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R.M.P.M. CHETTYAR FIRM v. SIEMENS (INDIA) LTD.

BROWN, J.

reason why the interpretation there put on the law as to what is an accession accruing for the benefit of the mortgagee should not be applied in this country.

For these reasons I would hold that the Chettyar appellant was entitled to claim the machinery in question as an accession to his mortgage security under the provisions of s. 70 of the Transfer of Property Act. That being so, the plaintiff-respondents must fail in the claim made by them. I would therefore set aside the decree of the trial Court and pass a decree dismissing the suit of the plaintiff-respondents ; the plaintiff-respondents to pay the costs of the appellant in both Courts, advocate's fee in this Court five gold mohurs.

DAS, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

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Mar. 16.

TAN SOON THYE AND OTHERS

v.

L. E. DUBERN.*

"On demand"—Demand when necessary—Liability of debtor, when it arises—Intention of parties—Limitation Act (IX of 1908), *Sch.* I, *Art.* 132.

Primâ facie where a person agrees to pay a certain sum "on demand" that sum is payable forthwith, but in each case the question whether or not the parties intended that the words "on demand" should be treated as an integral and operative part of the agreement depends upon the true construction of the agreement into which the parties have entered. The question to be conisdered is whether the words "on demand" are mere words, or whether looking at the whole document it was really intended that the demand should be made before the liability to pay arose.

Hanmantram v. *Bowles*, I.L.R. 8 Bom. 561 ; *N. Joachimson* v. *Swiss Bank Corporation*, (1921) 13 K.B. 110 ; *Nettakaruppa* v. *Kumarasami*, I.L.R. 22 Mad. 20 ; *Norton* v. *Ellam*, 2 Mee. & Wel. 461 ; *Secretary of State for*

* Civil First Appeal No. 89 of 1932 from the judgment of this Court on the Original Side in Civil Regular No. 16 of 1932.

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India v. *Pandit Radhika Prasad*, I.L.R. 46 Mad. 259; *Walton* v. *Mascall*, 13 Mee. & Wel. 452—*referred to*.

The debtor was indebted to his creditor on an on demand promissory note, and in consideration of the creditor not suing him immediately on that note the debtor executed a mortgage in favour of the creditor for the debt, and covenanted therein to pay the debt "on demand".

Held, that, having regard to the context and the common intention of the parties that the debtor should have further time in which to pay the debt, the debtor's promise to pay the debt "on demand" meant that unless and until the mortgagee made a demand for payment the debtor's obligation to pay would not arise. Hence the period of limitation would run from the date on which a demand was made by the creditor, and not from the date when the document was executed.

Po Aye for the appellants. Under Art. 132 of the Limitation Act the right to enforce payment of money charged upon immovable property becomes barred after the expiration of 12 years from the date when the money becomes due. The mortgage deed in question stipulated for the repayment of the mortgage debt "on demand" and, for the purpose of Art. 132, "on demand" means "forthwith". See *T. C. Bose* v. *Obedur Rahman Chowdhury* (1); *Perianna Goundan* v. *Muthuvira Goundan* (2). When the property was sold to the respondents more than 12 years had elapsed from the date of execution of the mortgage deed, and consequently no rights in the property passed to the purchasers. The vendors purported to act in the exercise of the power of sale without the intervention of the Court given to them under the mortgage deed; but since the mortgage debt had become irrecoverable by effluxion of time any other right under the document, being only incidental to the right to recover the debt, also ceased to be enforceable.

Mootham for the respondent. The Limitation Act cannot operate *in vacuo*. The provisions of that Act can be taken advantage of only in a

(1) I.L.R. 6 Ran. 297. (2) I.L.R. 21 Mad. 139.

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proceeding before a Court, as for instance, by way of defence. This is a suit for ejectment, and it is not contended that such a suit is barred by virtue of the Act. But it is suggested that since the right to recover the mortgage debt is gone all other rights have vanished, and that possession obtained through the exercise of such other rights is not valid in law. Limitation bars the remedy, but not the right; so that if any other mode of realising the debt is left open it can be taken advantage of. See *Gajadhar* v. *Jagannath* (1); *Motan Mal* v. *Muhammad Bakhsh* (2). Moreover, s. 28 of the Limitation Act does not provide that by a mere extinguishment of a right to certain property the property shall be deemed to be re-conveyed to another. *Muhammad Mumtaz Ali Khan* v. *Mohan Singh* (3).

It cannot, however, be contended that the right to recover the mortgage debt is gone because the mortgage deed uses the words "on demand". It is only in commercial transactions for obvious reasons that the term "on demand" means "forthwith", *Seetharama Aiyar* v. *Muniswami Muddliar* (4). In all other cases the meaning to be given to that term is to be gathered from the surrounding circumstances. In this case it is clear that the term has a special significance; an actual demand has to be made before the mortgage debt can be said to become due. Time therefore cannot begin to run until an actual demand has been made. As was observed in *The Secretary of State for India* v. *Prasad Bapuli* (5), these words ought not to be treated as mere surplusage, but their meaning must be ascertained by a reference to the context. The following cases

(1) I.L.R. 46 All. 775, at p. 786. (3) I.L.R. 45 All. 419, at p. 425.
(2) I.L.R. 3 Lah. 200, at p. 206. (4) 37 Mad. L.J. 613.
(5) I.L.R. 46 Mad. 259, at p. 288.

illustrate the proposition that parties may intend to give the term "on demand" a meaning other than "forthwith". *Hanmantram Sadhuram Pity* v. *Arthur Bowles* (1); *Nettukaruppa Goundan* v. *Kumarasami Goundan* (2); *Nilkanth Balwant* v. *Vidya Narasinh* (3); *Bradford Old Bank* v. *Sutcliffe* (4); *Joachimson* v. *Swiss Bank Corporation* (5); *Norton* v. *Ellam* (6).

PAGE, C.J.—This appeal must be dismissed.

This is a suit for ejectment and for mesne profits. As the defendants are in possession it is incumbent upon the plaintiff to prove his title to possession. The plaintiff is the executor of the will of Jules Emile DuBern who died on the 16th February, 1931, and he claims that Jules Emile DuBern was the owner of this property under the following documents of title :

On the 28th of July, 1916 a mortgage of the property in suit was executed in favour of one Khoo Heng Yean to secure a debt of Rs. 25,000. Under this deed of mortgage, in default of payment of the money due thereunder, the mortgagee was entitled to sell the property without having recourse to the Court.

On the 18th of June, 1918, the mortgagee Khoo Heng Yean assigned his interest in the mortgage to Ma Thein, the wife of one Lim Taik Kee. In February, 1930, Ma Thein, purporting to exercise the power of sale in the deed of mortgage, sold the property secured thereunder to one Lim Eng Hoke ; and on the 4th of August, 1930, by registered deed of sale Ma Thein and Lim Eng Hoke

(1) I.L.R. 8 Bom. 561.
(2) I.L.R. 22 Mad. 20.
(3) I.L.R. 54 Bom. 495, 509.
(4) (1918) 2 K.B. 833, at p. 844.
(5) (1921) 3 K.B. 110, at p. 129.
(6) 2 Mee. & Wel. 461.

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sold their interest in the mortgaged property to Jules Emile DuBern.

The defendant contended that under these documents no title to or interest in the property passed to Jules Emile DuBern, because the mortgage having been executed on the 28th of July, 1916, the right to recover the money thereby secured was barred by limitation on the 4th August, 1930, when Ma Thein and Lim Eng Hoke purported to sell the property to Jules Emile DuBern, and the debt being irrecoverable by suit the other remedies under the mortgage by which the repayment of the loan was secured were no longer capable of enforcement.

Now, it is common ground that the case turns upon Art. 132 of Sch. I to the Limitation Act (IX of 1908), which runs as follows:

Description of suit.	Period of Limitation.	Time from which period begins to run.
To enforce payment of money charged upon immovable property.	Twelve years ...	When the money sued for becomes due.

The first, and in my opinion the vital, question to be determined for the purpose of deciding this appeal is whether the money secured by the mortgage became due more than 12 years before the sale of the property to Jules Emile DuBern on the 4th of August, 1930. Under the deed of mortgage it is provided that

"whereas the mortgagors by their joint and several promissory note dated the 1st day of June 1915 are indebted to the mortgagee in the sum of Rs. 25,000 AND WHEREAS the mortgagee has demanded that a registered mortgage of the said premises subject to the recited mortgage shall be granted to him by the mortgagors to secure the aforesaid sum of Rs. 25,000, or in default that the

said sum shall be forthwith repaid which the mortgagors have agreed to do upon the terms hereinafter appearing NOW THIS INSTRUMENT WITNESSETH that in pursuance of the said agreement and in consideration of the mortgagee allowing the mortgagors further time within which to repay the said sum of Rs. 25,000 the mortgagors hereby covenant with the mortgagee to pay to him on demand the sum of Rs. 25,000."

Thereafter are set out the terms of the mortgage. What is meant by the words "the mortgagors hereby covenant with the mortgagee to pay to him on demand the sum of Rs. 25,000" as used in this deed of mortgage? *Primâ facie* where a person agrees to pay a sum on demand that sum is payable forthwith, and the learned advocate for the appellants has contended that, inasmuch as in the present case Rs. 25,000, the sum secured by the mortgage, was stated to be repayable on demand, such sum became due within the meaning of Art. 132 forthwith, that is to say, immediately after the execution of the deed of mortgage on the 28th of July 1916. In support of his contention reference was made to the cases of *T. C. Bose* v. *Obedur Rahman Chowdhury* (1) and *Perianna Goundan* v. *Muthuvira Goundan and another* (2) in which it was held that where money lent is repayable on demand there is a cause of action for the recovery of the money on the date of the loan, and also to Art. 59 of the Limitation Act in which it is provided that a suit for money lent under an agreement that it shall be payable on demand must be brought within three years from the date when the loan was made. If it was intended in those cases to lay down that in every case in which it was agreed that a sum of money should be payable on demand the money was payable forthwith, I am of opinion that in those cases the law was laid down too

(1) (1928) I.L.R. 6 Ran. 297. (2) (1897) I.L.R. 21 Mad. 139.

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broadly. In my opinion, although *primâ facie* a sum payable "on demand" is repayable forthwith and the words "on demand" are superfluous, in each case the question whether or not the parties intended that the words "on demand" should be treated as an integral and operative part of the agreement depends upon the true construction of the agreement into which the parties entered.

In *N. Joachimson* v. *Swiss Bank Corporation* (1) Atkin L.J. observed that

> "The question appears to me to be in every case, did the parties in fact intend to make the demand a term of the contract? If they did, effect will be given to their contract, whether it be a direct promise to pay or a collateral promise, though in seeking to ascertain their intention the nature of the contract may be material."

In so holding the learned Lord Justice was stating what, in my opinion, has always been the common law upon this subject.

In *Norton* v. *Ellam* (2), Parke B. observed:

> "It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so."

And in *Walton* v. *Mascall* (3), Parke B. laid down that

> "It is clear that a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made: if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due."

See also *Hannantram Sadhuram Pity* v. *Arthur Bowles* (4); *Nettakaruppa Goundan* v. *Kumarasami*

(1) (1921) 3 K.B. 110, at p. 129.
(2) 2 Mee. & Wel. 461, at p. 464.
(3) 13 Mee. & Wel. 452, at p. 458.
(4) (1884) I.L.R. 8 Bom. 561.

Goundan and others (1); and *The Secretary of State for India in Council* v. *Pandit Radhika Prasad Bapuli* (2). In the last case (2) Schwabe C.J. held that

"The question to be considered is whether the words 'on demand' are mere words, or whether, looking at the whole document, it is really intended that the demand should be made before the liability to pay arises".

In my opinion it is manifest, having regard to the language in which the deed of mortgage of the 28th of July, 1916, is couched, that the parties to the deed of mortgage intended that the sum of Rs. 25,000 should not be due and payable unless and until a demand in that behalf had been made upon the mortgagors by the mortgagees. At the time when the deed of mortgage was executed the mortgagors were jointly and severally liable to pay Rs. 25,000 to Khoo Heng Yean; and if the parties intended that the words "payable on demand" in the deed of mortgage should mean forthwith the mortgagors would have been equally liable to pay Rs. 25,000 to Khoo Heng Yean forthwith and unconditionally both before or after the mortgage was executed. But the object for which the mortgagors consented to execute the mortgage in favour of Khoo Heng Yean was in order that they should obtain some further time in which to repay the loan. In effect the agreement between the parties was that the mortgagors should have further time within which to pay the Rs. 25,000, and in consideration of the mortgagee not suing them upon the promissory note the mortgagors provided further security by executing the deed of mortgage, and undertook to pay the sum of Rs. 25,000 if and

(1) (1898) I.L.R. 22 Mad. 20. (2) (1922) I.L.R. 46 Mad. 259.

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when the mortgagee should think fit to demand it from them. It is true that it was not stipulated that any specific period of time should elapse before the demand for payment was made; but as I apprehend the terms of the deed of mortgage it is plain that the parties intended that the mortgagors should not be bound to pay the Rs. 25,000 unless and until the mortgagee thought fit to make a demand upon them for repayment, and it is not pretended that any demand for payment was made as provided in the deed of mortgage. The learned advocate for the appellants conceded that unless the Court held that the words "on demand" in the deed of mortgage meant "forthwith" he could not resist the respondent's claim. In my opinion the appeal fails, and is dismissed with costs.

MYA BU, J.—I agree.