1905

KALI CHARAN v. JEWAT DUBE.

depatment and not by separate suit. There is a Full Bench ruling to the same effect in the Calcutta High Court in the case of *Punchanun Bundopadhya* v. *Rabia Bibi* (1). In that case an objection had been taken by a person who had become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction of the decree was his own property and was not held by him as such representative, and it was held that this was a matter cognizable under section 244 of the Code of Civil Procedure and was not subject-matter of a separate suit. In view of these decisions we think that the decision of the lower appellate Court was correct and we dismiss the appeal with costs.

Appeal dismissed.

1905
June 13.

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

KOMAL PRASAD AND ANOTHER (DEFENDANTS) *v.* SAVITRI BIBI (PLAINTIFF).*

Act No. XV of 1877 *(Indian Limitation Act) sch. II, art.* 58—*Suit to recover the value of hundis given as a loan—Limitation—Terminus a quo.*

Held that the mere transfer of hundis for the purpose of making a loan of their value when realized does not amount to a loan until money has been realized by the transferee. *Garden* v. *Bruce* (2) referred to.

THIS was a suit to recover from the defendants the sum of Rs. 11,000 odd alleged to have been advanced by the plaintiff to the defendant, Prag Narain, under the following circumstances. The plaintiff was the holder of four hundis of the aggregate value of Rs. 10,000, and on the 5th of June 1900, on the application of Prag Narain, who was her son-in-law, she transferred these hundis to him as a loan with a view to starting him in a separate business. The suit was instituted on the 11th of June 1903, and one of the main defences of Prag Narain was that it was barred by limitation; he also alleged that the hundis were given, not as a loan, but as a gift. The Court of first instance (Subordinate Judge of Farrukhabad) found that the transaction was a loan and not a gift, and as

* First Appeal No. 270 of 1903, from a decree of Pandit Rai Indar Narain, Subordinate Judge of Farrukhabad, dated the 14th of September 1903.

(1) (1890) I. L. R., 17 Calc., 711. (2) (1868) L. R., 3 C. P., 300.

to limitation that it was not to be reckoned from the time when the hundis were handed over, but from the time when the money due in respect of them was realized, and on this computation the suit was not time-barred. What Komal Prasad had to do with these hundis and why he was made a party defendant to the suit appears from the judgment of the Court, but is not material for the purposes of this report. The lower Court decreed the claim as against both defendants, and both defendants appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Mohan Lal Nehru*, for the appellants.

Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* and Munshi *Mangal Prasad Bhargava*, for the respondent.

STANLEY, C. J. and BURKITT, J.—This appeal arises out of a suit for the recovery of a sum of Rs. 11,000 odd, alleged to be due to the plaintiff under the following circumstances. The plaintiff was the holder of four hundis for principal amounts of the aggregate value of Rs. 10,000; and on the 5th of June 1900, on the application of her son-in-law Prag Narain, she transferred these hundis to him as a loan with a view to starting him in a separate business. That the hundis were transferred as a loan is expressly stated in the plaint and also in the evidence of the plaintiff, and of one at least of her witnesses, and is so found by the Court below. One of the plaintiff's witnesses, Jhinguri Lal, says that "on Asarh Badi 3rd, Sambat 1957, Prag Narain took hundis worth Rs. 10,000 as a loan from the Musammat, and having sold them in the market obtained hundis in his own favour with the money thus received and sold them to his father-in-law, Komal Prasad." The plaintiff herself says that the money which she gave to Prag Narain was given by her as a loan. The claim is framed on the basis that the hundis were transferred to Prag Narain as a loan and not otherwise. Now it appears that Prag Narain, on the transfer of the hundis to him, went to the firm of Nathu Ram Kishen Das and exchanged the hundis for fresh hundis drawn by them in his favour. Thereupon it would appear that he endorsed over the new hundis to the defendant, Komal Prasad, who is his father-in-law, and it is said that Komal

1905

KOMAL PRASAD v. SAVITRI BIBI.

Prasad realized the amount of these hundis and holds the proceeds. The plaintiff sued not merely Prag Narain but also Komal Prasad, alleging as regards Komal Prasad that the amount of the hundis was fictitiously and fraudulently invested *benami* in the name of Komal Prasad. Now it appears to us that if the original hundis were transferred by the plaintiff to the defendant, Prag Narain, as a loan to enable him to embark in a separate business, it is perfectly immaterial so far as the plaintiff is concerned whether or not he transferred the hundis to a third party or what that third party did with them. The transaction was a loan transaction with Prag Narain alone, and Prag Narain alone became responsible to the plaintiff for the value of the hundis when realized. The learned Subordinate Judge, however, although he finds that the transaction was a loan in favour of Prag Narain, has come to the conclusion that there has been some juggling with the hundis between Prag Narain and his father-in-law, Komal Prasad, and that Komal Prasad is the person who has benefited by the loan of the original hundis. Therefore he came to the conclusion that Komal Prasad, who never borrowed, so far as we are aware, a single pie from the plaintiff, is responsible to her in respect of the loan of the original hundis. This conclusion appears to us to be wholly wrong. Having found that the hundis were lent to Prag Narain alone, it is clear that Prag Narain alone is responsible to the plaintiff in respect of them. The plaintiff or her advisers seem to think that she is entitled to follow the proceeds of the hundis into the hands of any third party to whom these proceeds may have come, but such is not the law. The Court below was altogether in error in giving a decree against the defendant Komal Prasad, and as regards him the appeal must be allowed.

As regards Prag Narain it has been argued that the claim of the plaintiff was barred by limitation. This raises a rather novel question. The hundis are dated the 27th, 28th and 30th April 1900, respectively, and were payable about 50 days after date. They were transferred by the plaintiff to Prag Narain on the 5th of June 1900, and the suit was not instituted until the 11th of June 1903. In the case of a loan the period of

limitation is three years. Therefore if the period from which limitation is to be calculated is the 5th of June 1900, that is, the date on which the hundis were transferred by the plaintiff, the suit apparently is statute barred. We find, however, that the hundis were not as a matter of fact turned into cash for some 20 days after the 5th of June 1900. Is therefore limitation to start from the date when the transfer was made to Prag Narain or from the date when the hundis were realized and money was received in respect of them, that is to say, when the loan actually took place? We are of opinion that limitation runs from the later period. The mere transfer of hundis for the purpose of making a loan of their value when realized does not amount to a loan until money has been realized by the transferee. We are borne out in this view by the decision in the case of *Garden* v. *Bruce* (1). In that case the plaintiff agreed to lend the defendant a sum of money, and gave him a cheque for the amount, which the defendant paid into his bankers, receiving credit for it. The cheque was not paid by the plaintiff's bankers until some days later. In an action for the money so lent, it was held that the statute of limitation only ran from the time of the payment of the cheque by the plaintiff's bankers. Bovill, C. J., in his judgment said :—"The only question is whether the cheque should be treated as an advance from the time it was given to the defendant and used by him, or only from the time it was paid by the plaintiff. I think it must be considered as an advance from the later time only and that the statute of limitations did not begin to run before the cheque was paid." Montague Smith, J., in the course of his judgment said :—"I think the loan was when the plaintiff's money passed into the hands of the defendant, and not when the cheque was given. Otherwise it follows that if an action had been brought by the plaintiff for money lent, he would, according to the opinion of Patterson, J., have been able to recover the amount of the cheque although the cheque might have been subsequently dishonoured." Keating, J., observed :—"The question is—when could the plaintiff have first sued the defendant for

(1) (1868) L. R., 3 C. P., 300.

1905

KOMAL PRASAD v. SAVITRI BIBI.

money lent? And it seems to me that he could not have done so till he had lent the money, which was when the cheque was cashed on the 21st of June." Applying the principle laid down in this case to the case before us, we are of opinion that no suit could have been maintained for the recovery of the amount of the hundis lent by the plaintiff until the hundis had been realized and money had come to the hands of the defendant. If that were not so, and it so happened that the hundis proved valueless through the insolvency of the persons responsible for their payment, the borrower would be liable for the amount of them though he had not received any advantage from them.

As regards then the appeal of Komal Prasad, we allow the appeal, set aside the decree of the Court below, and dismiss the suit as against him with half costs in this Court, seeing that both of the appellants are represented by the same advocate, and full costs in the Court below, in which Court we understand he was separately represented. As regards the appeal of Prag Narain it is dismissed, also with half costs in this Court.

Appeal of Komal Prasad allowed.

Appeal of Prag Narain dismissed.

1905

May 16.

Before Mr. Justice Knox.

HEM BAN (DECREE-HOLDER) *v.* BIHARI GIR (JUDGMENT-DEBTOR)*.

Act No. IV of 1882 *(Transfer of Property Act), section* 99—*Mortgage—Suit for sale—Compromise resulting in a money decree—Mortgagee not competent to sell mortgaged property in execution of such decree.*

A mortgagee brought a suit for sale on his mortgage. The suit was compromised, and the mortgagee took a money decree, in which, however, the property originally hypothecated to him was set out as being charged. *Held* that the mortgagee decree-holder could not bring the mortgaged property to sale in execution of this decree, but, if he wished to do so, he would have to institute a suit under section 67 of the Transfer of Property Act on the decree. *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (1) followed.

THE facts of this case were as follows: One Sukh Lal Gir mortgaged some 33 bighas odd of land to Hem Ban. Hem Ban

* Second Appeal No. 1282 of 1904, from a decree of J. S. Campbell, Esq., District Judge of Bareilly, dated the 16th of September 1904, confirming a decree of Babu Udit Narain Singh, Munsif of Bareilly, dated the 13th of July 1904.

(1) (1895) I. L. R., 22 Calc., 859.