paying the money to them was that they were willing to trust him with the money. That decision has therefore no application to the present case. The accused Debendranath Ganguly kept these monies which were entrusted to him as a public servant for periods of seventeen, thirteen and ten days in violation of the rules by which he was bound. This in itself raises a case which he has to answer. He gave a false explanation that the monies had not been received until the 9th of June. He also made entries in his register showing that the articles were still undelivered in the post office long after they had been delivered and the money for them had been received. This amounts to a denial of the receipt of the money and is conclusive evidence of criminal breach of trust. In my opinion, therefore, Debendranath Ganguly was properly found guilty of the charges framed against him.

The result is that the appeal of Chandra Prasad is allowed and his conviction and sentence are set aside and he is ordered to be acquitted and released from bail. His fine, if paid, will be refunded. The appeal of Debendranath Ganguly is dismissed; and he will surrender to his bail to undergo the rest of his sentence.

KULWANT SAHAY, J.—I agree.

PRIVY COUNCIL.

GANESH LAL PANDIT

v.

KHETRAMOHAN MAHAPATRA.*

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March, 23.

Limitation Act, 1877 (*Act XV of* 1877), *Schedule II, Articles* 66, 132—*Mortgage—personal covenant—decree for sale—deficiency—Hindu Law—Hindu widow—alienation—necessity—decree by co-sharers for contribution.*

*Present: Viscount Dunedin, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

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A suit to enforce a personal covenant in a mortgage deed is not one "to enforce payment of money charged upon immoveable property" within the Indian Limitation Act, 1877, Schedule 2, Article 132.

Where upon a sale under a mortgage decree, which includes no personal decree against the mortgagor, there is deficiency, a claim to recover the balance under a personal covenant in the mortgage is barred by Article 66 unless it is made within a period of three years from the date when the debt became payable; the period does not begin to run only from the date when the deficiency is ascertained by the sale.

Ramdin v. *Kalka Pershad* (1), applied.

Miller v. *Runga Nath Moulick* (2), approved.

Where a Hindu widow has failed to pay her share of revenue on a mauza, a share in which forms part of the estate of her deceased husband, and the co-sharers have attached part of the estate under a decree for contribution, an alienation by the widow of part of the estate for the purpose of discharging the decree is for necessity, and is binding upon the reversionary heirs.

Upendra Lal Mukerji v. *Grindra Nath Mukerji*(3), distinguished.

Judgment of the High Court varied.

Appeal by the defendants.

Appeal (no. 96 of 1923) from a decree of the High Court at Patna (January 16, 1922) varying a decree of the Subordinate Judge of Cuttack (January 30th, 1919).

The plaintiff, upon whose death the respondents (her sons) had been substituted, claimed as reversionary heir of her deceased father, a Hindu, to set aside certain alienations of his estate made by her mother Suryamani, deceased. The alienations consisted of a mortgage and sale both made in 1884, and certain conveyances made in 1899.

(1) (1884) I. L. R. 7 All. 502; L. R. 12 I. A. 12.
(2) (1885) I. L. R. 12 Cal. 389.
(3) (1898) 2 Cal. W. N. 425.

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The facts are fully stated in the judgment of the Judicial Committee.

The Subordinate Judge dismissed the suit. Upon appeal the High Court (Das and Adami, JJ.) varied the decree by declaring that the conveyances made in 1899 were invalid. The reasons for the decisions are stated in the judgment upon the present appeal.

DeGruyther, *K. C.* and *Dube* for the appellants.

The respondents did not appear.

March, 23.

The judgment of their Lordships was delivered by—

MR. AMEER ALI.—Their Lordships are relieved of the necessity of narrating at length the facts of this complicated litigation, as the judgment under appeal summarises very clearly the history of the transactions in debate.

This is an ex parte appeal from the judgment and decree of the High Court of Patna which partly affirmed and partly reversed the order of the court of first instance.

A Hindu lady of the name of Suryamani, who died in 1904 or 1905, conveyed by mortgage and sale to one Behari Lal Pandit the father of the defendant no. 1, almost the whole of the property which had devolved on her as the widow of one Banamali Mahapatra, a native of Orissa, subject to the Mitakshara law. Banamali appears to have died in the year 1863, leaving him surviving his widow, Suryamani, and two daughters, one of whom died not long after, childless; the other Satyabhama, survived her mother, and was the original plaintiff in the present suit, which was instituted in the court of the Subordinate Judge of Cuttack on the 17th September, 1916. Satyabhama challenged in the action the validity of the transactions entered into between Suryamani and Behari Lal Pandit in respect of the

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properties conveyed to him by the widow. On Satyabhama's death her sons, the present respondents, were substituted in her place.

It is not disputed that Suryamani, on coming into possession of the properties left by her husband, had to meet heavy expenses connected with the litigation in which Banamali was involved The High Court, in its judgment, refers to the circumstances which compelled her to alienate many of the properties which formed the subject of controversy in the present case.

In respect of the others the learned Judges of the High Court, differing from the trial Judge, have held firstly that the documents which purported to create the alienations were not properly explained to the lady, that she was an ignorant pardanashin woman and had no independent advice; and secondly, that some of the alienations challenged by the plaintiffs were either for debts that were barred or not binding on the reversioners. They have also held that the principal mortgage purporting to have been executed by Suryamani was not executed in compliance with the provisions of the law so as to make it binding on Suryamani.

It is with regard to these findings that the present appeal before the Board is concerned.

On the defendants' side it is alleged that on the 23rd July, 1884, Suryamani entered into two transactions with Behari Lal Pandit: one was a mortgage for Rs. 30,500, the other a sale to him of certain properties for Rs. 8,000. The sale-deed is marked in the proceedings as Exhibit Q. 6, and the deed of mortgage as Exhibit M.

In 1896 Behari Lal Pandit instituted a suit against Suryamani and her daughter Satyabhama for enforcement of the mortgage On the 28th August, 1896, Behari Lal Pandit obtained an ex parte decree.

Their Lordships do not think it necessary to refer to the steps taken by the ladies to set aside the ex parte

decree; it is enough to say that they failed in those proceedings and on the 25th and 26th August, 1897, the mortgage decree was executed, and the mortgaged properties were put up for sale and purchased by Behari Lal himself for Rs. 33,000 odd. At the time of the sale the mortgage debt amounted to something like Rs. 80,000. In order to pay the balance of the mortgage debt Suryamani entered into a razinama or deed of compromise by which she agreed to transfer to Behari Lal her remaining properties in her hands belonging to the estate of her husband. In pursuance of this razinama she appears to have executed in 1899 a number of conveyances which are marked in the proceedings as Q., Q. 1, Q. 2, Q. 3 and Q. 4. Q. 5, executed about the same time, stands in a different category.

As already stated Satyabhama, and after her death, the plaintiffs, as reversioners to Banamali's estate, challenged the sale-deed of the 23rd July, 1884, by which Behari Lal purchased some of the property on the 23rd July, 1884. They also challenged the mortgage deed of the same date and the transactions of 1899, evidenced by Exhibit Q., Q.1, Q.2, Q.3, Q.4 and Q. 5.

The learned Judges of the High Court have held that the defendants had established legal necessity in respect of the mortgage of the 23rd July, 1884, and that consequently the sale under the mortgage decree was valid, but that they had failed to satisfy that the sale of the 23rd July, 1884, Q. 6, was for justifiable necessity, or that she had in fact executed the sale-deed, or that it was read over and explained to Suryamani, and that apart from that she had no independent advice. They also held that the kabalas executed by the widow in 1899 were not binding on the reversioners.

In their Lordships' opinion the evidence fully justifies the conclusions of the learned Judges. The

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deed of sale (Q. 6) was executed for Suryamani by a person of the name of Lakhan Mahanty, under a power-of-attorney which bears date the 29th of July, 1884, six days after the sale in question. The substance of the powers entrusted to Lakhan are set out in the Register of Powers of Attorney for 1884 as follows:—

"General Powers—To execute and register a mortgage bond of Rs. 33,500 and a deed of sale of Rs. 8,000 in favour of Babu Behari Lal Pandit."

It will be noticed that this power was registered on the 29th of July, whilst the sale was effected on the 23rd. Neither of the two witnesses to the execution of the power was examined. Under the Registration Act of 1877 the same provisions are made as under the Act now in force for safeguarding the interests of absent executants of documents when presented for registration by a person claiming to act by and under their alleged authority. Section 32 provides that

"every document to be registered under the Act whether such a registration be compulsory or optional, shall be presented by such person executing or claiming under the same.....or by the representative or assignee of such person or by the agent of such person represented or assignee *duly authorised* by power-of-attorney duly executed and authenticated in the manner hereinafter mentioned."

Their Lordships concur with the High Court in holding that the sale-deed of the 23rd July, 1884, which purported to be executed by Lakhan Mahanty for Suryamani was not validly executed and that the sale thereunder could not bind either Suryamani or the reversioners.

As regards the kabalas by which Suryamani purported to transfer her remaining properties to Behari Lal Pandit in discharge of the balance remaining over after the sale under the mortgage decree, their Lordships also agree with the High Court that the claim on the personal covenant for the balance of the mortgage-debt was barred by the Indian Limitation Act (XV of 1877), long before the execution of the rasinama and the conveyances thereunder. It will be noticed that the mortgage of the 23rd July, 1884, by

which Suryamani borrowed Rs. 33,500 from Behari Lal Pandit on interest at the rate of 1 per cent. per mensem was repayable by her within six months from the date of the execution of the document. The covenant on her failure to repay is as follows :—

"If I fail to pay the whole of the principal and interest within the aforesaid term the creditor is competent to sue me in the court and realise the principal with interest thereon at the rate of Re. 1 per cent. per mensem from this day till the date of realisation and costs of the suit from me and from the mortgaged properties, and, if insufficient, from my other movable and immovable properties."

The decree on this mortgage, Exhibit T. (1), made on the 28th August, 1896, was in the following terms :—

"This suit is for recovery of the principal of Rs. 33,500-0-0 and the balance of interest of Rs. 47,228-8-0 in all Rs. 80,728-8-0 and the interest which will accrue from the date of institution of the suit till that of realisation and the costs of the suit from the defendant and if not fully realised from her then from the mortgage properties, except those exempted from mortgage liability at the request of the defendant no. 1 by putting them up for sale and if insufficient the balance be realised from the surety defendant no. 2 and her properties."

The suit on the mortgage bond was not instituted until ten years after the debt became repayable. The decree for the balance, if the sale of the mortgaged properties proved insufficient, was against Satyabhama, who had stood as surety on the mortgage. Satyabhama was afterwards absolved from all liability as surety in the High Court In the case of *Ramdin* v. *Kalka Pershad*(1), it was held by the Judicial Committee that when a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realisation of the mortgage-debt out of the mortgaged properties, the claim would be barred in three years. That case arose under the Limitation Act of 1871 (IX of 1871), and the same argument which has been advanced in the present case was submitted to the Board Their Lordships in that case held as follows :—

"The second schedule places simple money demands generally under the three years' limitation,

(1) (1884) L. R. 12 I. A. 12; I. L. R. 5 All. 502.

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and under no. 65 the same limitation is applied to a single bond, and under the same limitation are placed bills of exchange, arrears of rent and suits by mortgagors to recover surplus from mortgagee. The six years' limit embraced suits on foreign judgments and some compound registered securities. The twelve years' period is made applicable principally to suits in respect of immovable property, though it also applies to judgments and recognizances in India. But the counsel for the appellant relied upon the language of the 132nd article of the second schedule: 'For money charged upon immovable property, twelve years.' His contention was that that period of twelve years applied to every remedy which the instrument carried with it, and gave twelve years for the personal remedy against the mortgagor as well as against the mortgaged property."

The Judicial Committee expressly over-ruled the contention that a claim for the balance of the mortgage debt based on the personal covenant came under Article 132 of Schedule II applicable to claims for money "charged on immovable property."

That case was followed by the High Court of Calcutta in *Miller* v. *Runga Nath Moulick*(1) which arose under Act XV of 1877. There the learned Judges held as follows:—

"We are of opinion that the decision of the lower court upon the question of limitation is correct. The contention of the learned counsel for the appellant that Article 132 of Schedule II of the Limitation Act of 1877 refers to a claim to recover money charged upon immovable property quite irrespective of the remedy asked for, has been set at rest by the decision of the Judicial Committee of the Privy Council in the case of *Ramdin* v. *Kalka Pershad*(2). That decision was passed with reference to the corresponding article of

(1) (1885) I. L. R. 12 Cal. 389.
(2) (1884) L. R. 12 I. A. 12; I. L. R. 5 All. 502.

the Limitation Act of 1871. That article provides a period of twelve years for suits of money charged upon immovable property. The Legislature in the present Limitation Act has used a different phraseology, viz., ' to enforce payment of money charged upon immovable property.' The language of the present Act, viz., ' to *enforce*, etc.,' is more in favour of the contention that the article in question refers only to suits ' to enforce payment of money charged upon immovable property ' *by the sale of the said property*. This construction was put by the Judicial Committee of the Privy Council upon Article 132 of the Limitation Act of 1871, the language of which did not suggest it so clearly as that of the present Limitation Act. The claim to make the defendants personally liable has therefore been rightly held to be barred by limitation, the present suit having been commenced more than six years after the accrual of the cause of action."

Article 65 of the second Schedule (Act IX of 1871) is reproduced in Act XV of 1877 as Article 66.

Their Lordships are of opinion that the view taken by the High Court on the question of limitation is well founded. The cause of action on the personal covenant accrued to Behari Lal Pandit when Suryamani failed to pay the mortgage debt, viz., within six months from the date of the mortgage. And the claim had become barred under Article 66 long before the execution of the razinama and the conveyances thereunder. Consequently it is not necessary to consider whether a decree under section 90 of the Transfer of Property Act of 1882 is requisite in case of deficiency in the realisation from the mortgaged property. Admittedly no decree was asked for or made. Section 90 is now Order XXXIV, rule 6, of the Civil Procedure Code, 1908.

As regards the consideration for Exhibit Q. 5, which was a conveyance executed by Suryamani in favour of Behari Lal Pandit on the 25th November,

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1899, it appears that Suryamani became liable for her arrears of Government revenue under Act XI of 1859 in respect of a mouzah which she held in her husband's estate with other co-sharers. To save the property from sale under the Act the co-sharers paid the revenue due from her and sued her for contribution. They obtained a decree and attached her dwelling house for the satisfaction of the debt. This is recited in Exhibit Q. 5, the kabala by which she conveyed the property now claimed by the reversioners.

The learned Judges of the High Court relying on the case of *Upendra Lal Mukherji* v. *Grindra Nath Mukherji*(1), have held that where the Hindu widow fails to pay her share of the Government revenue and after her death her co-sharer brings a suit for contribution, the reversionary heirs of her husband's estate were not bound to satisfy the debt. But in the present case it has been found as a fact by the Subordinate Judge that the co-sharers had, in execution of their decrees for contribution, attached Suryamani's dwelling-house, and that in consequence thereof she was compelled to raise money by executing the kabala Exhibit Q. 5.

Their Lordships are of opinion that sufficient evidence has thus been given by the defendants to show that there was a compelling necessity on the part of the widow for entering into this transaction. They accordingly vary the decree of the High Court by deleting the transaction covered by the deed of sale, Exhibit Q. 5. In other respects the decree and judgment appealed against will be confirmed and the appeal will be dismissed. As there is no appearance on behalf of the respondents it will be without costs.

Their Lordships will humbly recommend His Majesty accordingly.

Solicitors for appellants: *Wakins and Hunter.*

(1) (1898) 2 Cal. W. N 425.