

1931
March, 12.

Before Mr. Justice Young and Mr. Justice Pullan.

ZAITUN AHIR (DEFENDANT) *v.* SAT RAM SINGH
AND ANOTHER (PLAINTIFFS).*

Limitation Act (IX of 1908), articles 61, 116 and 120—Money left with mortgagee to pay off prior creditors of mortgagor—Default by mortgagee—Mortgagor forced to pay himself—Suit by mortgagor to recover the amount from mortgagee—Limitation.

A mortgage was made, and out of the consideration money a sum was left with the mortgagees for payment to prior creditors of the mortgagors. The mortgagees did not pay that sum. The mortgagors, being threatened by their creditors with a suit, were forced to pay the money themselves. They sued to recover the amount so paid, with interest by way of damages, from the mortgagees. On a question of limitation, *Held* that article 61 of the Limitation Act did not apply because this was not a suit for money paid for the defendant; the money was paid by the mortgagors for themselves to save their own property from their creditors and it was not paid by them for the mortgagees in any true sense of the term; admittedly the mortgagees could not have been sued by the creditors to make the payment. The case was governed either by article 116 or by article 120, and in either case the suit was within six years of the date of the mortgage, which was the earliest possible date from which limitation could begin to run.

Mr. A. P. Pandey, for the appellant.

Mr. Shiva Prasad Sinha, for the respondents.

YOUNG and PULLAN, JJ. :—The facts giving rise to this suit are as follows. Sat Ram Singh and Maharaj Singh mortgaged certain property to Zaitun and another for Rs. 750, out of which Rs. 400 were left with the mortgagees for payment to prior creditors of the mortgagors. The mortgagees did not pay that sum. The mortgagors, being threatened by their creditors with a suit, were forced to pay the money, and they have brought this suit to recover the amount so paid, with interest by

*Second Appeal No. 1612 of 1928, from a decree of Hanuman Das, Additional Subordinate Judge of Azamgarh, dated the 8th of August, 1928, reversing a decree of Bishambhar Frakash, Munsif of Haveli, dated the 21st of March, 1928.

way of damages, from the mortgagees. The date of the mortgage was the 11th June, 1921, and the payments were made by the mortgagors on the 12th June, 1922, and 14th June, 1923. The suit was brought on the 14th June, 1927, and is within six years from the date of the mortgage. The claim has been decreed by the lower appellate court, which held that the period of limitation was one of six years and that the article applicable was 116 of the first schedule of the Limitation Act. The appeal is based on the contention that this is not a suit to which article 116 is applicable, but is a suit governed by article 61. There is no other point before us for decision. Article 61 deals with a suit for money payable to the plaintiff for money paid for the defendant. Limitation runs from the date when the money is paid. If this article is applicable, the suit is beyond time, as it was filed more than three years after the last date of payment. In order that this article of the Limitation Act should apply, it must be proved that the suit was for (1) money payable to the plaintiff, (2) for money paid for the defendant. Certainly the suit is for money which the plaintiff alleges to be payable to himself. But we do not agree with the learned counsel who has argued the case with great skill for the appellant, that this is a suit for money paid for the defendant. The only person who was liable to the creditors for the payment of this money was the plaintiff in this suit. It was his debt and it was not the debt of his mortgagee. It is conceded that the plaintiff himself could not have sued his mortgagee in any way so as to compel him to pay this money to the creditors, and that the creditors could not have sued the mortgagee. This money, in our opinion, was paid by the mortgagor for himself to save his own property from his creditors, and it was not paid by him for the mortgagee in any true sense of the term. Reliance is placed by the learned counsel for the appellant on a decision of this High Court in *Girraj Singh v. Raghubans Kuar* (1).

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In that case there was a compromise between two persons providing that the encumbrances affecting a certain village would be paid by one of the parties. That party failed to discharge the encumbrances, which appear to have been in the nature of mortgage debts. The encumbrances were paid off by the other party and he sued to recover the amount so paid. It was found by the Court that this was a suit for money paid for the defendant, within article 61 of the Limitation Act. But there is no discussion in the judgment showing the reasons for which the Court held that that payment was made for the defendant. We are unable to say that that case is exactly parallel with the one before us. There is a parallel case also decided by this Court, *Ishri Prasad v. Muhammad Sami* (1). The facts of that case are indistinguishable from those of the present case, and the decision of the Court was that article 116 of the Limitation Act applies. But in that case also the question which is before us was not discussed. We consider, therefore, we are free to decide this question as *res integra*, and are of opinion that a payment of this nature is not a payment made for the defendant and therefore that article 61 of the first schedule of the Limitation Act does not apply.

The lower appellate court has held that the article applicable is 116. This again is an article which may be distinguished from the present case. It applies to a suit for compensation for the breach of a contract in writing registered, and the time from which the period begins to run is the time when the contract is broken. Now the mortgagee undoubtedly entered into an agreement with the mortgagor that he would pay off his debt; but it is argued, and not without force, that that agreement is not enforceable by the mortgagor, and it is difficult to say when, if ever, there has been a breach of the contract. But it is no part of the pleadings in this

(1) (1920) 19 A.L.J., 81.

case that the plaintiff has no right to recover the money paid by him. The only dispute arose as to whether the suit to recover it was or was not within time. We do not think it necessary, therefore, to enter into a minute argument as to whether article 116 can or cannot be made to fit into the facts of this case. It was for the appellant to show that the suit was barred by some article of the Limitation Act which provided for a shorter period than six years, and in our opinion the appellant has failed to do so. Thus, even if article 116 did not apply, we see no reason why we should not apply article 120, which deals with suits for which no period of limitation is provided elsewhere in the schedule. It is true that under article 120 the time from which the period begins to run is the time when the right to sue accrues, and it has been argued, not without reason, that we would be forced to give some date in this case when the right to sue did accrue. Again, we do not think that it is necessary to answer this question. The right could not accrue before the mortgage was executed, and even if that were taken as the date, the suit is within time. Roughly speaking, the suit being one for which the cause of action is clearly the necessity for the mortgagor to pay off his debt, the period might be held to commence at the date of that payment. But there is authority for the view that the failure of the mortgagee to pay off his debt commenced from the date of the mortgage, and the period of limitation might be held to run from that date. In either case the suit is within time and we do not think it necessary to decide a point which is of no importance for the decision of this appeal.

One other question raised was that the rate of interest allowed by way of damages is excessive. But this point was not raised in the courts below, and the learned Subordinate Judge has stated that in his opinion interest at 2 per cent. per mensem is not excessive. We accordingly dismiss this appeal with costs.

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