## PRIVY COUNCIL.

MA HNIT (*Plaintiff*)

*v.*

FATIMA BIBI AND ANOTHER (*Defendants*).

P.C.*
1927

*Feb.* 22.

(On Appeal from the High Court at Rangoon.)

*Indian Limitation Act (IX of 1908), Schedule I, Article 97—Suit on failure of consideration—Time from which limitation runs—Money advanced on mortgage—Mortgage declared void.*

On August 6, 1907, the appellant and her husband advanced Rs. 10,000 to the first respondent, a Mahomedan woman who purported to be acting as guardian for her nephew, a minor; she as guardian executed in favour of the lenders a mortgage upon two oil wells professedly belonging to the minor for the sum advanced and interest. In 1913 the oil wells were sold under a mortgage decree, but in 1918 a decree, made at the suit of the minor, set aside the sale and the mortgage, on the ground that the first respondent was not his guardian and had no authority. On August 9, 1919, the appellant (her husband being dead) brought a suit against the first respondent, the plaint submitting that as the money could not be recovered from the minor, the first respondent was liable, and stating that the cause of action arose at the date of the decree of 1918.

By the Indian Limitation Act, 1908, Schedule I, Article 97, a suit for money paid under an existing consideration which afterwards fails must be brought within three years of the date of the failure of consideration.

*Held*, that Article 97 applied to the suit, and that the period of three years did not begin to run until the date of the decree setting aside the mortgage; and consequently that the suit was not barred.

Decree of the High Court reversed.

Appeal (No. 83 of 1925) from a decree of the High Court (May 12, 1924) affirming a decree of the District Court of Magwe (May 22, 1922).

The suit was instituted by the appellant on August 9, 1919, claiming Rs. 10,000, and over Rs. 11,000, for interest, from the respondents in circumstances which appear from the judgment of the Judicial Committee.

The main question arising upon the appeal was whether the suit was barred by limitation.

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* *Present*:—LORD PHILLIMORE, LORD CARSON, LORD DARLING AND MR. AMEER ALI.

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The District Judge dismissed the suit, holding that it was one for a simple debt due on a registered document, and therefore barred by the Indian Limitation Act, 1908, Schedule I, Article 146.

An appeal to the High Court was dismissed. The learned Judges (Godfrey and Duckworth, JJ.) agreed with the view of the District Judge, holding that the terms of the plaint and the claim for interest showed that the suit was based upon the mortgage of 1907, and that the plaintiff was thus precluded from contending that the cause of action arose only on March 21, 1918.

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*E. B. Raikes* for the appellant. The plaint sufficiently indicated that the claim was upon a failure of consideration in 1918, not under the mortgage. The cause of action was given by section 65 of the Indian Contract Act, 1872, and the period of limitation was provided by the Indian Limitation Act, 1908, Schedule I, Article 97. The appellant was in possession at the date of the decree of 1918; and until then the mortgage had been treated as binding. The period of limitation therefore did not begin to run until then; *Basso Kuar* v. *Dhum Singh* (1) *and Harnath Kunwar* v. *Indar Bahadur Singh* (2). It is true that in *Annada Mohan Roy* v. *Gour Mohan Mullick* (3,) it was said that generally a cause of action under section 65 arises when the void contract was made. That case related however to a contract which by its nature was wholly void, and there were no circumstances, such as existed here and in the above decisions of the Board, whereby the cause of action arose only when the contract was declared void. In 1907 the parties to the mortgage were

(1) (1888) I.L.R. 11 All. 47; L.R. 15 I.A. 211.
(2) (1922) I.L.R. 47 All. 179; L.R. 50 I.A. 69.
(3) (1923) I.L.R. 50 Cal. 929; L.R. 50 I.A. 239.

entitled to assume that the first respondent as *de facto* guardian had authority; the decisions of the Board to the contrary effect were given later: *Mata Din* v. *Ahmad Ali* (4) and *Imambandi* v. *Mutsaddi* (5). It was established that the money came to the hands of the first respondent and her husband.

*Wallach* for the respondents. The evidence did not show that the first respondent received the money. But in any case the suit is barred. The mortgage was void, when made, and the cause of action, if any, arose then: *Annada Mohana Roy* v. *Gour Mohan Mullick* (3). There were no special circumstances taking the case out of the general rule laid down in that case. It is not shown that the first respondent was *de facto* guardian, or that in 1907 there was any misunderstanding of Mahomedan law as to the powers of a guardian. There was really no cause of action under section 65. That section relates to cases in which there has been a complete failure of consideration. Here the failure was only as to the security given for the debt. The cause of action, if any, was to recover personally, and arose at the date of the loan; it was therefore barred. Further the appellant not having taken out a succession certificate or letters of administration to the estate of her deceased husband, could not sue.

*E. B. Raikes* replied.

*Feb. 22*

The judgment of their Lordships was delivered by—

LORD DARLING.—This appeal is from a decree of the High Court dated the 12th May, 1924, dismissing an appeal from a decree of the District Court of Magwe, dated the 22nd May, 1922.

(3) (1923) I.L.R. 50 Cal. 929; L.R. 50 I.A. 239.
(4) (1912) I.L.R. 34 All. 213; L.R. 39 I.A. 49.
(5) (1918) I.L.R. 45 Cal. 879; L.R. 45 I.A. 73.

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The chief question in the appeal is whether the suit in which it is made was rightly dismissed as barred by the Limitation Act.

The appellant and her husband, U Po Ya, on the 6th August, 1907, advanced Rs. 10,000 to the first respondent, Fatima Bibi—then alleging herself to be the guardian of one Ali Hashim Mehter, her nephew, then a minor.

The first respondent is a Mohommedan purdah-nashin woman, and borrowed this money through her agent and husband, Hamed Ebrahim Madari, and he at the same time executed on her behalf and was her constituted attorney as guardian of the minor, a mortgage of two oil wells, professedly belonging to the minor, in favour of the appellant and her husband to secure repayment of the money advanced with interest at the rate of $1\frac{1}{4}$ per cent. per mensem.

That the minor had no real interest in any of the properties dealt with is demonstrated in the words of paragraph 5 in the sale deed (dated 18th January, 1912) by Fatima Bibi, her husband, and Mehter, the minor, which are as follows :—

"Although Ali Hashim Mehter's name is included in the sale deed by which Hamid Ebrahim Mandali and wife Fatima Bibi buy the oil and the No. 1416 from Ma Ngwe, he has no monetary relation or claim in the affairs and he does not enjoy any possession of the well too. We have bought it with our own money and enjoyed it. We have only mentioned the minor Ali Hashim Mehter's name in it, a way of 'trying luck.' We guarantee the said well to be free from all encumbrances. In case of any incumbrance, we, the vendors, agree to make good any expense incurred by the vendees and also profits from the well which they may enjoy otherwise."

On the 5th February, 1913, the appellant and her husband sued the minor (by the first respondent as his guardian) and the first respondent and her husband in the District Court of Magwe for the

principal and interest due on the mortgage, and the first respondent and her husband put in a written admission of the claim. The District Court on the 8th July, 1913, passed a decree in that suit as claimed. In execution of that decree the oil wells were sold by auction and purchased by one, Ma Tok, who afterwards resold them to the appellant and her husband, who thus got possession of them.

In or about April, 1915, the minor Ali Hashim Mehter, by his father, as next friend, sued the appellant and her husband, Ma Tok, and the first respondent, and her husband in the same District Court to set aside the sale of the oil wells and for a declaration that the mortgage of the 6th August, 1917, was not binding on him. His suit failed in the District Court; but the Appellate Court gave him, on the 11th March, 1918, the decree that he claimed, on the ground that the first respondent was not legally his guardian and had no authority to mortgage his oil wells or to represent him in the suit on the mortgage. The appellant had thereupon to give up possession of the oil wells.

The appellant's husband having died she, on the 9th August, 1919, brought the suit under appeal against the first respondent in her personal capacity and as one of the heirs of Hamid Ebrahim Madari (who had also died), and against the second respondent (his son as his heir) by a plaint, in which, after setting out the facts already mentioned, she relied on the admission of the first respondent and her husband that they had received the money borrowed, and she submitted that as it could not be recovered from the minor they should repay it with interest. She further stated that the cause of action arose on the 11th March, 1918, when the Appellate Court set aside the sale.

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The respondents put in written statements and the Court raised issues of which the following are material to this appeal :—

(1) Is the plaintiff's suit time barred ?

(2) Are the defendants liable for the amount claimed ?

The appellant gave evidence in support of her claim and asked for a postponement to produce further evidence which the District Judge refused. The respondent gave no evidence.

The District Judge dismissed the suit as barred by limitation, as being a suit on the personal covenant in a registered instrument.

The High Court in appeal took the same view : overruling the contention of the appellant that her cause of action in the suit only arose on the 11th March, 1918, on the ground that the frame of the plaint and the claim for interest showed that she had sued on the covenant in the mortgage.

From that decree, dated the 12th May, 1924, the appellant has appealed to his Majesty in Council.

Although many points were raised on the pleadings, several were abandoned in the course of the litigation ; and in the course of the arguments of this appeal it has appeared to their Lordships that of the points taken on behalf of the appellant one is in itself conclusive. In fact the case is reduced to the simple question whether the appeal is so late as to be barred by the Indian Limitation Act, 1908 (IX of 1908). For the appellant it was argued by Mr. Raikes that the suit in which the decree under appeal was made was not founded on the mortgage of 6th August, 1907, but is for the repayment of the money due to her, and that her claim to this sum arose when the mortgage and sale thereunder were set aside, that is to say, on 11th March, 1918 ; and

reliance was placed on the Indian Limitation Act, 1908, First Schedule, Part VI, Article 97. The effect of that provision is that the suit is not barred if brought "for money paid upon an existing consideration which afterwards fails" ; provided that suit is begun within three years from the date of the failure of the consideration.

This present suit was commenced on 9th August, 1919. For the respondents it was contended that there never was any consideration for the loan of the sum of Rs. 10,000 then advanced by plaintiff and her husband—as the respondents then had no interest or property in the subject of the mortgage. Thus it was contended there was a complete absence or failure of consideration at and from the very moment when the money was advanced, *i.e.*, more than twelve years before this suit was begun. Were this contention well founded this present claim would undoubtedly be statute barred. But should the true date of the failure of the consideration for the loan of the money be the day on which the Appellate Court made a decree in favour of Ali Hashim Mehter (the minor) setting aside the mortgage and giving him possession of the mortgaged property, *i.e.*, 11th March, 1918, then this suit would be well within the three years allowed for taking proceedings to recover the Rs. 10,000, with interest, for the loan of them. In the opinion of their Lordships this contention of the appellant is well founded. It was proved that respondent and her husband did for some time pay to the appellant and her husband the interest agreed by them to be payable on the money lent. Default in this respect having been made, appellant and her husband, on 5th February, 1913, took proceedings, claiming the principal and interest as due from the respondents, who made written

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admission of the debt. On 8th July, 1913, a decree in favour of appellant was made, and by virtue of it the property was sold by auction in order to pay the money then due to appellant and her husband. As already stated, this decree was set aside at the instance, and in favour of Ali Hashim Mehter (the minor), and on 11th March, 1918, the sale was finally set aside by the Appellate Court, and the property on the security, of which appellant and her husband had advanced Rs. 10,000, was handed over to Ali Hashim Mehter.

From these facts it appears that the appellant and her husband were from the date of the loan (6th August, 1907), down to 11th March, 1918, not entitled to allege that they had not received any consideration for the loan that they had made—since for a considerable time they had actually received interest upon it, paid to them by the respondents. In 1913 they had obtained, in a suit against the respondents, a decree under which the property was sold in order that the appellant's loan might be repaid. The fact that they afterwards became possessed of the same property, by buying it from the purchaser at the auction, has no immediate bearing on the matter in dispute. They purchased from one who had bought the property at a sale decreed by a competent Court, and the price paid by him had been applied to repay a portion of the money advanced by the appellant to the respondents on security of the property mortgaged. It therefore appears to their Lordships that there was at the time of the loan no failure of the consideration upon which the loan of the money and the promise to repay it with interest were made—since the obligation of that promise was for some time observed—and it appears to them that the failure of consideration

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for the loan of the money did not occur until 11th March, 1918. Consequently the suit is not barred by statute.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, and that judgment should be entered for the plaintiff for the principal sum, Rs. 10,000 with interest at such rate and for such period and subject to such allowance, if any, for mesne profits during the period during which the plaintiff and her husband were in possession of the land as the Courts in India may determine, and that for this purpose the suit be remitted to the High Court at Rangoon. Their Lordships will also humbly recommend that the plaintiff do have her costs of the suit here and below.

Solicitors for Appellant—*Bramall and Bramall.*
Solicitors for Respondents—*Waterhouse & Co.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Maung Ba.*

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*Mar.* 1.

KING-EMPEROR
*v.*
WUN NA AND THIRTY OTHERS.*

*Search witnesses—Criminal Procedure Code (Act V of 1898), section 103—Witnesses whether competent to take part in the actual search.*

*Held*, that a search made with the active assistance of the search witnesses is in accordance with the provisions of section 103 of the Criminal Procedure Code.

*Held*, that the object of the section is better achieved by permitting independent witnesses to assist in the search and that, by rendering such assistance, they do not cease to be competent witnesses of the search.

*Ti Ya* v. *King-Emperor*, 8 L.B.R. 38—*referred to.*

MAUNG BA, J.—This is an appeal by the Crown from an order of acquittal passed by the Headquarters

* Criminal Appeal No. 1858 of 1926.