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one made without permission, and as such it is voidable under section 30, Guardians and Wards Act. In this view, there can be no doubt that article 44 of the Limitation Act is applicable, and the plaintiff cannot avail himself of the longer period provided by article 144 for a suit for possession if his claim to have the voidable alienation made by the guardian during the plaintiff's minority set aside is barred. In the case before us the suit, having been admittedly brought more than three years from the date the plaintiff attained majority, is clearly barred.

The result is that this appeal must succeed. It is accordingly allowed, and the decrees passed by the courts below are set aside and the plaintiff's suit is dismissed.

Before Mr. Justice Young and Mr. Justice Pullan.

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March, 19.

ABDUL SHAKUR (DEFENDANT) *v.* NAND LAL AND OTHERS (PLAINTIFFS)*

Haq-i-chaharum—*Covenant in lease binding lessee to pay to landlord one-fourth of sale price on transfer by lessee—Transferee taking with notice of covenant—Covenant not enforceable against transferee— Transfer of Property Act (IV of* 1882), *section* 40.

A covenant in a lease by which the lessee bound himself to pay to the landlord *haq-i-chaharum*, i.e. one-fourth of the sale price whenever he sold his interest in the land, can not be enforced against the transferee, although he has purchased with notice of the covenant.

Haq-i-chaharum can not be considered to be a restrictive covenant of the kind dealt with in English law as in the case of *Tulk* v. *Moxhay* (1).

Section 40 of the Transfer of Property Act can not be applied to a personal obligation such as the payment of

*Second Appeal No. 1255 of 1928, from a decree of V. Mehta, Subordinate Judge of Benares, dated the 2nd of May, 1928, modifying a decree of Niraj Nath Mukerji, Additional Munsif of Benares, dated the 4th of January, 1928.

(1) (1849) 2 Phill., 774.

haq-i-chaharum arising out of a contract of lease; the obligation can not be said to be annexed to the ownership of immovable property, within the meaning of the section.

The transferee in such a case can not be held bound, upon any general principles of equity, to pay the personal obligation of his vendor, to whom he has already paid the full purchase price.

Messrs. *M. A. Aziz* and *Zahur Ahmad Naqvi*, for the appellant.

Dr. *K. N. Malaviya*, for the respondents.

YOUNG and PULLAN, JJ.:—This is an appeal against the judgment of the Subordinate Judge of Benares. The plaintiffs were the zamindars of a plot of land. The predecessor in title of the appellants executed a *kabuliat* by which he agreed to pay to the plaintiffs annual *parjot*, and he also agreed to pay *zar-i-chaharum*, that is, one fourth of the sale price received by him whenever he sold his interest in the plot. Doman, defendant No 1 in the suit, sold the plot to the defendant No. 2, and the plaintiffs zamindars sued both the defendants for the *zar-i-chaharum*. Defendant No. 1 did not defend the suit. The trial court held that defendant No. 2 was not liable, but the lower appellate court held on the authority of *Parbhu Narain Singh* v. *Ramzan* (1) that both the defendants were jointly and severally liable for the amount of the *zar-i-chaharum*, and gave a decree in favour of the plaintiffs against defendant No. 2. Defendant No. 2 appeals.

The sole question before us is whether, under the circumstances given above, the assignee of defendant No. 1 is liable to pay to the zamindars the *zar-i-chaharum*. We agree with the lower appellate court that the defendant No. 2 must be held to have notice of the *haq-i-chaharum* payable by defendant No. 1. We have carefully considered the case of *Parbhu Narain*

(1) (1919) I.L.R., 41 All., 417.

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Singh v. *Ramzan* (1). We notice that PIGGOTT, J., decided that case on the nature of the plea set up by the defendant Ramzan in the trial court. WALSH, J., alone decided the actual point before us in favour of the zamindars. With great respect to the learned Judge, we are of opinion that that case was wrongly decided. The learned Judge appears to have based his judgment upon the view that *haq-i-chaharum* was a restrictive covenant of the kind dealt with in the English authority of *Tulk* v. *Moxhay* (2).

We are of opinion that *haq-i-chaharum* cannot be considered to be such a restrictive covenant. Restrictive covenants are covenants restraining the use to be made of the land. A contract to pay a certain sum of money on the happening of a certain event cannot possibly, in our opinion, be held to be a restrictive covenant. It appears to us that the whole of the judgment of the learned Judge is based upon this misapprehension. In any event, it was held in *Haywood* v. *Brunswick Building Society* (3) that the rule in *Tulk* v. *Moxhay* that "anyone coming into possession of land with notice, actual or constructive, of a covenant entered into by some one through or under whom he claims, restricting the use of that land, will be prohibited from doing anything in breach of the covenant", applies only to a negative and not an affirmative covenant. Equity would not allow the assignee to use the land in contravention of the restriction. *Tulk* v. *Moxhay* cannot be used to place the pecuniary liability of an assignor upon his assignee. In any event, it has long been held in English law that no action of covenant will lie against the assignee of the lessee, except for breaches of covenant happening while he is assignee. In our opinion it is clear that the whole of the argument of the learned

(1) (1919) I.L.R., 41 All., 417. (2) (1849) 2 Phill., 774.
(3) (1881) 8 Q.B.D., 403.

Judge based upon restrictive covenants and *Tulk* v. *Moxhay* is misconceived. Further, the learned Judge appears to be impressed with a paragraph taken from Gour's Transfer of Property Act, in which the learned author of that work quotes Dart's Vendors and Purchasers, 6th edition, page 927, as to the knowledge of a purchaser of land of an encumbrance on the property either before or after the execution of the conveyance and the learned Judge proceeds to state that that substantially was the position in the case he was then deciding. An encumbrance is a mortgage or charge upon the property purchased, and cannot be held to mean a liability such as that of paying the *zar-i-chaharum*. He further relies upon the general principles of equity. We fail to conceive how the transferee in this case can be held to be bound in any way in equity to pay the personal obligation of his predecessor in title, especially when the transferee had paid the full purchase price to his predecessor and when, we must conclude, the vendor, having to pay the *zar-i-chaharum* to the zamindar, must have taken that into consideration in fixing the price which he demanded for his interests in the land.

Reliance is placed by the respondents, however, on section 40 of the Transfer of Property Act. The first part of that section merely adapts to the law of India the English doctrine of restrictive covenants illustrated in *Tulk* v. *Moxhay* and *Haywood* v. *Brunswick Building Society*. The second paragraph is more difficult to construe. But we are of opinion that it cannot possibly apply to an obligation arising out of a contract such as an obligation to pay *zar-i-chaharum*. The illustration given to the section confirms us in this view. That illustration is concerned solely with an equitable right to enforce the specific performance of a contract entered into by B with A against C to whom

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subsequently the land was sold with notice of the previous contract. It would be, we think, a strained construction of the section to apply it to a personal obligation, such as the payment of *zar-i-chaharum* arising out of a contract of lease. We think that the legislature by this part of the section merely meant to adapt to the law of India the English rule of conferring an equitable title in land on the holder of a contract relating to the transfer of land. Such a contract does not amount to an "interest in land or an easement thereon" within the meaning of this part of the section. It confers merely an equitable title. We see no reason to apply this part of the section to a merely personal obligation to pay a sum of money to a third party arising out of a contract, and further we do not think an obligation to pay *zar-i-chaharum* could be said to be "annexed to the ownership of immovable property" within the meaning of this part of the section. A contract giving rise to a right of pre-emption or a contract of sale would create an obligation annexed to the ownership of property, and it is to such obligations that this part of the section is meant to apply.

We allow the appeal, set aside the decision of the lower appellate court and restore that of the trial court with costs.