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JUGGA SINGH v. MUSAMMAT RANJITA.

Mahesh Prasad had arrived at a stage where Musammat Ranjita was compelled to hand over her property to B. Mahesh Prasad on payment of Rs. 1,200, whether she wished to resile from the bargain or whether she did not wish to resile from it, and when Musammat Ranjita was certain to lose the property, Jugga Singh and Chedda Singh would have a right to take the place of Mahesh Prasad on payment of the money to Musammat Ranjita. But where, as here, Mahesh Prasad has not expressed any desire to obtain the property and has himself resiled from the bargain, Jugga Singh and Chedda Singh have no right in the matter. For the above reasons we uphold the decision of the courts below and dismiss this appeal with costs.

Stuart, C. J., and Raza, J.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.

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MUHAMMAD AINUL HAQ AND OTHERS (PLAINTIFFS-APPELLANTS), v. ABDULLAH KHAN AND OTHERS (DEFENDANTS-RESPONDENTS).*

Damages, suit for—Breach of contract—Person agreeing to satisfy a mortgage-debt incurred by another making default—Suit for damages for breach of contract—Cause of action, accrual of—Civil Procedure Code (Act V of 1908) section 151—Appellate Court's power to reverse a judgment on a point not appealed against.

Where a person agrees to satisfy the debt on a mortgage incurred by another, the cause of action for a suit for damages for failure to satisfy the mortgage does not, in the absence of a covenant fixing a particular date for the payment of the mortgage-money, arise until it has been put finally out of the power of the transferee to satisfy the mortgage-debt. Where the transferee has still an opportunity of satisfying

*First Civil Appeal No. 79 of 1926, against the decree of S. Shaukat Husain, Additional Subordinate Judge of Gonda, dated the 25th of February, 1926.

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the mortgage-debt, it cannot be said until that opportunity has passed whether he has or has not committed a breach of contract.

It is certainly unusual for a court of appeal to reverse a decision of the court below on a point which has not been appealed against, but when it is brought to the notice of the court of appeal that there is a fundamental defect in a suit which has been undetected by the court below it is the duty of the court of appeal to give effect to the result of its observations, otherwise it would not function as a court of justice or equity. The court of appeal has clearly powers under section 151 of the Code of Civil Procedure to take action in this respect. *Raghubar Rai* v. *Jaij Raj* (1), dissented from.

Messrs. *Mahmud Beg* and *Shaukat Ali*, for the appellants.

Mr. *Zahur Ahmad* for Mr. *Mohammad Ayub*, for the respondents.

STUART, C. J., and RAZA, J. :—The facts of the suit out of which this appeal arises are as follows. Karimdad Khan, owned a 2 anna share in Manapar Baheria. Zafar Mohammad Khan owned a 1 anna share in the same village. Karimdad Khan and Zafar Mohammad Khan mortgaged jointly the 3 annas on the 15th of April, 1909. On the 4th of February, 1913, Karimdad Khan sold 1 anna out of his 2 annas share to Abdulla Khan for the following consideration. Abdulla Khan paid Rs. 154 in cash only, and agreed to settle in full three debts. One of the debts which he agreed to settle in full was the amount due on the mortgage of the 15th of April, 1909. We have examined this deed, and it is perfectly clear that Abdulla Khan undertook as a part of the consideration for his purchase full liability to satisfy the mortgage in favour of Jang Bahadur Khan. The amount stated to be due at the time of the execution of the deed of sale was Rs. 3,000. That

(1) (1912) I. L. R., 34 All., 429.

was, however, an estimate. The undertaking on the part of the vendee Abdulla Khan was to settle the debt. This 1 anna share has since been the subject of many transfers. Abdulla Khan did not keep it long, for Abdul Jabbar Khan and Mumtaz Khan asserted effectively a right of pre-emption and obtained the share, and since then there have been other transfers. But the essential fact remains that whoever remains as the transferee of this 1 anna share has to meet the liability to satisfy the mortgage-deed in favour of Jang Bahadur Khan. Now what has happened has been this. Jang Bahadur Khan's representatives-in-interest have instituted a suit upon the mortgage and under the mortgage they have a right to proceed against the whole of the 3 annas, not only the 1 anna share which has gone out of the possession of Karimdad Khan's family, but the 1 anna which has remained in their possession and the 1 anna which is in the possession of Zafar Mohammad Khan. The heirs of Karimdad Khan and Zafar Mohammad Khan brought the suit out of which the present appeal has arisen against every person who had an interest or had had an interest in the 1 anna share transferred by sale and claimed the recovery of Rs. 8,625, with future interest, in respect of the failure of those responsible to satisfy the mortgage-debt due to Jang Bahadur Khan. They further asked for a charge on the 1 anna share transferred by sale. The court below has arrived at the conclusion that the suit was not premature but that it was barred by limitation. The plaintiffs have appealed. They naturally have desired to support the decision that the suit was not premature, for if they took the plea that the suit was premature it would have to be dismissed, and the respondents have naturally not wished to disturb the decision as they hoped to gain in appeal on the ground

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that the suit was barred by limitation. It is certainly unusual for a court of appeal to reverse a decision of the court below on a point which has not been appealed against, but when, as is the case here, it is brought to the notice of the court of appeal that there is a fundamental defect in a suit which has been undetected by the court below it is a duty of the court of appeal to give effect to the result of its observations; otherwise it would not function as a court of justice or equity. We have clearly powers under section 151 of the Code of Civil Procedure to take action in this respect. Our view is that the suit should be dismissed not for the reasons set forward by the learned trial Judge but for completely different reasons. In our opinion the suit is premature. The case for the appellants is as follows. They say that as part of the consideration for the transfer of a 1 anna share in the village the transferee agreed to take full responsibility for the satisfaction of a certain mortgage. They say that as he has not satisfied the mortgage they have a cause of action. They are certainly supported to some extent in this view by the decision in *Raghubar Rai and others* v. *Jaij Raj* (1), but we are unable, with due respect to the learned Judges who decided that appeal, to agree with the view that they took. According to that view when a person agrees to satisfy the debt on a mortgage incurred by another the cause of action for a suit for damages for failure to satisfy the mortgage arises on the date of the agreement in absence of a covenant fixing a particular date for the payment of the mortgage-money. If this view be accepted the suit was not premature. But the appellants would not gain by the acceptance of this view in the circumstances of this particular case for in that event the suit would be time-barred.

(1) (1912) I.L.R., 34 All., 429.

In our view, in a case such as this, the cause of action does not arise until it has been put finally out of the power of the transferee to satisfy the mortgage-debt. In this case the transferees have still an opportunity of satisfying the mortgage-debt and it cannot be said until that opportunity has passed whether they have or have not committed a breach of contract. When Abdulla Khan agreed to satisfy the amount due on the mortgage held by Jang Bahadur Khan and agreed that this liability should form a portion of the consideration for the property transferred to him it was open to him to satisfy the debt when he wished provided he satisfied it. If he chose to allow the interest to run on and pay more, that was his own affair. He could not be compelled to pay the money within any specified time. He had to pay it before it was too late. That was all. This is not the view which was taken by the learned Judges who decided the Allahabad case, but this is our view. In these circumstances the suit was not time-barred, but it was premature. It remains to be seen whether any of the transferees will settle the mortgage-debt. If they do so, the plaintiffs will have no cause of action. If they do not do so, the plaintiffs will then have a cause of action in a suit for damages. In these circumstances, although we take a view exactly contrary to the view taken by the trial court, we uphold its decree. The suit must stand dismissed as having been premature. The appellants will pay their own costs and those of the respondents.

Stuart, C. J., and Raza, J.

Appeal dismissed.