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regard to the judgment of this Board in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*⁽¹⁾ this view was manifestly correct. It is therefore unnecessary for them to consider the applicability of article 111, by which a shorter period is prescribed and upon which reliance is placed for the company": [*Ram Raghbir Lal v. United Refineries (Burma) Limited*⁽²⁾]. The decision, although urged in support of the contention by Mr. Sinha appearing on behalf of the respondent, does not in any way affect the view taken of this case having regard to the fact that there was there an express contract to pay the consideration within a certain time.

In my judgment, on a proper view of this case, Article 111 of the Limitation Act applied, and consequently the application was barred by limitation. The appeal succeeds and the application in the Court below is dismissed with costs throughout. In the circumstances the revisional application which is also made to this Court in conjunction with the appeal need not be considered.

AGARWALA, J.—I agree.

... *Appeal allowed.*

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and James, J.

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August, 25,
 26.
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 3.

THAKUR SINGH

v.

RAMGULAM SINGH.*

Mortgage—company borrowing money from Government—mortgage unregistered—promissory note by Company in favour of Government—subsequent mortgage in favour of a director for payment of instalment to Government—

*Appeal from Original Decree no. 159 of 1934 (with Appeal from Original Decree no. 84 of 1935), from a decision of Babu Nand Kishor Chaudhuri, Subordinate Judge of Patna, dated the 19th May, 1934.

(1) (1916) L. R. 44 Ind. App. 65.

(2) (1933) L. R. 60 Ind. App. 183.

mortgagee director, whether to be treated as a secured creditor as against the purchaser at sale under the Public Demands Recovery Act.

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V, a Company, borrowed Rs. 75,000 from the Government under the Bihar and Orissa State Aid to Industries Act by mortgaging all its assets in their favour but the bond was not registered and subsequently after deducting the payments made the Company executed a promissory note for Rs. 60,000 in favour of the Government. R, one of the Directors of the Company, advanced Rs. 5,000 to the Company on a mortgage of the assets of the Company for payment of one of the instalments due to the Government and in the mortgage bond the Secretary of State for India in Council was expressly recited as the first mortgagee. The Company went into liquidation at the instance of another creditor. The Government took steps for realisation of their dues under the Public Demands Recovery Act and the assets of the Company were sold and purchased by T.

R then brought his suit for the enforcement of his mortgage impleading T and the Company as defendants. The suit was decreed and T appealed.

Held, that it was not right that R the Director of an insolvent company about to go into liquidation should be allowed the privileged position of a secured creditor by merely discharging a small portion of the Company's indebtedness as against an innocent purchaser for value of property sold in execution of debt due to an unsecured creditor.

Gaslight Improvement Company v. Terrell(1), applied.

Appeal by defendant no. 2.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

Sir Sultan Ahmad (with him *Rai Guru Saran Prasad* and *Parasnath*), for the appellant.

Baldeva Sahay (with him *Chaudhury Mathura Prasad* and *K. P. Upadhaya*), for the respondents.

COURTNEY TERRELL, C.J.—These two appeals are by defendant no. 2 against the preliminary and

(1) (1870) L. R. 10 Eq. Cas. 168.

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final decrees, respectively, granted by the Subordinate Judge in a suit to enforce a simple mortgage.

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A Company named the Vishvakarma Mills, Limited on March 7th, 1925, borrowed from the Government under the Bihar and Orissa State Aid to Industries Act, 1923, a sum of Rs. 75,000. Under the contract of loan the Secretary of State for India guaranteed a cash credit overdraft in favour of the borrower at the Imperial Bank of India, Patna Branch, and the borrower was to repay annually Rs. 5,000 in March of each succeeding year. The Company, in consideration of the loan, also executed a deed of mortgage of all its assets in favour of the Government. For some reason the Government neglected to register this mortgage and the Directors of the Company similarly omitted to take any steps in the matter. The instalments for March, 1926, and March, 1927, were duly paid by the Company and on the 5th March, 1928, the third instalment fell due. Before this date, however, Government had become aware of the non-registration of the mortgage and on the 20th January, 1928, had caused the Company to execute a promissory note for Rs. 60,000 being the balance of the principal, after deducting the instalments which had been paid up to that time. The Company seems to have been throughout in financial difficulties and the loan by the Government does not seem to have been a very judicious investment. In the month of April, 1926, the Company borrowed Rs. 10,000 from the Bank of Behar Limited; on the 26th January, 1928, the Bank were demanding repayment of this loan with interest, and on the 16th May the Bank brought a money suit in the Patna Civil Court for the recovery of this loan.

The plaintiff Ramgulam Singh was a shareholder and a Director of the Company. There were two classes of Directors, "Honorary" and "Permanent" and by the Articles of Association the

former had merely an advisory function whereas the latter were to conduct the business of the Company. There is no doubt that the plaintiff was a permanent Director although his services from the point of view of any right to Directors' fees may have been honorary. The plaintiff was a guarantor of the loan by the Behar Bank and in the subsequent litigation he was sued in that capacity. The Company fully availed itself of the overdraft guaranteed by the Government and had withdrawn nearly Rs. 60,000. In these circumstances the finances of the Company were in a very parlous condition.

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On the 4th March, 1928, there was a meeting of the Directors of the Company at which five persons are recorded as having been present, one of whom was the managing Director Deodhari Singh, one was Saiyid Sultan Husain, a Director who from his evidence would appear to have had little comprehension of the business to be transacted. Mithila Saran Singh and Permashwar Prasad Varma, two other Directors were present. Babu Ramgulam Singh was also present but there is recorded this note—"N. B. Babu Ramgulam Singh is present but takes no active part". Babu Permashwar Prasad Varma, M.A., B.L., was elected President of the meeting and the managing Director was authorised to execute an agreement with Babu Ramgulam Singh according to which Ramgulam Singh and sons were to pay the next instalment of Rs. 5,000 to the Imperial Bank which would fall due on the 7th March and further would pay off the loan due to the Bank of Behar and that the Company through the managing Director would execute a mortgage in his favour of the profits and assets of the Company.

It appears that it had earlier been contemplated that Babu Ramgulam Singh would take a lease of the whole of the Company's assets but this proposal was abandoned in favour of a mortgage. On the 9th March there was a further Directors' meeting at which the same persons were present, with the

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exception of Babu Permishwar Prasad Varma, and Babu Mithila Saran Singh was appointed to the chair. A Memorandum of Agreement was read of which we have not seen a copy but there is a note that "the second party Babu Ramgulam Singh wants five days' time to consult his legal adviser on the point", and the 15th of March was accordingly appointed for reconsideration, with the further sentence that "it would be executed and registered immediately". On the 26th March there was an "emergent general meeting" of the Directors but the only Directors present were Babu Mithila Saran Singh, Babu Ramgulam Singh and the managing Director Babu Deodhari Singh. On this occasion Babu Mithila Saran Singh was unanimously voted to the chair. It was proposed that an extraordinary general meeting should be called to consider—

"(a) that the Company's business be settled at the impending session (sic) if any on the terms as may be agreed upon to conduct the business of the Company;

(b) that the business of the Company be sent to liquidation."

The third resolution is as follows:—

"That the second mortgage bond be executed in favour of Babu Ramgulam Singh who paid 5,000 rupees (five thousand) the said (?) instalment of the Imperial Bank on the 5th of March 1928 to the amount of Rs. 5,000 aforesaid to be paid within a year with interest at 12 annas per cent. per month and the interest to be paid every six months, i.e., on the 30th of the month, six monthly interest will be incorporated with the principal and interest will run on the aggregate at the rate of 12 annas per cent. per month."

Accordingly on the 20th of May, 1928, the mortgage bond in question was executed and in it the earlier mortgage bond to the Government of the 7th of March, 1925, was recited, as were the payment of the two instalments of 1926 and 1927 and the fact that the third instalment had become due on the 6th of March, 1928. There was a recital that the Company had no money to pay the third instalment. No mention was made of any other indebtedness of the Company and in particular there was no reference to the loan by the Behar Bank. The loan

by Babu Ramgulam Singh of Rs. 5,000 to pay the said third instalment was recited and there is no doubt that in fact Babu Ramgulam Singh did find the necessary sum of Rs. 5,000 and paid it to the Imperial Bank to discharge the liability of the instalment. The bond also recites the failure of the original proposal for a lease to Babu Ramgulam Singh. Therefore the Company agreed to repay the loan with interest at the rate of 12 annas per cent. per month within a period of one year from the 5th of March, 1928 (when the instalment to the Government was paid). If interest should be in arrears for six months then the amount of arrears was to be compounded with the principal, that is to say, the loan was to be with interest compounded at six monthly rests if unpaid. The mortgage was expressly stated to be a second mortgage, the Secretary of State for India in Council being recited as first mortgagee.

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Now at the time when this document was executed it must have been perfectly clear to the Directors that the original mortgage was defective by reason of non-registration, and moreover the promissory note to the Government in respect of the unpaid debt had been executed, so that although it was piously recited that from the point of view of priority of mortgages Babu Ramgulam Singh held only a second mortgage, this, on the contention of the plaintiff, had very little significance. On the other hand it may perhaps be said, with more credit to Babu Ramgulam Singh, that, at the time, he desired to express that the debt to him was to be considered as secondary to the debt to the Government, mortgage or no mortgage.

On the 24th September, 1928, the Behar Bank applied to the Court for a compulsory winding up order and this was made on the 21st March, 1928. The Government being unable to enforce their mortgage took the course of proceeding under the Public Demands Recovery Act and obtained an order

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of the Court, and on the 21st January, 1930, sold up the assets of the Company for Rs. 33,000, the defendant no. 2 Thakur Das being the purchaser.

On the 24th September, 1932. Babu Ramgulam Singh brought this suit to enforce his mortgage, claiming about Rs. 7,500, and making Thakur Das defendant no. 2 and the Company defendant no. 1. In the winding up proceedings an application was made to the High Court to stay the suit as against the Company and this was accordingly done and the suit has proceeded against Thakur Das alone, the Company taking no part.

The learned Subordinate Judge dismissed the suit against the Company but without costs having regard to the order for stay but he granted a decree against defendant no. 2 with costs.

The plaintiff took his stand upon the following contentions :—

It was pointed out on his behalf that the Government had not sued on their mortgage but had proceeded under the Public Demands Recovery Act and accordingly what had been sold was the right, title and interest of the judgment-debtor at the date of the sale. Therefore, it was argued that no question of priority of mortgages arose. It was conceded that had the Government been able to proceed upon its mortgage, Babu Ramgulam Singh would have been merely a second mortgagee as contemplated by his mortgage bond and it was suggested that there was nothing in the bond which put the Government debt before the plaintiff's debt otherwise than as a mere matter of priority of mortgages. It was argued that although possibly in the winding up proceedings the liquidator under the provisions of section 231 of the Indian Companies Act and section 54 of the Provincial Insolvency Act (but for the fact that there was a period of more than three months between the date of the bond and the application for the winding up order) might have had the

of the Court, and on the 21st January, 1930, sold up they had not done so, and in any case it was said that only the liquidator or some creditor could have taken this course.

Now it is certainly true that we are not here concerned with either section 231 of the Indian Companies Act or section 54 of the Provincial Insolvency Act. These sections deal with matters of procedure governing the relief to be accorded to a liquidator or to a rival creditor, but in considering the position of defendant no. 2, the auction-purchaser, we must remember that he stands in the shoes of the judgment-debtor, that is to say, the Company, and is entitled to and affected by the same equities and estoppels as those which the Company might have laboured under or enjoyed. Therefore the question really resolves itself into whether the plaintiff in any contest with the Company would have insisted that his mortgage debt should take precedence of the debt which was due to the Government. In my opinion he certainly could not have done so.

It is true that the sections of the Indian Companies Act and the Provincial Insolvency Act furnish the procedure for setting aside a transfer as fraudulent in certain circumstances only and that the absence of those circumstances will prevent the adoption of the specified procedure but that does not imply that the transfer was not fraudulent in fact although the judgment of the learned Judge would seem to suggest that this is so. There are several circumstances from which it may be inferred that Babu Ramgulam Singh was not acting in the interests of the Company—first, the position with regard to the Government mortgage must have been well within his knowledge for it is a specific duty imposed upon Directors to see to any necessary registration of documents to which the Company is a party: he must have been aware that the document was not registered. Secondly, that he was uneasy about the position is shown by the note in the

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Minutes of the meeting of the 4th of March to the effect that Babu Rangulam Singh was present but took no active part : also from the note in the Minutes of the 15th March that Babu Rangulam Singh wanted five days to consult his legal adviser and that the document when completed was to be executed and registered immediately. Thirdly, he was well aware that the Company was in desperate financial circumstances and that its assets were in jeopardy, and that he knew on the 26th of March that a liquidation had actually been decided upon. Fourthly, it may be observed that notwithstanding that at the meeting of the 4th of March Babu Rangulam Singh had agreed to pay off the claim to the Bank of Bihar, he had not in fact done so, and fifthly, notwithstanding the entry in the Minutes of the 4th of March that a mortgage should be executed, it was not in fact executed until very much later, that is to say, the 20th of May.

Babu Rangulam Singh, therefore, either knew that the Government would be unable to sue on their mortgage in which case the provision in his mortgage bond to the effect that his mortgage was to be considered secondary to the Government mortgage was meaningless or it was intended that the Government debt as such should take priority over the debt to him. This is not a case in which a contract is entered into between two independent persons; it is in the nature of a contract between the trustee and his cestui que trust; the trustee by discharging a small portion of the cestui que trust's indebtedness puts himself in the position of a secured creditor as against the unsecured creditor, the Government, and therefore prevents the Company from paying off its creditors equitably.

It is true that the mortgage to the plaintiff was executed for good consideration and that he supplied the Rs. 5,000 for payment of the Government instalment but in taking security from the Company which he knew to be in an insolvent condition he acted

inconsistently with his duties as a Director. The case of the *Gaslight Improvement Company v. Terrell*(1) is an illustration of the principle involved. It was a suit by the Company in liquidation to set aside a security given by the Company to the defendant Directors as being an undue and fraudulent preference over the general creditors. The Directors had borrowed money for the sake of the Company and quite properly became creditors of the Company. It was clear that the Directors knew that the Company was in a state of insolvency and could not avoid being wound up, and in those circumstances they took security in the shape of an assignment of the assets. Lord Romilly, dealing with the fact, said—

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“ The Directors of the Company think fit to pay themselves. It is to be observed that the Directors of every Company who are also creditors fill two distinct and antagonistic characters. In the first place, they are trustees for the benefit of the Company, and are trustees for the creditors to this extent, that they are bound to apply all the assets for the benefit of the creditors as far as they will extend. They themselves are also creditors, and have an interest to have their own debts paid.”

No doubt in this case the defendants had taken an assignment in payment of their debts and not a mortgage but the difference in this matter between this and the present case is one of degree and not of principle. In my opinion it is of no avail to contend in this case that the Company by merely paying off the plaintiff's mortgage could have freed the assets from the plaintiff's debt. It is not right that the Director of an insolvent Company about to go into liquidation should be allowed the privileged position of a secured creditor by merely discharging a small portion of the Company's indebtedness. As against an innocent purchaser for value of property

 (1) (1870) L. R. 10 Eq. Cas. 168.

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sold in execution of a debt due to an unsecured creditor, the plaintiff Director should not be allowed to enforce his security.

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I would, therefore, allow both appeals and dismiss the plaintiff's suit with costs throughout.

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JAMES, J.—I agree.

Appeals allowed.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Madan, JJ.

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v.

SYED ALI.*

Transfer of Property Act, 1882 (Act IV of 1882), section 54—“ equity of redemption ”, whether tangible property—sale, whether can be effected by delivery of possession—vendee already in possession—renunciation of all rights by vendor and mutation of vendee's name in record-of-rights, whether sufficient compliance with section 54.

The “ equity of redemption ” left in a mortgagor, after he gives his property in usufructuary mortgage, is a tangible property and the sale of such a property (the value of which is less than one hundred rupees) may be effected by delivery of possession under section 54 of the Transfer of Property Act, 1882.

Sohan Lal v. Mohan Lal(1), followed.

Sheikh Hushmat v. Sheikh Jamir(2), dissented from.

*Appeal from Appellate Decree no. 325 of 1933, from a decision of Babu Dwarka Prasad, Additional Subordinate Judge of Darbhanga, dated the 14th of December, 1932, reversing a decision of Babu Anjani Kumar Saran, Munsif of Samastipur, dated the 15th of September, 1931.

(1) (1928) I.L.R. 50 All. 986, F.B.

(2) (1918) 23 Cal. W. N. 513.