is urged that under the terms of the bond in this case the mortgagee was not entitled to realize the balance personally from his debtors until after the hypothecated property had been sold, and as his application for a decree under section 90 was made within three years from the date of the sale of the mortgaged property, it ought to have been granted.

The question we have to determine is whether, on the date of the application for a decree under section 90, the balance of the amount due on the mortgage was legally recoverable from the debtors otherwise than out of the mortgaged property. If, under the terms of the bond, the mortgaged property was the only security for the debt and the mortgagors did not incur any personal liability, the balance is not recoverable otherwise than out of the mortgaged property. But if there is nothing in the mortgage bond to the contrary, the presumption will be that the mortgagor has undertaken a personal liability to pay the mortgage debt. In the latter case if a claim for a personal decree against the mortgagor would have been time-barred on the date of the mortgagee's suit the balance would not be legally recoverable otherwise than out of the mortgaged property, within the meaning of section 90. This was held in *Musaheb Zaman Khan v. Inayat-ul-Jah* (1). The decision of this appeal, therefore, turns upon the question whether, if the appellant mortgagee had on the date of the institution of his suit asked for a personal remedy

(1) I. L. R., 14 All., 513.

against the mortgagors, his claim for that remedy would have been barred by limitation.

In this case the mortgagors in distinct terms undertook a personal liability to pay the mortgage debt. The bond gives the mortgagee two remedies for a breach of the conditions thereof, namely, first, a right to proceed against the immovable property hypothecated in the bond; and, secondly, in the event of the proceeds of the sale of that property proving insufficient, a right to proceed against the debtors personally. The debt, however, is one and the same, and the personal liability of the debtors co-exists with the liability of the property. It is upon the occurrence of a breach in the conditions of the bond that the cause of action of the mortgagee for the remedies given to him under the bond arose. It was a single cause of action, and upon the accrual of it the mortgagee became entitled to seek all his remedies. The covenant in the bond that the mortgagors would be personally liable for the balance which might remain due after the sale of the mortgaged property did not give the mortgagee a right to bring a separate suit for a decree personally against the mortgagors after the sale of the property. The truth is, as observed by HERSHELL, L. C., in *in re McHenry : McDermott v. Boyd* (1), "the right of the creditor in law would have been precisely the same as if those words had not been inserted." His Lordship added:—"I cannot say that that right of realization gave a separate and independent cause of action, so that the statutory period did not begin to run until that date." The ruling in that case is, in our opinion, conclusive of the question. A similar view was held by the Calcutta High Court in *Miller v. Runga Nath Moulick* (2). In this case the appellant's cause of action arose when his debtors made default in payment of the debt. He was bound to come into Court within the period of limitation prescribed for his suit computed from the date of the accrual of his cause of action. The limitation for the claim for sale being sixty years, his suit for sale was within time, but the period of limitation for a suit upon the

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(1) (1894) L. R., 3 Ch., 290.

(2) I. L. R., 12 Calc., 389.

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personal covenant being six years only, a claim upon that covenant would have been time-barred on the date on which the suit was brought, more than six years having elapsed on that date from the date of the accrual of the cause of action. That being so, the Courts below have, in our opinion, rightly held that the amount which the appellant seeks to recover by a decree under section 90 is not legally recoverable from the mortgagors within the meaning of that section, and this appeal must fail. We dismiss it with costs.

Appeal dismissed.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Banerji.

PULANDAR SINGH (PLAINTIFF) v. JWALA SINGH AND OTHERS
(DEFENDANTS).*

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Civil Procedure Code, section 13 expl. II—Res judicata—Matter which might have been a ground of defence in a former suit.

A defendant in a suit for the recovery of possession of immovable property pleaded only a right to the proprietary possession of the property in suit in himself. This defence failed, and a decree was given in favour of the plaintiff. Subsequently the plaintiff sold a portion of the property so decreed to them, and the *quondam* defendant brought a suit for pre-emption. *Held*, that the suit must fail, inasmuch as the plaintiff's claim was one which he might have made when defendant in the former suit as an alternative to his defence of title. *Srimut Rajah Mootoo Vijaya, &c., v. Katama Natchiar* (1), *Kameswar Pershad v. Raj Kumari Ruttan Koer* (2) and *Baldeo Sahai v. Bateshar Singh* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

KERSHAW, C. J., and BANERJI, J.—The suit out of which this appeal has arisen was one for pre-emption brought by the present appellant in respect of a sale made by one Musammat Subta on the 11th of May 1894. The suit has been dismissed as barred by the

* Second Appeal No. 522 of 1896, from a decree of W. F. W. Wells, Esq., District Judge of Shahjahanpur, dated the 13th April 1896, confirming a decree of Rai Banwari Lal, subordinate Judge of Shahjahanpur, dated the 7th December 1895.

(1) 11 Moo. I. A., 50.

(2) I. L. R., 20 Calc., 79.

(3) I. L. R., 1 All., 75.