APPELLATE CIVIL.

Before Dhavle and Agarwala, JJ.

MUSAMMAT MEHDATUNNISSA BEGUM

v.

MUSAMMAT HALIMATUNNISSA BEGUM.* 1938. *August*, 29.

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Articles* 83 *and* 116—*mortgagor transferring a portion of mortgaged property—transferee undertaking to pay off mortgage debt existing on the property—contract of indemnity —default by transferee—cause of action arises when vendor actually damnified—limitation—terminus a quo—donee of other portion of mortgaged property, free of encumbrance, whether entitled to the benefit of the contract.*

Where there is an undertaking by the vendee (or other transferee) to pay off a mortgage debt existing on the property, the covenant is not merely one to pay the purchase money in a particular manner to the vendor's nominee, but one to relieve the vendor from the liability of the mortgage, and in that sense there is a contract of indemnity, which may be express or implied. In such cases a cause of action arises when the vendor, or any person who is entitled to the benefit of the contract with the vendor, is actually damnified by the sale of the property in the suit by the mortgagee, and limitation under Article 83 or 116 of the Limitation Act runs from the date when he is so damnified.

Tilak Ram v. *Surat Singh*(1), *Ram Rachhya Singh Thakur* v. *Raghunath Prasad Misser*(2) and *Musammat Rajbansi Kuer* v. *Bishundeo Narayan Singh*(3), followed.

C, a mortgagor, transferred for value a portion of the mortgaged property and left the consideration money with the transferees for payment to the mortgagee, the transferees undertaking to pay off the mortgage debt. *C* subsequently gifted away (*inter alia*) another portion of the property to his daughter *H*, free of encumbrance. The transferees made

* Appeal from Original Decrees nos. 65 and 59 of 1935, from a decision of Babu Nidheshwar Chandra Chandra, Subordinate Judge of Patna, dated the 22nd December, 1934.

(1) I. L. R. [1938] All. 500, F. B.
(2) (1929) I. L. R. 8 Pat. 860.
(3) (1930) I. L. R. 10 Pat. 451.

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default in the payment of the mortgage debt as a result of which the entire mortgaged property was sold. *H* then brought a suit claiming the amount of loss which she had suffered on account of the sale of her property and impleaded, amongst others, the transferees as defendants in the action.

Held, that *H* was entitled to the benefit of the contract with the mortgagor.

Isri Prasad Singh v. *Jagat Prasad Singh*(1) and *Ganeshi Lal* v. *Charan Singh*(2), followed.

Appeal no. 59 on behalf of defendant no. 2, and appeal no. 65 on behalf of defendant no. 1.

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

S. N. Roy and *Raj Kishore Prasad*, for the appellant in F. A. 59.

Ray Guru Saran Prasad and *B. C. Sinha*, for the appellant in F. A. 65.

B. C. De, *B. N. Mitter*, *Syed Ali Khan*, *Chaudhury Mathura Prasad*, *Ram Chander Prasad*, *Syed Hasan* and *Ajit Kumar Mitter*, for the respondents.

DHAVLE, J.—These appeals arise out of a suit for the recovery of Rs. 7,222, the amount for which the plaintiff's properties were sold in execution of a mortgage decree. In March, 1919, one Saiyid Badshah Nawab died, leaving (*inter alia*) to his heirs thirty-one properties subject to a mortgage. Shortly before his death the amount of this mortgage was settled at Rs. 61,200 and odd. Saiyid Chhote Nawab, a brother of the mortgagor's, took a one-third interest in the mortgaged properties and in the mortgage debt as one of the heirs. In August, 1920, he sold his share in five of the properties to defendant no. 2 for Rs. 6,581-6-0, which sum was left with the purchaser for payment towards the mortgage debt. In October,

(1) (1937) I. L. R. 16 Pat. 557.
(2) (1930) I. L. R. 52 All. 958; L. R. 57 Ind. App. 189.

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1920, he similarly sold one property to defendants 3 and 4 for Rs. 3,000, which amount was to be paid by the purchaser towards the mortgage. The same month he also gave five other properties to defendant no. 5, wife of defendant no. 6, in mokarrari for a consideration of Rs. 4,500 which was left with defendant no. 5 for payment towards the mortgage. In March, 1924, Saiyid Chhote Nawab divided the remaining properties together with his debts among his heirs—one son and three daughters, namely, the plaintiff, defendant no. 1 and defendant no. 8 by tamliknamas under which each daughter was required to pay the debts assigned to her and was also made liable, in case any such debt had to be paid by some other heir, to compensate such heir. In this way defendant no. 1 was liable to pay Rs. 10,818 and odd, the balance of the principal of the mortgage debt due from Saiyid Chhote Nawab after deducting the amounts left with purchasers (*bád minhái zimme kharídárán*) towards Saiyid Chhote Nawab's share of the mortgage debt. The mortgage was sued upon in due course, and a decree obtained against Saiyid Chhote Nawab and his transferees for his share of the mortgage debt in 1926. Under the mortgage decree the properties assigned to defendant no. 1 were to be the properties to be 'first sold in execution, but defendant no. 1 succeeded in obtaining an order that on her depositing Rs. 15,500 her properties were not to be sold. She made the deposit in May, 1928. In June, 1929, the properties transferred to defendants 3 and 4, 5 and 6, and 2 were sold in execution for Rs. 2,025, Rs. 5,025 and Rs. 8,055, respectively. The order passed by the executing court in favour of defendant no. 1 on condition of her depositing Rs. 15,500 had not, however, satisfied defendant no. 1, who endeavoured to obtain a reconsideration of it, and then appealed to the High Court. As a result it was ordered that the mortgagee decree-holder was not to proceed against the properties of defendant no. 1 unless he

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refunded the deposit of Rs. 15,500, but that this was not to affect the right of the plaintiff in the present suit to claim contribution from her. The execution then proceeded, and only came to an end when five properties of the plaintiff's were sold for Rs. 7,222 on the 15th of December, 1932. On the 22nd of December, 1933, plaintiff brought the present suit for the recovery of this money, besides Rs. 1,000 as costs of the execution proceedings, with interest at 1 per cent per mensem. Plaintiff's case was that she had suffered this loss on account of the failure of defendant no. 1 and of defendants 2 to 6 to pay those portions of the mortgage debt that they had undertaken to pay.

The lower court held that defendant no. 5 (with whom goes defendant no. 6) had paid her share to Saiyid Chhote Nawab himself before the execution of the tamliknamas in favour of his daughters, and that defendants 1 to 4 were liable for the loss caused to the plaintiff. The claim of the plaintiff was accordingly decreed rateably against defendant no. 1, defendant no. 2, and defendants 3 and 4, the costs claimed being disallowed together with interest.

Against this decree defendant no. 1 has filed First Appeal no. 65 and defendant no. 2 First Appeal no. 59.

The learned Subordinate Judge had no difficulty in finding privity of contract between the plaintiff and defendant no. 1 on the ground that the tamliknamas in favour of the daughters formed the consideration for one another. This view has not been, as it cannot be, seriously contested. As regards defendant no. 2 also, the liability is clear—see *Isri Prasad Singh* v. *Jagat Prasad Singh*(1) on the footing [approved by their Lordships of the Judical Committee in *Ganeshi Lal* v. *Charan Singh*(2)] that there passed to the plaintiff the benefit of the contract

(1) (1937) I. L. R. 16 Pat. 557.
(2) (1930) I. L. R. 52 All. 358; L. R. 57 Ind. App. 189.

by which the money was to be applied by defendant no. 2, so that the plaintiff could say " I have a contract which frees me from the liability to contribution which the section (section 82 of the Transfer of Property Act) would otherwise impose upon me ".

It has, however, been contended on behalf of defendant no. 2 that the time is long past for enforcing his personal liability for the money left with him by Saiyid Chhote Nawab, and that the vendor's lien for unpaid purchase money is also gone since the property has been sold in the execution proceedings taken by the mortgagee. On behalf of defendant no. 1 also it has been contended that the personal remedy is barred by lapse of time, and that, in any case, the sum of Rs. 15,500 deposited by her was more than sufficient to cover what was due from her.

Taking the last point first, defendant no. 1 has given her calculations in paragraph 6 of her written statement. These calculations are erroneous in two respects. In the first place, they assume that the amount of Rs. 10,818 and odd, for which she became liable, refers to March, 1924, when the tamliknama was executed, and not to March, 1919, when the sum outstanding under the mortgage was settled just before the death of the mortgagor. Secondly, they assume that the sum of Rs. 10,818 and odd was arrived at after deducting not only the amounts left with the purchasers defendants 2, 3 and 4 but also the amount of Rs. 4,500 which the mokarraridar of 1920 was to pay towards the mortgage debt. A reference to the tamliknama of defendant no. 1 (Ex. 1) shows quite clearly that both these assumptions are erroneous. Saiyid Chhote Nawab's one-third share of the mortgage debt, as calculated in March, 1919, was Rs. 20,400-2-9 p., an amount which is only Rs. 9,581-6-0 in excess of the amount allotted to defendant no. 1; and this difference of Rs. 9,581-6-0 is the total of the Rs. 6,581-6-0 due from defendant no. 2 and the Rs. 3,000 due from

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defendants 3 and 4. The tamliknama purports to specify Rs. 10,818-12-9 p. as the principal of the mortgage debt—*besides interest*—after deduction of the amount in deposit with the *purchasers*. That no interest after March, 1919, is included in the amount allotted to defendant no. 1 is further made clear by the fact that in the schedule of debts given in the tamliknama there is one item relating to a hand-note with the specific remark "including interest". Defendant no. 5 was not a purchaser (*kharídár*), but only a mokarraridar, and if the Rs. 4,500 due from her were to be deducted from Saiyid Chhote Nawab's share of the mortgage debt, and interest calculated in the way that defendant no. 1 has done, her liability in March, 1924, works out, not at Rs. 10,818 and odd, but at Rs. 11,169 and odd. That the mokarraridar paid Rs. 4,500 to Saiyid Chhote Nawab before the tamliknamas is established by the evidence of his son Saiyid Muhammad Mehdi, p. w. 1, whose evidence there is no good reason to doubt. It is true that he does not know all the details, but the account that he speaks to, Ex. 2, as worked out by the Diwan of the estate, so far as it shows that Rs. 17,387 and odd was found due at that time on account of the mortgage has been shown by the calculations of Mr. De, who appears for the plaintiff, to be entirely consistent with the exclusion from Saiyid Chhote Nawab's share of the mortgage debt as calculated in March, 1919, of the two sums assigned to defendant no. 2 and defendants 3 and 4 only, without reference to the sum due from the mokarraridar. This supports the story of Saiyid Muhammad Mehdi. It has been pointed out on behalf of defendent no. 1 that it was plaintiff's own case that defendant 5 was also liable to contribute. That did not, however, preclude the lower court from ascertaining how the amount of Rs. 10,818 and odd, allotted to defendant no. 1, was really arrived at, and from distributing the liability for plaintiff's loss among the parties that were really liable. The

liabilities *inter se* of the transferees from Saiyid Chhote Nawab did not really arise in the mortgage suit, and the finding of the Subordinate Judge in that suit that defendant no. 5 had failed to make out her story of payment to Saiyid Chhote Nawab plainly does not act as *res judicata* in the present suit. Rs. 10,818 and odd must, therefore, be taken as due from defendant no. 1, not from March, 1924, but from March, 1919, for the purpose of the calculation, so that her liability in March, 1924, was Rs. 17,387 and odd and on the 15th May, 1928, was much in excess of the deposit of Rs. 15,500 made by her.

The contentions regarding the personal remedy against defendants 1 and 2 being barred by lapse of time and as against defendant no. 2 regarding the vendor's lien for unpaid purchase money having been extinguished by the mortgage sale are without merit. As the placitum of the recent Full Bench decision of the Allahabad High Court in *Tilak Ram* v. *Surat Singh*(1) puts it, "where there is an undertaking by the vendee (or, it may be added, other transferee) to pay off a mortgage debt existing on the property, the covenant is not merely one to pay the purchase money in a particular manner to the vendor's nominee, but one to relieve the vendor from the liability of the mortgage, and in that sense there is a contract of indemnity, which may be express or implied. In such cases a cause of action arises when the plaintiff vendor is actually damnified by the sale of the property in the suit by the mortgagee, and, under Article 83 of the Limitation Act, the plaintiff has three years from the time when he is so damnified, but the time is extended to six years by Article 116 as the contract of indemnity was contained in a sale deed in writing registered." This is in substantial accord with the view taken in this Court in *Ram Rachhya Singh Thakur* v. *Raghunath Prasad*

(1) I. L. R. [1938] All. 500, F. B.

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Misser(1) and *Musammat Rajbansi Kuer* v. *Bishundeo Narayan Singh*(2). The present is of course not a suit by the vendor himself, nor is defendant no. 1 a vendee, but only a transferee. It is a suit by a person entitled to the benefit of the contracts with Saiyid Chhote Nawab, and as it was brought a little over a year from the time the plaintiff was actually damnified, it is plainly within time, whether we regard it as governed by the limitation prescribed in Article 83 or Article 116 or 120 of the Limitation Act.

It has been urged on behalf of the appellants in the two appeals that the calculations of the lower court are wrong. Before dealing with this point, however, it is convenient to dispose of the plaintiff's cross-objection in the appeal by defendant no. 1. This cross-objection relates to the costs and interest (both prior to the institution of the suit) claimed in the plaint. The amounts were not disputed in the lower court, but the learned Subordinate Judge disallowed the costs on the ground that " defendant no. 1 as well as the decree-holders having contested the plaintiff's prayer for having her properties put up for sale last of all, the plaintiff cannot equitably call upon defendants 1 to 6 only to reimburse her in respect of her said cost ". It is said on behalf of defendant no. 1 that she had arrived at an arrangement with the decree-holder to refrain from proceeding against her properties in the first instance on condition she made a deposit; but this was no justification as against the plaintiff whom defendant no. 1 was bound under her tamliknama to save harmless. Plaintiff seeks by her cross-objection to recover from defendant no. 1 her proportionate share of the costs amounting to Rs. 348, and there does not seem to be any reason why she should not have these costs against defendant no. 1. As regards the interest claimed up to the date of institution of the

(1) (1929) I. L. R. 8 Pat. 860.
(2) (1930) I. L. R. 10 Pat. 451.

suit, the claim cannot be supported on any of the grounds that would appear admissible from *J. H. Pattinson* v. *Srimati Bindhya Debi*(1) and *The Bengal Nagpur Railway* v. *Ruttanji Ramji*(2). That claim, must, therefore, be disallowed.

The only point that remains is the correct calculation of the respective liabilities of defendants 1, 2, 3 and 4. The interest calculated in the lower court seemed to be wrong, at least at one point, and has been checked by the Bar in this Court, with the result that the interest on the sum of Rs. 6,581-6-0 chargeable to defendant no. 2 must, it is now agreed, be taken to be not Rs. 6,588-11-0 but Rs. 7,578-11-0. In the account of defendant no. 1 Rs. 15,500, the amount of her deposit, has been credited to her; but the deposit was made on the 15th of May, 1928, while the account was made up to the 15th of December, 1932, an interval which carried interest at eight annas per cent. per mensem, the rate allowed from the date of the expiry of the period of grace. This interest, it is agreed, amounts to Rs. 3,807-7-0 and must be credited to defendant no. 1. In the account of defendant no. 2 no allowance has been made for the sum of Rs. 8,055 that was realised by the sale of his properties in the execution proceedings. With interest this amount, it is agreed, comes to Rs. 9,746-8-0, a figure which must be credited to defendant no. 2 in his account. There is a similar omission in the account of defendants 3 and 4. Their property was sold in the execution proceeding for Rs. 2,025, to which Rs. 390 and odd must be added as interest, the total being credited to these defendants. The *pro rata* liabilities of the defendants must be worked out in the light of these revised figures. The calculations may be simplified by working out the totals to the nearest rupee, leaving out annas and pies.

(1) (1932) I. L. R. 12 Pat. 216.
(2) (1937) 42 Cal. W. N. 985, P. C.

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Except for these arithmetical modifications the appeals fail. I would dismiss them, but without costs. I would also allow the cross-objection in F. A. 65 in part, as already indicated. The cross-objection in the other appeal, being out of time, was not pressed and must be dismissed.

DHAVLE, J.

AGARWALA, J.—I agree.

Appeals dismissed.

Cross-objection in F. A. 65 allowed in part.

Cross-objection in F. A. 59 dismissed.

S. A. K.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Chatterjee, JJ.

SECRETARY OF STATE FOR INDIA

1938.

September, 13.

v.

RAWAT MULL NOPANY.*

Land Acquisition Act, 1894 (Act I of 1894), section 23—compensation for loss of income, when can be awarded—market value, how to be ascertained.

The loss of income which is contemplated in the fourth clause of section 23 of the Land Acquisition Act, 1894, is the loss of personal income to the owner of the land. It contemplates a case in which on account of the acquisition of a certain land the value of other properties of the owner has deteriorated or the owner has suffered loss of his own income not derived from the land itself: in such cases the owner is entitled to get compensation over and above what he is to get as the price of the land which has been acquired.

The clause has no application to a case where the loss of income complained of is the loss of the income of the property itself which is being acquired. That loss of income is a

*Appeals from Original decrees nos. 143, 144, 145 and 146 of 1936, from the decision of R. L. Chattarji, Esq., District Judge of Muzaffarpur, dated the 16th May, 1936.