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complaint of Suraj Lal and the evidence of the eye-witnesses examined in support of the complaint were false. This special pleading found favour with the learned trial Magistrate, who without recording any order directing that a complaint be filed as required by section 476 of the Code of Criminal Procedure drew up a complaint against Suraj Lal and his witnesses and addressed that complaint to the Sub-Divisional Magistrate of Tarabganj on the 4th of September, 1933. Not only was the procedure adopted by the learned trial Magistrate illegal and unjustifiable, but on the merits too there was no case made out against Suraj Lal and his witnesses.

For the reason given above I allow this application for revision, set aside the order of the learned Sessions Judge of Gonda refusing to withdraw the complaint filed by Mr. Gundevia against the applicants and direct that that complaint be consigned to the record-room without any further enquiry into the alleged offences mentioned therein.

Application allowed.

APPELLATE CIVIL

Before Mr. Justice Rachhpal Singh and Mr. Justice H. G. Smith

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 March, 28

BAIJ NATH (DEFENDANT-APPELLANT) *v.* PARMESHURI
 DAYAL AND ANOTHER (PLAINTIFFS-RESPONDENTS)*

Indian Limitation Act (IX of 1908). Articles 111 and 116—Sale of property subject to mortgage—Sale consideration left with vendee to pay off mortgage—Stipulation that balance after payment of mortgage to be returned to vendor—Suit to recover balance, whether governed by Article 111 or Article 116—Commencement of the period of limitation—Articles 111 and 116, Limitation Act, when apply—Transfer of Property Act (IV of 1882), sections 3 and 6(e)—Actionable claim—Right to

*Second Civil Appeal No. 161 of 1932, against the decree of Babu Gopendra Bhushan Chatterji, Subordinate Judge of Rae Bareli, dated the 11th of May, 1932, modifying the decree of Sheikh Ekbal Husain, Munsif. Dalmau, Rae Bareli, dated the 31st of July, 1931.

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unascertainable damages is mere right to sue and is not transferable—Right to ascertained amount is actionable claim and is transferable.

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Where a property which is subject to a mortgage is sold and out of the sale consideration a sum of money is left with the vendee for payment to the mortgagee and in the sale-deed there is a stipulation that if any surplus is left in the hands of the vendee after the redemption then he would return the same to the vendors, a suit to recover the balance remaining after the redemption of the mortgage is governed by Article 116 and not by Article 111 of the Limitation Act and the period of 6 years provided in that article commenced from the date of the breach which occurred for the first time when in the suit instituted by the vendee for redemption, the court of first instance found that a smaller sum than the amount left with the vendee was due. *Mukta Pershad v. Abdul Razzaq* (1), dissented from. *Ram Rachhya Singh Thakur v. Raghunath Prasad Misser* (2), *Ram Raghbir Lal v. The United Refineries, Burma, Ltd.* (3), and *Mehar Chand v. Shanti Sarup* (4), relied on. *Sivasubramania Ayyar v. Subramania Ayyar* (5), *Abdulla Beary v. Mammali Beary* (6), and *Indar v. Raghbir Singh* (7), referred to.

Article 111 of the Limitation Act is applicable only in two cases, and in no other. One is where the suit is to recover unpaid purchase-money after the completion of the sale. Then the suit has to be instituted within a period of three years from the date of the completion of the sale. The other is the case where the title is accepted after the time fixed for completion, when the suit should be instituted within three years from the date of the acceptance.

According to the definition of an actionable claim, as contained in section 3 of the Transfer of Property Act, the right to recover an unascertained amount of damages resulting from a breach of contract is not an actionable claim, but a mere right to sue which cannot be transferred because of the provisions of section 6(e) of the Transfer of Property Act. But the right to recover an ascertained amount, in other words, the right of vendor to recover a debt, is an actionable claim and is transferable. *Moti Lal v. Radhey Lal* (8), referred to.

Messrs. *M. Wasim, Ali Zaheer and Bhagwati Nath Srivastava*, for the appellant.

(1) (1916) 33 I.C., 527.

(3) (1930) I.L.R., 9 Rang., 56.

(5) (1916) I.L.R., 39 Mad., 537.

(7) (1929) 7 O.W.N., 12.

(2) (1929) I.L.R., 8 Pat., 860.

(4) (1929) A.I.R., Lah., 395.

(6) (1910) I.L.R., 38 Mad., 415.

(8) (1933) I.L.R., 55 All., 814.

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Messrs. *Akhtar Husain* and *Siraj Husain*, for the respondents.

RACHHPAL SINGH and SMITH, JJ.:—This is a defendant's second appeal arising out of a suit to recover a sum of money.

The facts which have given rise to this appeal may briefly be stated as follows:

Lallu and Mahadeva were the owners of a certain shop in Lalganj bazar which they mortgaged to one Ram Kishore for Rs.2,500. Later on, on the 31st of August, 1925, Lallu and Mahadeva sold their equity of redemption in the abovementioned shop to Baij Nath for a sum of Rs.4,475. Out of the sale consideration a sum of Rs.2,500 was left with the vendee, Baij Nath, for payment to Ram Kishore in satisfaction of the abovementioned mortgage. In the sale-deed there was a stipulation that if any surplus was left in the hands of the defendant after the redemption of the shop, then he would return the same to the vendors. Baij Nath brought a suit for redemption against Ram Kishore, and ultimately succeeded in redeeming the property on payment of a sum of Rs.1,090. There remained a balance of Rs.1,410 in his hands out of the sum of Rs.2,500 which had been left with him under the terms of the sale-deed mentioned above. Lallu died, and Mahadeva on the 1st of September, 1930, assigned his rights to the plaintiffs. The plaintiffs thereupon sued the defendant for the recovery of the amount due, together with interest. The claim was resisted by the defendant on various grounds. One of the pleas taken in defence was that under the deed of assignment set up by the plaintiffs a mere right to sue had been transferred to them, which was void in view of the provisions of section 6(e) of the Transfer of Property Act, and the other was that the suit was not within limitation. In addition to these two pleas, some other defences were also set up, but it is not necessary for us to consider them in this appeal. The suit has been decreed partially by the

lower appellate court, and the defendant has come up in second appeal to this Court. Cross-objections have been filed by the plaintiffs claiming that they should have been allowed much more interest than was allowed them by the lower appellate court.

In this appeal before us the above-mentioned two pleas in defence were again urged. The learned Counsel appearing for the appellant also took a plea to the effect that no interest should have been allowed to the plaintiffs at all, but he abandoned it eventually. We have, therefore, only to consider the other two pleas, and we proceed to do so.

In our opinion the plea that section 6(e) of the Transfer of Property Act is applicable to the assignment set up by the plaintiff has no force, so far as it relates to the assignment relating to the right to recover the balance left in the hands of the defendant, and it must, therefore, fail. The point for our consideration is what was assigned to the plaintiff under the deed of assignment. If it was a mere right to sue for unliquidated damages arising out of a breach of contract, after the breach, then certainly section 6(e) of the Transfer of Property Act would be applicable. According to the definition of an actionable claim, as contained in section 3 of the Transfer of Property Act, the right to recover an unascertained amount of damages resulting from a breach of contract is not an actionable claim, but a mere right to sue, which cannot be transferred because of the provisions of section 6(e) of the Transfer of Property Act. In the case before us, we find that the plaintiffs purchased a right to recover an ascertained amount, in other words, they purchased the rights of two vendors to recover a debt, which right is an actionable claim, and is transferable. The subject is discussed in *Moti Lal v. Radhey Lal and others* (1). It was decided there that where the assignment related to a debt, the amount of which was ascertained, then the transfer of such a right was valid,

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and was not in contravention of the provisions of section 6(e) of the Transfer of Property Act. We are, therefore, of opinion that the decision of the lower appellate court on this question is right, and cannot be disturbed.

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The next question for our consideration is that of limitation. A few dates may be kept in view in connection with this plea. The sale-deed in favour of the defendant-appellant was executed on the 31st of August, 1925. The redemption suit which Baij Nath defendant instituted was decreed by the court of first instance on the 8th of December, 1926. In pursuance of this decree, Baij Nath deposited in court for the mortgagee the redemption money on the 16th of December, 1926. There was an appeal against the aforesaid decree, which was dismissed on the 1st of June, 1927. The final decree for redemption was passed by the trial court on the 29th of August, 1927. The mortgagee preferred a second appeal to this court, which was dismissed on the 5th of March, 1928, the decrees made by the courts below being confirmed. The suit which has given rise to this appeal before us was instituted on the 5th of December, 1930. In his written statement, the defendant contended that the suit was not within limitation, and the trial court stated that the plea of limitation was half-heartedly pressed. No article of the Indian Limitation Act was quoted with reference to which the plea of Limitation was pressed. Before the lower appellate court, however, the defendant made his position clear by asserting that the suit was governed by article 111 of the Indian Limitation Act. On the other hand, the plaintiffs contended that article 116 was applicable. The learned Subordinate Judge who heard the appeal came to the conclusion that article 116 of the Indian Limitation Act was applicable, and, therefore, the suit, which was instituted within six years from the date of the preliminary decree, was within limitation. The question which we are called upon to decide is which of these articles is appli-

icable to the case before us. Article 111 provides a period of three years for a suit by a vendor of immoveable property for a personal payment of unpaid purchase-money. The starting point is either the date fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance. In the case before us the sale was completed on the 31st of August, 1925. The words "for personal payment of unpaid purchase-money", appearing in article 111, are important. If the suit is for personal payment, then it is to be governed by article 111 of the Indian Limitation Act. The vendor has, under the Transfer of Property Act, a statutory lien for the unpaid purchase-money, and he can enforce that lien or charge on the property sold as soon as the property in the estate sold has passed to the vendee by the execution of the sale-deed. For the enforcement of such a charge the vendor has 12 years within which to sue, and article 132 applies when he seeks to enforce his statutory lien. The learned Judge of the lower appellate court, relying on a ruling of this Court, *Mukta Pershad and another v. Abdul Razzaq and others* (1), has held that the vendor could not have enforced his statutory lien. With great respect to the learned Judge who decided this case, we find ourselves unable to agree with the view taken by him. He relied on a ruling of the Madras High Court, *Abdulla Beary v. Mammali Beary and another* (2). But we may point out that the view expressed in *Abdulla Beary v. Mammali Beary* (2) was subsequently dissented from in *Sivasubramania Ayyar v. Subramania Ayyar* (3). We think that the vendor in the case before us could have claimed his statutory lien under section 55 of the Transfer of Property Act. The learned Judge of the lower appellate court was of opinion that the vendor in the case before us was not claiming any portion of the unpaid purchase-money. We find ourselves unable to agree with this view. The amount which the plaintiffs

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(1) (1916) 33 I.C., 527.

(2) (1910) I.L.R., 33 Mad., 446.

(3) (1916) I.L.R., 39 Mad., 997.

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seek to recover can be nothing else but the "unpaid purchase-money". For the purpose of deciding the point in issue, it is immaterial whether the money has become due under an express agreement or otherwise. In any case it is "unpaid purchase-money". It was possible that the entire sum of Rs.2,500 which was left with the vendee would have to be paid to the mortgagee. As soon as it was found that a part of it remained with the vendee after satisfying in full the mortgage-debt, the balance remained available to the vendor.

We are of opinion that article 111 of the Limitation Act is not applicable to the case. Our reading of article 111 is that it is applicable only in two cases, and in no other. One is where the suit is to recover unpaid purchase-money after the completion of the sale. Then the suit has to be instituted within a period of three years from the date of the completion of the sale. The other is the case where the title is accepted after the time fixed for completion, when the suit should be instituted within three years from the date of the acceptance. In the case before us the sale was completed, and property in the estate sold passed to the vendee, on the 31st of August, 1925. In order to decide the point in issue we have to consider the terms of the sale-deed in this case. Now, can it be said that the vendor could have instituted a suit for the recovery of the unpaid purchase-money against the vendee before the decision of the question what amount was due to the mortgagee? We think not. Suppose that the vendor had instituted a suit against the vendee asking for the return of the sum of Rs.2,500. His suit would have been immediately thrown out on the ground that under the terms of the sale-deed the money was left for payment of the mortgagee. The vendee would have said in reply: "The sum is left with me for payment of the mortgagee. I do not know what amount is due to him. No part of this sum, under the agreement of sale, is returnable until the question what is due to the mortgagee is finally settled. There

would have been no answer to this plea. No suit would have been competent under the terms of the sale-deed so long as the amount due to the mortgagee was not determined. There was a possibility that within three years from the date of the sale the question might not be decided. Suppose that in this case the vendee had not instituted a suit for more than three years for redemption, could it be then said that the plaintiff had become entitled to recover any money, and that he had to sue within three years from the date of the completion of the sale? We think not. The seller's right to refund would arise only when it was found that after satisfying the prior charge some money still remained in the hands of the vendee. Before that point is decided he has no right of suit against the vendee. We must, therefore, hold that article 111 of the Indian Limitation Act is not applicable to the case.

In our opinion article 116 of the Indian Limitation Act is applicable to the case. Article 116 provides a period of six years for a suit for compensation for the breach of a contract in writing registered. The period would commence from the date of the breach. In the case before us the breach did not occur on the date on which the sale took place. The breach occurred for the first time when in the suit instituted by the defendant for redemption the court of first instance found that a smaller sum than the amount left with the vendee was due. After that date the defendant had no right to keep back the balance, and his act in not returning the amount of the balance constituted the breach. The period of six years would commence from that date. Before that date the vendor could not have instituted a suit for the recovery of any part of the sum of Rs.2,500 for the simple reason that there had been no breach. This view finds support in *Ram Rachhya Singh Thakur v. Raghunath Prasad Misser* (1), where it was held that six years would run from the date of the breach of the contract, which

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(1) (1929) I.L.R., 8 Pat., 860.

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in the case before us is the date of the decree passed by the first court. The learned Judges in the above cited case observe, at pages 869 and 870 :

“It has now been definitely held that Article 116 applies not only to a suit for a specified sum of money due on a registered bond but also to a suit like the present where the vendee having agreed to apply a portion of the purchase-money to the payment of a previous debt due by the vendor, fails to apply it in that way and a suit is brought to recover that amount from him. . .”

As regards the starting point of limitation they observe at page 874 :

“The question then arises as to when the contract was actually broken. Obviously it must be deemed to have been broken (1) when the liability under it was expressly repudiated by the defendant No. 1; (2) when the performance of the contract became impossible on account of the debt due to Palakdhari having been satisfied or paid off.”

We are in agreement with this view. In the case before us, the contract was broken by the defendant on the 8th of December, 1926, when the decree of the court of first instance in the redemption suit was passed. A specified sum was found due to the mortgagee, and the defendant came to know that the balance became refundable. As he did not return the balance, there was a breach of contract, and the limitation began to run from that date. We may also point out that in *Ram Raghbir Lal and others v. The United Refineries (Burma) Ltd.* (1), and *Mehar Chand v. Shanti Sarup* (2), it was decided that to a suit of this description article 116 is applicable. For the reasons given above, we hold that the learned Judge of the lower court was right in holding that the suit is governed by article 116 of the first schedule of the Indian Limitation Act and having

(1) (1930) I.L.R., 9 Rang., 56.

(2) (1929) A.I.R., Lah., 395.

been instituted within six years from the date of the breach, is within limitation.

The plaintiffs have filed cross-objections. Only one point was pressed, and this was that the lower appellate court was wrong in not awarding interest to the plaintiffs from the date of the sale-deed till the date on which they purchased the rights of the vendors under the deed of assignment. In our opinion the decision of the learned Judge cannot be assailed on this point. According to the view expressed in a Bench ruling of this Court, *Indar v. Raghbir Singh and others* (1), the plaintiffs, so far as the claim to interest due before the date of assignment is concerned, purchased a mere right to sue, which was not transferable in view of the provisions of section 6(e) of the Transfer of Property Act, and so their claim to interest was rightly rejected as regards any period other than that for which the lower appellate court allowed it.

For the reasons given above, we dismiss the appeal with costs. The cross-objections are also dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Rachhpal Singh and Mr. Justice H. G. Smith
PANDIT ADYA SHANKAR TEWARI AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* MUSAMMAT CHANDRAWAT (DEFENDANT-RESPONDENT)*

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April, 10

Hindu Law—Family settlement—Woman's estate—Widows of a person and his male relations each claiming entire estate—Widows getting part of estate under family settlement—Widows claiming to have got absolute estate in property received by them under family settlement—No presumption that the estate got by widows must have been a limited one

*First Civil Appeal No. 40 of 1932, against the decree of Sheikh Ali Hammad, Additional Subordinate Judge of Sultanpur, dated the 29th of February, 1932.

(1) (1929) 7 O.W.N., 12.

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