

1908

KALLU  
v.  
FAIYAZ ALI  
KHAJAN.

that on the finding of the lower appellate Court that the mortgage debt has been satisfied long ago out of the usufruct, the suit of the plaintiffs is barred by limitation. This plea, however, was abandoned before us. Another objection has been raised as to the finding of the lower Court in regard to the amount of the mortgage money. The respondents contended that the terms of the wajib-ul-arz of 1890 show that the amount secured by the mortgage was Rs. 1,000. We have examined this wajib-ul-arz and we agree with the construction placed on it by the lower appellate Court. We set aside the decrees of the Courts below and decree the plaintiffs' claim as set forth in relief (a) of the plaint. The plaintiffs will have their costs here and in the Courts below.

This case was very ably argued by the learned advocates for the parties, particularly by the learned advocate for the appellants.

*Appeal decreed.*

1908  
May 22.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

COLLECTOR OF MIRZAPUR (PLAINTIFF), v. DAWAN SINGH  
AND OTHERS (DEFENDANTS).\*

*Act No. XV of 1877 (Indian Limitation Act), schedule II, article 116—Limitation—mortgage—Suit for compensation for the breach of a contract in writing registered.*

A registered mortgage bond provided that the amount secured by it should be paid by instalments, and that in case of default the mortgagee would be entitled to take possession; further, that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the mortgagee would have power to realise the amount secured by the bond with the interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged.

*Held* that a suit based upon the foregoing covenant to recover the mortgage money upon failure of the mortgagor to pay instalments was in substance a suit for compensation for breach of contract, to which the limitation prescribed by article 116 of the second schedule to the Indian Limitation Act, 1877, applied. *Husain Ali Khan v. Hafiz Ali Khan* (1) referred to.

THIS was a suit to recover the amount of a mortgage bond, dated the 17th of April 1899. It was a registered document,

\* Second Appeal No. 10 of 1907 from a decree of Muhammad Ali, District Judge of Mirzapur, dated the 12th of September 1906, modifying a decree of Amjadullah, Subordinate Judge of Mirzapur, dated the 1st of June 1906.

and provided that the amount secured by it should be paid by instalments, and that in case of default the mortgagee would be entitled to take possession. It further provided that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the creditor would have power to realise the amount secured by the bond with interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged. The first instalment was payable on the 16th of December 1899. The present suit was brought on the 15th of December 1905. The Court of first instance (Subordinate Judge of Aligarh) decreed the plaintiff's claim. On appeal, however, this decree was reversed by the District Judge who dismissed the suit, holding it to be barred by limitation. The plaintiff appealed to the High Court.

Mr. A. E. Byves, for the appellants.

Mr. Muhammad Raoof, for the respondent.

STANLEY, C. J. and BANERJI, J.—The suit which has given rise to this appeal was brought by the plaintiff appellant to recover the amount of a mortgage bond, dated the 17th of April 1899. It was a registered document, and provided that the amount secured by it should be paid by instalments, and that in case of default the mortgagee would be entitled to take possession. It further provided that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the creditor would have power to realise the amount secured by the bond with interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged. The first instalment was payable on the 16th of December 1899. The present suit was brought on the 15th of December 1905. The Court below has dismissed the suit, holding it to be barred by limitation, and has referred to the case of *Ram Narain v. Kamta Singh* (1) as an authority in support of its view. That ruling in our opinion has no bearing whatever on the present case. That was a suit for arrears of rent, for which there is specific provision in schedule II of the Limitation Act. The present suit is

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one for money payable under a mortgage bond. As the property mortgaged consisted of mortgagee rights, it was assumed, according to the ruling in force at the time when the suit was brought, that the mortgaged property could not be sold, but there is the clear covenant in the bond that the money would be recoverable in case of default in delivering possession from the person and other property of the mortgagors. This was, in our opinion, a suit which was governed by article 116 of schedule II, being in substance a suit for compensation for breach of contract, namely, the contract to deliver possession and pay the amount secured by the bond in case of default in delivering possession. The bond being a registered instrument, the period of limitation under that article was six years, and the suit was therefore within time. This view is in consonance with the ruling of a full Bench of this Court in *Husain Ali Khan v. Hafiz Ali Khan* (1). The result is that we allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance with costs in all Courts.

*Appeal decreed.*

1908  
May 22.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*  
MUL KUNWAR AND OTHER (DEFENDANTS) v. CHATTAR SINGH (PLAINTIFF)  
AND MUSAMMAT NAUGI (DEFENDANT).\*

*Act No. XV of 1877 (Indian Limitation Act), schedule II, article 116—Limitation—Suit for compensation for the breach of a contract in writing registered.*

A deed of sale of immovable property, duly registered, contained a covenant to the effect that in the event of a claim being advanced by a co-sharer, or in the event of the purchaser losing any part of the property in any other way, he would be entitled to a refund of the consideration and to damages. The purchaser, failing to get possession of part of the property purchased, sued for possession, or in the alternative for a refund of a proportionate part of the consideration money and damages. *Held* that as regards the latter relief the suit was governed by article 116, and not by article 97, of the second schedule to the Indian Limitation Act, 1877.

THE facts out of which this appeal arose are as follows:—

Two brothers, Dip Chand and Lajja Ram, owned certain property. Dip Chand died in 1876 leaving him surviving his sons

\*Second Appeal No. 296 of 1907 from a decree of H. J. Bell, District Judge of Aligarh, dated the 22nd of December 1906, confirming a decree of Pitambar Joshi, Subordinate Judge of Aligarh, dated the 26th of January 1905.

(1) (1881) I. L. R., 3 All., 600.