

1908.

May 20.

Before Mr. Justice Aikman and Mr. Justice Griffin.

JANGI SINGH (JUDGMENT-DEBTOR) v. CHANDAR MOL (DECREE-HOLDER).*

Act No. XV of 1882 (Transfer of Property Act), section 90—Application for a personal decree against mortgagor—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 116.

Held that the fact that there is no express personal covenant to pay; the mortgage money is no bar to the mortgagee obtaining a personal decree under section 90 of the Transfer of Property Act, 1882, against the mortgagor if the requirements of the section are otherwise fulfilled: a personal covenant to pay is implied in and is an essential part of every simple mortgage. *Savada Khan-Sya v. Abaji Jotirav* (1) not followed. *Unichaman v. Ahmed Kutti Kayi* (2) referred to.

Held also that on an application under section 90 of the Transfer of Property Act it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant. *Hamid-ud-din v. Kedar Nath* (3) followed.

THE facts of this case are as follows:—

On the 5th of August 1893, Jangi Singh executed a deed of simple mortgage in favour of Chandar Mol. The money was payable on demand. The bond contained no personal covenant to pay. It was a registered instrument. The mortgagee on the 25th of July 1900, instituted a suit for sale on the mortgage and also asked for a personal decree against the mortgagor. On the 16th of August 1900, the mortgagee got an *ex parte* decree for sale. No personal decree was passed against the mortgagor. The property was sold on the 20th of December 1906, and, the proceeds of the sale having proved insufficient to pay the amount due on the mortgage, the decree-holder applied for a decree under section 90. The judgment-debtor raised an objection on the ground of limitation. This was overruled by the Court of first instance (Subordinate Judge of Shahjahanpur) and the decision of that Court was affirmed on appeal by the District Judge. Both the lower Courts found that there had been a payment by the judgment-debtor of interest on the 16th of June 1895, that is to say within six years of the date when the suit was filed. The judgment-debtor appealed to the High Court.

Babu *Surendra Nath Sen* and Babu *Jogindro Nath Mukerji*, for the appellant.

* Second Appeal No. 1174 of 1907 from a decree of C. D. Steel, District Judge of Shahjahanpur, dated the 13th of August 1907, confirming a decree of Achal Bihari, Subordinate Judge of Shahjahanpur, dated the 11th of May 1907.

(1) (1887) I. L. R., 11 Bom., 475. (2) (1897) I. L. R., 21 Mad., 242.

(3) (1898) I. L. R., 20 All., 386.

Babu Jogindro Nath Chaudhri and Babu Beni Madho Ghosh,
for the respondent.

AIKMAN and GRIFFIN, JJ.—This is an appeal by a judgment-debtor. The question which we have to decide is whether an application made by the respondent for a decree against the appellant under section 90 of the Transfer of Property Act is time-barred. On the 5th of August 1893, the appellant executed a deed of simple mortgage in favour of the respondent. The money was payable on demand. The bond contained no personal covenant to pay. It was a registered instrument. The respondent, on the 25th of July 1900, instituted a suit for sale on the mortgage and also asked for a personal decree against the mortgagor. On the 16th of August 1900, the respondent got an *ex parte* decree for sale. No personal decree was passed against the mortgagor. The property was sold on the 20th of December 1906, and, the proceeds of the sale having proved insufficient to pay the amount due on the mortgage, the respondent applied for a decree under section 90. The appellant raised an objection on the ground of limitation. This was overruled by the Court of first instance and the decision of that Court was affirmed on appeal by the learned District Judge. The judgment-debtor comes here in second appeal. The Courts below have found that there was a payment by the appellant of interest on the 16th of June 1895. That payment was within six years of the date when the suit was filed. On an application under section 90 it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant. The learned vakil for the appellant contends, relying on the decision of the Bombay High Court in *Sarwaba Khandapa v. Abaji Jotirav* (1), that, as there is not in the registered mortgage deed any personal covenant to pay, the respondent is not entitled to take advantage of article 116 of the second schedule of the Limitation Act, which allows a period of six years for a suit for breach of a contract in writing and registered. That decision does support the argument on behalf of the appellant. It was considered in a later Madras ruling in the case of *Unichaman v. Ahmed Kutbi Kayi* (2). In that case the learned Judges remark :—“ If

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(1) I. L. R., 11 Bom., 457. (2) (1897) I. L. R., 21 Mad., 242.

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this liability be taken to be one arising under a covenant implied by law as incidental to the mortgage contract, which was in writing and registered, then article 116 of the Limitation Act would apply, otherwise the appropriate article is 120, the case not being otherwise provided for." The Bombay ruling was distinguished on the ground that when it was decided the Transfer of Property Act was not in force in Bombay. Whether that would be sufficient for distinguishing the Bombay case in the present appeal we are not prepared to say. The facts of this case are on all fours with a case decided by this Court—*Hamid-ud-din v. Kedar Nath* (1). That case is against the appellant. It is true that in that case the special plea raised by the appellant was not considered. But we think that a personal covenant to pay, although not expressed, is implied in and is an essential part of every simple mortgage. The respondent's right to a decree under section 90 therefore was a part of and arose out of a contract in writing and registered, and we think that he is entitled to the benefit of article 116. The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

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May 26.

Before Mr. Justice Aikman and Mr. Justice Griffin.

RANJIT SINGH (DEBTEE-HOLDER) v. BALDEO SINGH AND ANOTHER
(JUDGMENT-DEBTORS).*

Civil Procedure Code, section 318—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 178—Execution of decrees—Limitation—Terminus a quo.

Although the grant of a certificate is a necessary preliminary to an application under section 318 of the Code of Civil Procedure, such application will be barred under article 178 of the second schedule to the Indian Limitation Act, 1877, if not made within three years of the date of the certificate, that is to say, the date of the confirmation of sale. *Basapa v. Marya* (2) and *Kashinath Trimbak Joshi v. Daming Zuran* (3) dissented from. *Petition of Kishan Singh* (4) referred to.

In this case one Ranjit Singh, on the 20th of November 1897, purchased certain immovable property in execution of a decree

* Second Appeal No. 985 of 1907 from a decree of H. W. Lyle, District Judge of Agra, dated the 8th of June 1907, reversing a decree of Chajju Mal, Subordinate Judge of Agra, dated the 2nd of February 1907.

(1) (1898) I. L. R., 20 All., 385. (3) (1892) I. L. R., 17 Bom., 228.
(2) (1879) I. L. R., 3 Bom., 433. (4) Weekly Notes, 1883, p. 262.