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the complainant may have been injured by a stray pellet accidentally deflected from its course. I allow the application. I quash the conviction under section 286 of the Indian Penal Code and the sentence passed thereon, and direct that the fine if paid be refunded.

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March 3.

APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Sir William Burkill.

JAMNA DAS (PLAINTIFF) v. NAJM-UN-NISSA BIBI AND OTHERS
(DEBENDANTS).*

Act No. IX of 1872 (Indian Contract Act), section 65—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 97—Contract—Failure of consideration—Suit to recover money paid—Limitation.

One Farzand Ali negotiated on behalf of his wife, Najm-un-nissa, a mortgage for Rs. 26,000 in favour of Jamna Das. This mortgage included two items, one of Rs. 3,403-11-6 and the other of Rs. 679-10-6. The former was a debt due by Farzand Ali to Jamna Das, for which Farzand Ali represented his wife was willing to become security; the latter was a sum taken by Farzand Ali in cash on the representation that it would be paid by him to the mortgagor. On suit by the mortgagee for recovery of the mortgage-money the first Court decreed the plaintiff's claim in full; but on appeal the High Court exonerated the mortgagor from payment of the two sums mentioned above. After the death of Farzand Ali the mortgagee sued the representatives of Farzand Ali for recovery of these two items. *Held* that the mortgagee had a good cause of action in respect of which limitation only began to run from the date of the decree of the High Court, which decided that the sum claimed could not be recovered from Najm-un-nissa as part of the mortgage debt. *Bassu Kuar v. Dhum Singh* (1) followed.

IN this case one Farzand Ali now dead, had negotiated a mortgage for his wife, Najm-un-nissa Bibi, one of the present defendant-respondents, in favour of the present plaintiff-appellant.

In a suit previous to the present one brought by the present plaintiff against the wife on his mortgage the High Court eventually disallowed two items of the alleged consideration, *viz.* one for Rs. 3,403-11-6, on the ground that it was a debt of

* First Appeal No. 76 of 1904, from a decree of Rai Shankar Lal, Subordinate Judge, Mirzapur, dated the 23rd December, 1903.

(1) (1888) I. L. R., 11 All., 47.

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Farzand Ali as to which his representation that his wife was prepared to take it on herself was made without her consent, the other an item of Rs. 679-10-6 cash which Farzand Ali had received, but had never handed on to his wife.

On Farzand Ali's death the plaintiff sued his legal representatives, including his wife, for the recovery of these two sums. The Court of first instance (Subordinate Judge of Mirzapur) gave a decree for the smaller sum received in cash, but held that the claim for the larger sum representing the debt of Farzand Ali was barred by limitation.

The plaintiff appealed and the defendants filed an objection.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the appellant.

Hon'ble Pandit *Sundar Lal*, Mr. *M. L. Agarwala* and Maulvi *Muhammad Ishaq*, for the respondents.

STANLEY, C.J. and BURKITT, J.—The facts of this case are simple. The plaintiff-appellant obtained a simple mortgage of certain property from the defendant-respondent, Musammât Najm-un-nissa, of date the 4th of February, 1898, to secure a principal sum of Rs. 26,000 and interest. On foot of this mortgage he instituted a suit on the 9th of February, 1900, for sale of the mortgaged property. Maulvi Farzand Ali, the husband of Musammât Najm-un-nissa, negotiated and carried out the loan on behalf of his wife. Included in the sum of Rs. 26,000 was a sum of Rs. 3,403-11-6 which was owing by Farzand Ali to the plaintiff and the payment of which, Farzand Ali represented to the plaintiff, his wife was prepared to take upon herself and to secure by the mortgage. There was also an item of Rs. 679-10-6, cash agreed to be paid to the mortgagor. In her written statement Musammât Najm-un-nissa pleaded as to the first of these two items that she had no knowledge whatever of the debt due by her husband and had not undertaken to pay it, and as to the second item she denied that she ever received it.

The Court of first instance decreed the plaintiff's claim, but on appeal this Court disallowed the two items to which we have referred, holding that it was not shown that Najm-un-nissa understood that she was encumbering her property to secure her husband's debt, and as regards the other item, though it was

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undoubtedly paid to Farzand Ali, there was no evidence to show that it found its way into the hands of Najm-un-nissa or was applied for her benefit. Accordingly this Court disallowed the claim in respect of these two items and modified the decree of the Court below.

Farzand Ali having died, the present suit was brought by the plaintiff-appellant against his legal representatives, including his wife, Najm-un-nissa, for payment of the two sums of Rs. 3,403-11-6 and Rs. 679-10-6 with interest, alleging that Farzand Ali had induced the plaintiff to believe that his wife had taken upon her the liability for the larger amount and had undertaken to pay to Najm-un-nissa the smaller item.

The Court below held, in regard to the sum of Rs. 679-10-6 that it was paid by the plaintiff to Farzand Ali on his undertaking to hand it over to his wife, and that Farzand Ali fraudulently misappropriated it, and was therefore liable to restore this amount to the plaintiff. As regards the other sum, the Court below held that the claim was barred by limitation, and that the successful repudiation of the debt by Musammat Najm-un-nissa gave no fresh cause of action. From this decision the plaintiff has appealed, and the defendants have filed an objection under section 561 of the Civil Procedure Code in respect of the decree for Rs. 679-10-6, alleging that the claim in regard to it was barred by sections 13 and 43 of the Code.

We think that the principles laid down by their Lordships of the Privy Council in the case of *Bassu Kuar v. Dhum Singh* (1) is applicable to this case. In that case the facts were these:— In 1879, Dhum Singh being indebted to Baru Mal, they entered into an arrangement that Baru Mal should buy certain villages of Dhum Singh and should give credit for and write off so much as was equal to the debt, receiving only the balance in cash. The conveyance was to be made in favour of Bassu Kuar, the wife of Baru Mal; but disputes having arisen, the completion of the agreement was refused by Baru Mal. Dhum Singh then sued Baru Mal for specific performance; but his suit was dismissed by the High Court, that Court holding that there had been no unqualified acceptance by Baru Mal and that no binding contract

(1) (188 I. L. R., 11 All., 47.

enforceable by law had been made between the parties. This decree was passed on the 14th of March, 1884. A suit was then brought on the 18th of September, 1884, by Baru Mal and Bassu Kuar for the amount of the debt due to Baru Mal in respect of which an allowance in the sale consideration had been made. The defendant set up the case that the claim was barred by limitation, alleging that nothing had occurred during the transaction and litigation between the parties to alter the nature of the original debt which had accrued in 1879. The Court of first instance decreed the claim, but upon appeal the High Court reversed the decision. On appeal to the Privy Council, their Lordships reversing the decision of the High Court held, that the decree of the High Court, dated the 14th of March, 1884, holding that there was no binding contract enforceable by law brought about a new state of things and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money, and that he became bound to pay that which he had retained in payment of his land, the date of the decree giving the date of the failure of an existing consideration within the meaning of article 97 of schedule II of the Limitation Act. In the case before us, the two sums in dispute were included at the instance of Farzand Ali in the debt for which his wife gave the security. On his representation that his wife agreed to become responsible for and to secure payment of the debt of Rs. 3,403-11-6 the plaintiff exonerated him from liability in respect of it and upon the faith of his undertaking to pay to his wife the other sum of Rs. 679-10-6, this sum was paid to him. The mortgage bond, which was actually drafted by Farzand Ali and executed by his wife, purported to secure payment of these amounts. It was on the faith of this agreement between the plaintiff-appellant and Farzand Ali that the latter would obtain from his wife security for the two sums in question, that the debt of Farzand Ali was discharged and the other sum was paid to him. When the decree of this Court absolving Najm-un-nissa from payment of the sums in dispute was passed there was, we think, a new obligation imposed on Farzand Ali to make good the two amounts, the payment of which he had induced the plaintiff for

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the time being to forego and make on the representation that they were included in the mortgage security, and that this security was binding on the mortgagor. Whether the case be viewed according to the terms of the Contract Act or according to the terms of the Limitation Act, we think on the principle laid down in the case to which we have referred, the respondents cannot successfully resist the plaintiff's appeal.

For the foregoing reasons above stated, there appears to us to be no force in the objection filed on behalf of the respondents. We therefore allow the appeal, modify the decree of the Court below, and give a decree to the plaintiff-appellant for the principal sum of Rs. 3,403-11-6 to be recovered from the property of Farzand Ali with interest thereon at the rate of 6 per cent. per annum from the 4th of February, 1898, to the date of payment, in addition to the sum already decreed. We give the plaintiff-appellant as against all the defendants-respondents the costs of this appeal, also the costs in the Court below. We dismiss the objection with costs.

Decree modified.

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March 13.

REVISIONAL CIVIL.

Before Mr. Justice Banarji and Mr. Justice Richards.

JAGAN NATH (DEFENDANT) v. CHET RAM (PLAINTIFF).*

Act No. IX of 1887 (Provincial Small Cause Courts Act), section 17—Application to set aside an ex parte decree—Necessity of depositing amount of decree or giving security.

Section 17 of the Provincial Small Cause Courts Act, 1887, requires that at the time of presenting his application the applicant must either deposit in Court the amount of the decree or give security as provided for by the section; so that the deposit of the decretal amount or the furnishing of security is a condition precedent to the entertaining of an application to set aside an *ex parte* decree. *Jogi Abir v. Bishen Dayal Singh* (1) followed. *Ramasami v. Kurisu* (2), and *Muhammad Fazl Ali v. Karim Khan* (3), dissented from.

In this case a suit for money was brought against one Jagan Nath in the Court of the Munsif of Tilhar exercising the powers of a Small Cause Court Judge, and was decreed *ex parte*

* Civil Revision No. 38 of 1905.

(1) (1890) I. L. R., 18 Cal., 83.

(2) (1890) I. L. R., 13 Mad., 178

(3) Punj. Rec., 1894, p. 410.