## APPELLATE CIVIL.

*Before Jwala Prasad and James, JJ.*

MUSSAMMAT RAJBANSI KUER

1930.

*v.*

*Dec. 9, 10.*

BISHUNDEO NARAYAN SINGH.*

*Limitation—portion of purchase money left with vendee for payment to vendor's mortgagee—money not paid—suit on mortgage—decree for full amount—satisfied on vendor's behalf —suit for recovery of unpaid amount from vendee—limitation terminus a quo—cause of action, when arises.*

The ancestors of the plaintiffs executed a usufructuary mortgage in favour of *R* and another on the 31st of August, 1898. On the 13th May, 1907, the mortgagors sold a share in one of the mortgaged properties to the defendants. Out of the consideration money a sum of Rs. 3,450 was kept with the purchasers as *amanat* for payment to the usufructuary mortgagees. The defendants did not pay this sum to the mortgagees, who brought a suit on the basis of their mortgage and obtained a decree. The mortgagors at last sold away half of the mortgaged properties to one of the mortgagee decree-holders who eventually satisfied the entire decree on the 3rd November 1925. The plaintiffs, therefore, brought the present suit on the 14th July, 1927, for the recovery of Rs. 3,450 from the defendants who pleaded the bar of limitation in defence.

*Held*, that the cause of action for the suit did not arise until the 3rd of November, 1925, when the decree was satisfied on behalf of the plaintiffs, and that, therefore, the suit was not barred by limitation.

*Ram Ratan Lal* v. *Abdul Wahid Khan* (1), followed.

*Raghubar Rai* v. *Jaij Raj* (2), not followed.

*Kaliyammal* v. *Kolandavela Goundar* (3) and *Mussammat Izzatunnissa Begam* v. *Kumar Pertab Singh* (4), referred to.

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* Appeal from Appellate Decree no. 623 of 1929, from a decision of Rai Bahadur Jyotirmoy Chatterji, District Judge of Saran, dated the 7th February, 1929, affirming a decision of Mr. Ihtisham Ali Khan, Subordinate Judge of Saran, dated the 27th August, 1928.

(1) (1927) I. L. R. 49 All. 603.

(2) (1912) I. L. R. 34 All. 429.

(3) (1916) 38 Ind. Cas. 188.

(4) (1909) 36 I. A. 203.

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Appeal by the defendants.

The plaintiffs' ancestors had executed a zarpeshgi deed for Rs. 45,499 in favour of Raja Sidheshwari Prasad Narayan Singh and Raja Gunjeshwari Prasad Narayan Singh in respect of certain villages on the 31st of August, 1898. On the same date they also executed a simple mortgage bond for Rs. 6,061 in favour of those two persons. On the 13th May, 1907, the plaintiffs' ancestors executed a deed of sale in favour of the defendants selling 5 annas 4 pies share in village Parsa, one of the mortgaged properties. Out of the consideration money of that kabala Rs. 3,450 was kept with defendant no. 1 as amanat for the payment of zarpeshgi to Raja Sidheshwari Prasad Narayan Singh and Gunjeshwari Prasad Narayan Singh and the balance of the purchase money was paid to the landlords, the plaintiffs' ancestors. This *amanat* money was not paid by the defendants to the mortgagees. The mortgagees then brought a suit no. 160 of 1912 for recovery of the zarpeshgi money as well as the money due under the simple mortgage bond referred to above. On the 14th of January, 1914, a preliminary decree was passed in their favour for Rs. 66,330. On the 11th June, 1917, the decree was made absolute and was put into execution. On 5th April, 1921, the plaintiffs executed a deed of sale conveying half the property to one of the mortgagee decree-holders for Rs. 66,000 and the vendee decree-holder filed a petition of satisfaction of the entire decree on the 14th April, 1921. On an objection preferred by the other decree-holder the Court refused to enter satisfaction with regard to the whole of the decree and directed satisfaction to be entered into in respect of half the decretal amount and the execution to proceed with respect to the remaining half. The execution then proceeded for realisation of half the decretal amount over Rs. 33,000 and the properties mortgaged were advertised for sale. One of those properties was Parsa which had been purchased in

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1907 by the defendants in the name of defendant no. 1. Defendant no. 1 was also impleaded as defendant in the mortgage suit and the execution proceedings, and upon her prayer it was ordered that five annas four pies of mauza Parsa would be sold last of all. On part payment that execution was ultimately dismissed. Further execution of the decree for realisation of the amount due thereunder was started in 1924. In that case also upon the objection of defendant no. 1 the Court directed that village Parsa would be sold last of all the mortgaged properties. One of the two decree-holders, who had already purchased the mortgaged properties in 1921 from the plaintiffs, paid off the entire amount due under the decree on the 3rd of November, 1925. Thus there arose no occasion to sell village Parsa and it was saved on account of the entire satisfaction of the mortgage decree as stated above. Defendant no. 1 did not pay Rs. 3,450 as part of the consideration money for the sale of village Parsa to her, which was kept in deposit or *amanat* with her for payment to the prior zarpeshgidars, Raja Sidheshwari Prasad Narayan Singh and Gunjeshwari Prasad Narayan Singh. The plaintiffs, therefore, brought the present suit for realization of the said amount of Rs. 3,450 principal with interest from the defendants upon the ground that the said money belonged to the plaintiffs as part of the consideration of the sale of village Parsa to the defendants and that it was kept with the defendants in order to pay off a part of the zarpeshgi of Raja Sidheshwari Prasad Narayan Singh and Gunjeshwari Prasad Narayan Singh of 1898 and that money was never paid and the said zarpeshgi and the mortgage debts of the aforesaid Rajas were paid off on behalf of the plaintiffs.

The defendants, of whom defendant no. 1 claimed to be the sole vendee of Parsa resisted the plaintiffs' claim on various grounds, and also pleaded limitation. The suit was decreed by the lower courts. In second appeal the only point urged by the defendants was

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that the suit was barred by limitation.

*P. C. Manuk* (with him *Sambhu Saran* and *Rajeshwari Prasad*), for the appellants.

*Harnarayan Prasad*, for the respondent.

Jwala Prasad, J. (after stating the facts set out above proceeded as follows :)

Both the Courts below have decided against the defendants holding that the suit was not barred by limitation. Mr. Manuk on behalf of the appellants strenuously contended that the cause of action in this case arose on the 13th May, 1907, when the sale deed in respect of mauza Parsa was executed by the plaintiffs in favour of the defendants. His contention is that the aforesaid sum of Rs. 3,450, part of the consideration money of the sale of village Parsa, was kept in deposit for immediate payment to the prior zarpeshgidars and the mortgagees and failure to pay it at once gave rise to a cause of action on the very date that the sale deed was executed. At the very outset I would say that this contention of Mr. Manuk has not appealed to me either on the abstract principle of law or in the circumstances of the case. A number of authorities have been cited on both sides. Mr. Manuk has solely relied upon the case of *Raghubar Rai* v. *Jaij Raj*(1). The respondents have relied upon later decisions of that Court in *Ram Dulari* v. *Hardwari Lal*(2), *Sarju Misra* v. *Shaikh Ghulam Husain*(3) and *Kedar Nath* v. *Har Gobind*(4) and also upon a case of the Madras High Court, *Kaliyammal* v. *Kolandavela Goundar*(5). The plaintiffs also urge that the view taken in *Kumar Nath Bhuttacharjee* v. *Nobo Kumar Bhattacharjee*(6) also supports their contention.

(1) (1912) I. L. R. 34 All. 429.
(2) (1918) I. L. R. 40 All. 605.
(3) (1920) 68 Ind. Cas. 87.
(4) (1926) 24 All. L. J. 550.
(5) (1918) 38 Ind. Cas. 188.
(6) (1898) I. L. R. 26 Cal. 241.

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The decision in *Raghubar Rai* v. *Jaij Raj*(1) does not apply to the facts of the present case, and their Lordships at page 433 have made it clear that the point that arises in this case did not arise in that case. In that case the actual damage had not been sustained by the plaintiff when he brought his suit. That was a case where compensation was sought for breach of a covenant on account of an apprehended injury in future. Their Lordships say: "The point that the debt on which actual damage was sustained gave the plaintiffs a second cause of action, does not arise inasmuch as the plaintiffs have not yet paid any money to the heirs of Sanchi Ram." Thus, any general observation that might lead to a construction of the views of their Lordships that limitation for a suit for recovery of actual damages on account of breach of a covenant must be computed from the date of the contract, must be taken to be *obiter dictum*; nor do I think that the observation of Bayley, J. in *Battley* v. *Faulkner* (2) quoted by their Lordships in that case does in any way support the view of the law taken by their Lordships in that case. The later decisions of that very Court have not accepted the view taken in that case. The latest decision of that Court in *Ram Ratan Lal* v. *Abdul Wahid Khan*(3) is on all fours with the present case. In that case, as in the present, no time was fixed for payment of the money deposited with the defendants and, therefore, no opportunity ever arose for the performance of the obligation and consequently there could be no breach until the person who had undertaken to pay was called upon to do so. The cause of action in such a case, as held in that case, does not arise until the demand is made and ignored, or when the person to whom the money is to be paid sues the person with whom the contract had been made and consequent loss and damage occur. The decision in

(1) (1912) I. L. R. 34 All. 429.
(2) (1820) 3 Barn & Ald. 288.
(3) (1927) I. L. R. 49 All. 603.

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the case of *Raghubar Rai* v. *Jaij Raj*(1) was distinguished: "Reliance was placed upon a decision, which is now of some years' standing, *Raghubar Rai* v. *Jaij Raj*(1). We doubt whether that ease is a clear authority. The money in that case had not been paid and, therefore, the question which has arisen in most of the subsequent cases did not arise. There seems to be a healthy and consistent current of authority in recent years that the statute runs from the time when the loss is incurred, or, in other words, when payment is made." Thus the plaintiffs' suit is not barred by limitation. The cause of action arose on the 3rd of November, 1925, when the payment was made and the mortgage decree of the Rajas Sidheshwari Prasad Narayan Singh and Gunjeshwari Prasad Narayan Singh was satisfied. The present suit was instituted on the 14th July, 1927, and was well within time. In the circumstances of the present case no payment could be made by the defendants until the plaintiffs were ready to pay off the balance of the zarpeshgi and the mortgage money due under the mortgage bonds of 1898. By those bonds a number of properties were mortgaged. The amount of the zarpeshgi was Rs. 45,499 and the amount of the mortgage money was Rs. 6,061. Only one of those properties, namely, village Parsa was purchased by the defendants for a very small sum compared with the mortgage debt of the Rajas, namely, Rs. 4,150. Out of this only Rs. 3,450 was kept in *amanat* with the defendants to pay off a very insignificant portion of the zarpeshgi debt. In the bond it was stipulated that the balance would be paid by the mortgagors and the properties "in their ijara" would be released. The mortgagors did not pay the zarpeshgi debt. The zarpeshgidars would not accept part payment of their debt. Therefore, the defendants were not in a position to pay the *amanat* money which was kept in deposit and the only time when they could pay was at the time

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

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when the final adjustment was made in 1925 in the execution case when, on behalf of the plaintiffs, the entire zarpeshgi money was paid. The defendants should have at that stage paid their quota which was the plaintiffs' money in their hand. In the case of *Kaliyammal* v. *Kolandavela Goundar*(1) it was observed with regard to a similar covenant that it was a covenant of indemnity and that apart from any principle of construction it is the wording of a particular document that must determine the decision in each case. Construing the document in question, namely, the sale deed of 1907 executed by the plaintiffs' ancestors in favour of the defendants, I have no hesitation in holding that the covenant in question was a covenant of indemnity by their covenant has been held to be one of indemnity by their Lordships of the Privy Council in the case of *Musammat Izzat-un-nissa Begam* v. *Kumar Pertab Singh*(2). "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. The purchaser takes the property subject to the burden attached to it."

The next point urged is as to the rate of interest allowed by the Courts below. The Courts below have allowed one per cent. per mensem. There is no indication anywhere that any rate of interest was settled between the parties. Therefore the interest will be allowed in shape of damages at the rate of six per cent. per annum. The decree of the Court below will, therefore, be modified.

The appeal is substantially dismissed and therefore the appellants should bear the costs of the respondents.

JAMES, J.—I agree.

*Decree varied.*

(1) (1916) 38 Ind. Cas. 188.

(2) (1909) 36 Ind. Ap. 203, 208.