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cumstances are not so compelling as to lead inevitably to such a conclusion, we have no hesitation in holding that the appellants are barred by the provisions of sections 92 and 94 of the Evidence Act from showing that the intention of the parties to the transaction of mortgage was different from what appears from the terms of the mortgage deed itself.

For reasons given above we dismiss this appeal with costs.

FULL BENCH

Before Mr. Justice Bennet, Acting Chief Justice, Mr. Justice Bajpai and Mr. Justice Ganga Nath

1938 *February*, 17

TILAK RAM AND OTHERS (DEFENDANTS) *v.* SURAT SINGH AND OTHERS (PLAINTIFFS)*

Limitation Act (IX of 1908), articles 83, 116—Sale of mortgaged property—Covenant in sale deed—Purchase money left with vendee—Vendee undertaking to discharge a mortgage existing on the property sold and on other property of vendor—Contract of indemnity implied—Failure to pay—Properties sold in execution of mortgage decree—Vendor's suit for damages—Limitation.

Upon a sale of property the whole of the consideration money was left by the vendor with the vendee for payment and discharge, to that extent, of a mortgage existing on the property sold as well as on other property belonging to the vendor, but the payment was not made and the mortgagee obtained a decree on his mortgage and sold the mortgaged properties and the vendor brought a suit for damages against the vendee:

Held that article 83 of the Limitation Act applied to the suit, and read with article 116 it gave a period of six years to the plaintiff from the date of sale of the properties under the mortgage.

Where there is an undertaking by the vendee to pay off a mortgage debt existing on the property, the covenant is not merely one to pay the purchase money in a particular manner to the vendor's nominee but one to relieve the vendor from the liability of the mortgage, and in that sense there is a con-

*Second Appeal No. 303 of 1935, from a decree of N. L. Singh, First Civil Judge of Saharanpur, dated the 23rd of November, 1934, confirming a decree of Bijey Pal Singh, Munsif of Havali, dated the 23rd of March, 1934.

tract of indemnity, which may be express or implied. In such cases a cause of action arises when the plaintiff vendor is actually damnified by the sale of the property on the suit by the mortgagee, and under article 83 of the Limitation Act the plaintiff has three years from the time when he is so damnified, but the time is extended to six years by article 116 as the contract of indemnity was contained in a sale deed in writing registered.

Mr. G. S. *Pathak,* for the appellants.

Mr. *K. C. Mukerji,* for the respondents.

BENNET, A. C. J.:—This is a reference to a Full Bench of the following issue of law: "Is the plaintiffs' suit barred by limitation under the circumstances of the present case?"

The facts of the case are as follows. These four second appeals arise out of a suit brought by the plaintiffs to recover Rs.5,000 as damages from the defendants on account of a breach of contract. The plaintiffs were owners of property mentioned in schedule A which was subject to the following three mortgages: (1) of 13th February, 1902; (2) of 7th May, 1919, and (3) of 28th September, 1920. The first mortgage was a usufructuary mortgage and was for Rs.3,200. The second mortgage was a simple one and was for Rs.1,000 and the third mortgage was also a simple one and was for Rs.5,000. Out of the property mentioned in schedule A, a part which is given in schedule B was sold on the 13th of September, 1922, by three sale deeds to the defendants. By one sale deed plaintiffs, Sarupi and Mughla, sold property mentioned in the sale deed to defendants Nos. 1 to 3 for Rs.4,500. The entire sale consideration was left with the vendees for payment to the mortgagees of the 28th of September, 1920, without any date being fixed for payment. By the second sale deed the same vendors sold to defendant 4 the property mentioned in their sale deed for Rs.4,000, out of which Rs.3,200 were left with the vendee for payment towards the usufructuary mortgage of the 13th of February, 1902, and the balance Rs. 800 was left for payment to

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the mortgagee of the mortgage of the 28th of September, 1920. By the third sale deed plaintiffs Nos 2, 3 and 4 and Sarupi sold property to defendant No. 5, and Zalim, since deceased, predecessor of defendants Nos. 7 and 8, and Mukha, since deceased, predecessor of defendant No. 6, for Rs.2,000, out of which Rs.1,050 were left with the vendees for payment to the mortgagee of the mortgage of the 7th of May, 1919, and Rs.950 to the mortgagees of the mortgage of the 28th of September, 1920.

No money was paid by the vendees. A suit, No. 3 of 1929, was brought by the mortgagee of the mortgage of the 28th of September, 1920. A decree was passed in execution of which the whole of the property in schedule A was sold on the 23rd of July 1930. If the vendees had paid the money left with them to the mortgagees of the aforesaid mortgages, property mentioned in schedule C would have been saved to the vendors, but this property was also sold with the remaining property in execution of the decree obtained by the mortgagee of the mortgage of the 28th of September, 1920.

The plaintiffs thereafter brought the present suit on the 20th of July, 1933, to recover damages caused by the default of the defendants vendees in payment of the money left with them to the mortgagees. The plaintiffs claimed Rs.5,000 as damages for the value of the property C which had been sold. The defendants contended *inter alia* that the suit was time barred. The trial court decreed the suit for Rs.3,000, finding that the suit was within time. Cross-appeals were filed by plaintiffs and defendants Nos. 1 to 3 and 5 to 8. Defendant No. 4 did not appeal. The lower appellate court decreed the plaintiffs' appeal and dismissed the defendants' appeals. The defendants Nos. 1 to 3 and 5 to 8 have filed these appeals against the decrees dismissing their appeals and the decree allowing the plaintiffs' appeal in respect of the amount of damages

which was enhanced by the lower appellate court. Appeals Nos. 303 and 304 of 1935 are by defendants Nos. 1 to 3, and Nos. 305 and 361 of 1935 by defendants Nos. 5 to 8.

The contention of learned counsel for the appellants defendants 1 to 3 is that the suit is time barred. He first of all refers to the sale deed in question and claims that this sale deed is merely for the payment of Rs.4,500 to the nominee of the vendor. The sale deed no doubt sets out that the property is sold for Rs.4,500 consideration as specified below. Further down it is stated: "There being no other means of payment of the debt due by the ancestors, the property sold has been sold for payment of the former debt due by the father, uncle and husband of executant No. 3 to Aulad Mal Mahajan resident of Qasba Lekhuanti, pargana Gangoh, under which the property sold stands hypothecated and the payment whereof is necessary." After the detail of the property it is stated: "Specification of the receipt of the amount of consideration: Left with the vendees for payment of part of the amount of the hypothecation bond executed by Surat Singh, etc., registered on the 28th of September, 1920, . . . admitted as being due by us, . . . Rs.4,500."

The contention of learned counsel is that this document is merely for Rs.4,500. Eventually he admitted that if the vendees had not paid this amount immediately on execution of the document, but had paid later, then a claim for damages would have lain by the plaintiffs against the vendees for the sum of interest which had accrued between the date of the sale deed and the date of the payment. We think that this is a very strange interpretation to put on this document and in our opinion the document means that the vendees will pay the former debt under which the property stands hypothecated and if the vendees delay for some time in making that payment then under this document the vendees are bound to pay the mortgagee not only

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Rs.4,500 but also the interest which has accrued up to the date of payment. A further argument of learned counsel for appellants was that under section 55(5)(*b*) of the Transfer of Property Act the mortgagee is merely a nominee of the vendor. The sub-section says that the buyer is bound "to pay or tender, at the time and place for completing the sale, the purchase money to the seller or such person as he directs," and learned counsel argued that the only obligation undertaken was to pay a sum of money to the mortgagee merely as a nominee. We do not think that the contract is properly described in this manner. We consider that the obligation undertaken was to pay off a part of this particular mortgage which was a mortgage on the property sold and also on the property retained by the vendor and on the property sold on the other two sale deeds. Now the question which has been argued has ranged over several articles of the Limitation Act and we do not consider it incumbent on us to mention all the rulings which have been cited before us. We consider it desirable to refer only to two of those articles, article 116 read with article 115 and article 83. No doubt in the case of this sale deed, which is a registered document, there is a contract and the period laid down by article 116/115 is specified as a period of six years' limitation, time running from the time when the contract is broken, or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs. Among other rulings which have been shown to us there is a ruling of the Full Bench of this High Court in *Naima Khatun* v. *Sardar Basant Singh* (1). That was a case where the plaintiff was a vendor and he had brought a suit for recovery of an amount left with the vendee to pay to certain mortgagees. The vendee had not made the payment and the question was whether the vendor was entitled to maintain her suit for recovery of the amount left with the vendee without

(1) (1933) I.L.R. 56 All. 766.

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first proving that she has been actually damnified by the vendee's failure. The ruling held that the plaintiff was entitled to sue under those circumstances. The ruling classified the cases where property was transferred by a vendor to a vendee with a direction to the vendee to pay off a third person, under three heads:

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(1) Where the amount left in the hands of the vendee may be a part of the purchase money remaining unpaid, in which case it is money belonging to the vendor and can be recovered by enforcement of the statutory charge under section 55(4) of the Transfer of Property Act:

(2) It may amount to a covenant with an undertaking to relieve the vendor from his existing liability, in which case a suit on the covenant would lie:

(3) It may be a mere promise to perform an act for consideration, or a contract of indemnity, in which case a suit for damages incurred on breach of the contract would lie under section 125 of the Contract Act, but it must be proved that loss has been sustained.

Now the present case appears to us to differ from case (2) as it is a case where the vendor has been damnified by the actual sale of his property under the decree obtained by the mortgagee. Learned counsel for the appellants argued that because the property of the vendee was also sold therefore a cause of action would not arise to the vendor. We do not agree with that proposition and it appears to us that as the vendee undertook to make a payment and did not make the payment, and that non-payment has resulted in the property of the plaintiff being sold, the plaintiff therefore has a cause of action. Now as regards the actual contract no doubt a suit would lie under articles 115 and 116 of the Limitation Act within the period of six years from the date of the sale deed. The question before us is whether after that period has expired and there has been a loss caused to the plaintiffs by the auction sale, can this further loss give a cause of action within limitation for the plaintiffs? The argument

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has centred on this point round article 83. Learned counsel contended that this article would not apply because there was no indemnity in the sale deed in question. Article 83 sets out that a suit upon any other contract to indemnify may be brought within three years from the time when the plaintiff is actually damnified. The present suit has been brought within three years of the date of sale, but actually the period would be six years under article 116 as the contract is one in writing registered. The most important ruling which has been shown to us in this connection is a ruling of their Lordships of the Privy Council in *Izzat-un-nisa Begam* v. *Partab Singh* (1). With the actual facts of that ruling we are not concerned but on page 589 their Lordships laid down the following general rule of law: "It seems to depend on a very simple rule. On the sale of property subject to incumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the incumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity." This proposition lays down that in any case in which there is a covenant to pay incumbrances there is a contract of indemnity, which may be express or implied. Learned counsel has argued from the facts of the particular case before their Lordships that some difference would arise from the present case, but I am not able to distinguish the present case from the general proposition of law laid down by their Lordships of the Privy Council. In *Raghunatha Chariar* v. *Sadagopa Chariar* (2) at page 352 some comments are made on this case of the Privy Council and in that case it was held that the plaintiffs were entitled to recover from the defendant the amount the defendant had

(1) (1909) I.L.R. 31 All. 583. (2) (1911) I.L.R. 36 Mad. 348.

agreed to pay to third parties and did not pay within a reasonable time. In that case the plaintiff had not been damnified, so no question of indemnity arose. The Madras case was not intended to lay down any other doctrine of law than had been laid down in the Full Bench case in *Naima Khatun* v. *Sardar Basant Singh* (1) in a similar matter. I do not consider that the comments made by the Madras ruling in any way affect the dictum laid down by their Lordships of the Privy Council and I find myself unable to distinguish the present case in any way from the broad rule of law laid down by their Lordships. The question before us is a very simple one: Where there is an undertaking by the vendee to pay off a mortgage debt, as I consider the present sale deed implies, is or is there not an implied contract of indemnity, and if there is a contract of indemnity does the case therefore come for the purpose of limitation under article 83 of the Limitation Act when the plaintiff is actually damnified by the loss of his property as in the present case?

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The dictum of their Lordships of the Privy Council was not delivered in a suit in regard to limitation but article 83 has been applied to such suits by the following rulings: *Kaliyammal* v. *Kolandavela Goundar* (2). *Abdul Aziz Khan* v. *Muhammad Bakhsh* (3), *Kolavakolanu Seetanna* v. *Poddri Narayana Murthi* (4) (a suit on an agreement to discharge debts), *Tajammal Husain* v. *Raunak Ali* (5), *Onkar Singh* v. *Kashi Prasad* (6), *Kedar Nath* v. *Har Govind* (7) and *Sarju Misra* v. *Ghulam Husain* (8).

Learned counsel for the appellants among other rulings relied on *Raghubar Rai* v. *Jaij Raj* (9) and on *Ram Narain* v. *Nihal Singh* (10). Those were both cases in which the plaintiff was not damnified and therefore the question which arose was different and would

(1) (1933) I.L.R. 56 All. 766.
(2) (1916) 38 Indian Cases, 188.
(3) (1921) 64 Indian Cases, 431.
(4) (1919) 57 Indian Cases, 982.
(5) (1911) 13 Indian Cases, 979.
(6) (1933) I.L.R. 55 All. 490.
(7) (1926) 24 A.L.J. 550.
(8) (1920) 63 Indian Cases, 87.
(9) (1912) I.L.R. 34 All., 429.
(10) A.I.R. 1925 All. 488.

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not be a question under article 83 for indemnity, and it was a similar case in *Makund Lal* v. *Bhola Rai* (1) and again in *Abdul Majeed* v. *Abdul Rashid* (2). The relationship of these two kinds of suit has been well expressed in *Kolavakolanu Seetanna* v. *Poddri Narayana Murthi* (3): "It was also pointed out in that case, following *Jacob* v. *Down* (4), that a mere breach of one of the terms in the indemnity clause does not start the cause of action at once but that it is open to the party to waive the right and to wait till he is damnified. In the present case the covenant was entered into to relieve the first defendant and his assignees from all liability for debts contracted on behalf of the family. It is only when a suit was brought by the creditor to enforce an obligation which is binding on the family that the cause of action can be said to have arisen. Reading the clause in question as an indemnity clause, it is only when the plaintiff actually suffered damages that he became entitled to sue for reparation. It was not, therefore, until Veeraswami brought a suit to recover damages and the plaintiff was compelled to meet that decree that he was damnified. That was in 1915 and the suit was brought within three years from that date. The article applicable to this case is article 83 and the suit having been brought within three years of the damages, it is within time."

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For these reasons I am of the opinion that the suit of the plaintiffs in the present circumstances is within time and is not barred by limitation as it is a suit which comes under the provisions of article 83 of the Limitation Act.

BAJPAI, J.:—The facts underlying the cases which have given rise to the above appeals have been stated at length in the judgment of the ACTING CHIEF JUSTICE, and some of the authorities that have been cited before us at the Bar have also been considered by him. I wish to refer only to three cases. The first of them is

(1) [1931] A.L.J. 985.
(2) [1936] A.L.J. 940.
(3) (1919) 57 Indian Cases, 982(985).
(4) [1900] 2 Ch. 156.

the Full Bench case of *Naima Khatun* v. *Sardar Basant Singh* (1), wherein the true basis of the liability of the vendee where property is transferred and there is a direction to the vendee to pay off a third person was considered, and it was laid down there that the transaction may be of three characters and different remedies would be available to the vendor in each case:

(1) The amount left in the hands of the vendee may be a part of the purchase money remaining unpaid, in which case it is money belonging to the vendor and if not paid as directed can be recovered by enforcement of the statutory charge created by section 55, sub-section 5(*b*) of the Transfer of Property Act, which says that in the absence of a contract to the contrary there is a duty on the buyers to pay or tender at the time and place of completing the sale the purchase money to the seller or such person as he directs. There being nothing in the contract to the contrary, the personal liability to pay the amount must be implied and the vendor has the statutory charge on the property transferred for the amount of the purchase money not paid. This would be so, even though the vendor had left the money in the hands of the vendee for payment to a creditor, and where the property transferred is subject to a charge and money is left in the hands of the vendee to pay off that charge, the vendee would of course be entitled to pay the amount in discharge of the incumbrance and not pay it to the mortgagor direct. Such a suit is not of the nature of a suit for damages for breach of contract at all but a suit for recovery of amount due by enforcement of the charge. The position is similar to a person who mortgages his property as security for the payment of an amount due by him. The limitation for such a suit would be twelve years from the date of the original sale deed, for the charge is a statutory charge created by the document and time would begin to run for enforcement of such a charge from the date of that document

(1) (1933) LL.R. 56 All. 766.

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(2) It may amount to a covenant with an undertaking to relieve the vendor from his existing liability, in which case a suit on the covenant would lie. If the suit is for specific performance of the contract, then it would be governed by article 113 of the Limitation Act, and time would begin to run from the date when there was failure to perform it. A suit may also lie for compensation for breach of contract under article 115 or article 116 of the Limitation Act, and time would begin to run from the time when the contract was broken, or, in the case of successive breaches, from the date when the last breach occurred, or in the case of a continuing breach, when it ceased. It would not be necessary in cases of the second kind for the plaintiff vendor to prove actual loss.

(3) It may be a mere promise to perform an act for consideration or a contract of indemnity in which case a suit for damages incurred on the breach of the contract would lie under section 125 of the Contract Act, but it must then be proved that the loss has been sustained. It is wrong to suppose that time for a suit for damages for such a breach of contract would have commenced to run from the original failure to perform the contract even before any damages were sustained, for the damage caused would undoubtedly give a fresh cause of action for a suit for damages.

The dictum in the case of *Raghubir Rai* v. *Jaij Raj* (1), to the effect that one breach of a contract can furnish only one cause of action and no more and the actual loss when it accrues is only one of the results of the breach and creates no second cause of action was considered to be *obiter* and was not approved of.

In the case of *Ram Chander* v. *Ram Chander* (2), sitting with SULAIMAN, C. J., I had to consider the same point and my views are expressed at length in that case, and we followed the Full Bench case just referred to.

(1) (1912) I.L.R. 34 All. 429. (2) A.I.R. 1936 All. 870.

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In a contract of sale like the present one, there is obviously a contract of indemnity implied. In the case of *Izzat-un-nisa Begam* v. *Partab Singh* (1) their Lordships of the Privy Council, while considering a different point, observed at page 589 that a contract of indemnity may be expressed or implied and if the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity.

The vendees in the cases before us covenanted with the vendors not only to pay the purchase money in a particular manner but to relieve the vendors from the liability of the mortgages, and in that sense there was a contract to indemnify. The cause of action in such cases arises when the plaintiffs vendors are actually damnified. In the present case damage occurred to the plaintiffs when their property, which they thought they would be able to obtain unfettered with the mortgages, was sold on an action brought by the mortgagees, and I am of the opinion that under article 83 the plaintiffs have three years from the time when they were damnified, and as such a contract of indemnity was contained in a sale deed in writing registered. the time is extended to six years.

I have no doubt that several causes of action accrue to the plaintiff when he sells property with a direction to the vendee to pay a third person according to the nature of the transaction, and different periods of limitation as prescribed by the Limitation Act will be applicable according to the nature of the relief claimed. I agree that the question referred to the Full Bench should be answered by saying that the plaintiffs' suit is not barred by time.

GANGA NATH, J.:—I agree with the ACTING CHIEF JUSTICE and Mr. JUSTICE BAJPAI in finding that the present case is one of contract to idemnify and comes under article 83 of the Indian Limitation Act. The property in this case was sold and the whole of the

(1) (1909) I.L.R. 31 All. 583.

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consideration was left for the specific purpose of paying off a part of the incumbrance that existed on the property sold and other property. The object of the sale was to save another property. It has been urged by learned counsel for the appellants that inasmuch as the whole of the incumbrance was not to be paid off by the money that had been left with the appellants, they were not bound to pay off the money that was left with them. There is no doubt that the whole of the incumbrance was not to be paid off by the appellants, but there is no reason why they should not be held liable for that portion of the incumbrance which they undertook under the sale deed to pay off with the money that was left with them. It was further argued on behalf of the appellants that there was no express clause of indemnity in the contract, so the contract could not be regarded as one of indemnity. In order to make a contract of indemnity, it is not necessary that there should always be an express clause of indemnity. A contract of indemnity may be express or implied. As observed by their Lordships of the Privy Council in *Izzat-un-nisa Begam* v. *Partab Singh* (1), "If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity." In the present case, as stated above, the vendee had covenanted with the vendor to pay the incumbrance on the property to the extent of the money that was left with him The present contract therefore is one of indemnity and the appellants are liable to indemnify the vendor against the loss sustained by the vendor by their default. The cause of action for the suit arose when the vendor was damnified and the suit was brought within six years and is consequently within time.

BY THE COURT:—Let the case be returned to the Division Bench with the finding that the plaintiffs' suit is not barred by limitation.

(1) (1909) I.L.R. 31 All. 583(589).