APPELLATE CIVIL.

Before Tek Chand and Monroe JJ.

1932

Dec. 1.

GULZARI MAL AND ANOTHER (PLAINTIFFS) Appellants

versus

MAGHI MAL AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 1719 of 1931.

Civil Procedure Code, Act V of 1908, Order XXII, rule 9: Abatement of previous suit as against pro forma *defendants—whether affects subsequent suit against those defendants only—on a different cause of action—Indian Limitation Act, IX of 1908, Articles 61, 83, 116, 132: Suit by mortgagors against vendees of equity of redemption—who had undertaken but failed to pay purchase-price in redemption of mortgage—Limitation.*

On 16th October 1902 *A* mortgaged his shops and his share in a *haveli* to *X* for Rs. 5,000 with possession and on 16th September, 1921, he sold the share in the *haveli* to *B* and *C* for Rs. 10,000, half of which was paid to *A* in cash, and the balance of Rs. 5,000 was retained by the vendees for payment to *X* in redemption of the mortgage. *B* and *C* failed to pay the mortgagee and were accordingly impleaded as *pro forma* defendants in the suit by *A* for redemption against *X*. That suit was decreed, the fact that *C* had died during the pendency of the suit and that his sons had not been impleaded as his legal representatives being held to have caused abatement so far as the *pro forma* defendants *B* and *C* were concerned, but not so as to affect the suit *qua* the mortgagee-defendant, against whom a final decree was passed on the 1st June 1930. In the present suit, brought on the 16th December 1930, for recovery of the Rs. 5,000, being the balance of the price under the sale deed of 16th September 1921 and for damages, the defendants, *B* and the sons of *C*, pleaded Order XXII, rule 9 of the Civil Procedure Code by reason of the abatement of the previous suit as against *B* and *C* and Article 116 of the Limitation Act, as bars.

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Held that, as the present defendants were merely *pro forma* parties, and no cause of action had been disclosed, nor any relief claimed against them in that suit; and as the cause of action was different, and arose after, and in consequence of, the decision of that in the previous suit; there was no substance in the plea that Order XXII, rule 9, was a bar to the maintainability of the present suit.

Held also, that as regards the claim for Rs. 5,000 'as unpaid vendors' "on the security of the share in the *haveli*," the claim was governed by Article 132 of the Indian Limitation Act, which prescribes a period of 12 years from the date when the money became due.

And, as regards the rest of the claim, the suit was governed either by Article 116, read with Article 83, under which the plaintiffs could bring their suit within six years from the date when they actually sustained the loss; or, Article 61, under which they could sue within three years from the date of the payment. In either case the suit was within time.

Case law discussed.

First Appeal from the decree of Sayyad *Mohammad Abdullah, Subordinate Judge, 1st Class, Lahore, dated the 18th May, 1931, dismissing the plaintiffs' suit.*

M. L. SETHI and AMAR NATH CHOPRA, for Appellants.

SHAMAIR CHAND, QABUL CHAND, JAGAN NATH MALHOTRA and RAM LAL ANAND, for Respondents.

TEK CHAND J.—The facts of the litigation which has given rise to this appeal are as follows:— TEK CHAND J.

Nanda Mal, the predecessor-in-interest of the plaintiffs-appellants, owned six shops and a two-third share in a *haveli* situate in Kasur town, the remaining one third of the *haveli* being the property of Maghi Mal, defendant No. 1 and Shankar Das, father of defendants 2 and 3. On the 16th of October 1902 Nanda

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Mal mortgaged the six shops and his share in the *haveli* to Narain Mal and Pala Mal for Rs. 5,000. The mortgage was with possession. On the 16th of September 1921, Nanda Mal sold by registered deed his two-third share in the *haveli* to Maghi Mal, defendant No. 1, and Shankar Das for Rs. 10,000. Out of the sale price, Rs. 5,000 was paid in cash to the vendor, and the remaining Rs. 5,000 was left with the vendees for payment to the mortgagees. The vendees took no action to redeem the mortgage for more than two years, and on the 30th of April 1924 the plaintiffs served them with a notice asking them to redeem the mortgage without further delay, so that the plaintiffs might be able to get back the six shops free from all encumbrances. The vendees replied on the 12th of May 1924, saying that the demand of the vendors was premature as no time for redemption had been fixed and that they could pay the mortgagees at any time during the currency of the mortgage. The vendors were naturally anxious to avoid further loss to themselves and, therefore, they filed a suit for redemption against the mortgagees in the Court of the Senior Subordinate Judge, Lahore, on the 17th December 1925. In that suit the vendees (Maghi Mal and Shankar Das) also were impleaded as *pro forma* defendants. During the pendency of this suit Shankar Das died and his representatives were not brought on the record within ninety days. The Senior Subordinate Judge held that the suit had abated as against both the *pro forma* defendants but that this did not affect the case against the mortgagees. He accordingly proceeded to trial on the merits and granted the plaintiffs a preliminary decree under Order XXXIV, rule 7 for redemption on payment of Rs. 5,000 within one month. This amount was duly deposited in Court by the plaintiffs on the

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15th February 1928. The mortgagees lodged an appeal in the District Court, but the appeal was dismissed on the 20th December 1928. A second appeal was filed in this Court and this also was unsuccessful. The Senior Subordinate Judge accordingly passed a final decree in the redemption suit on the 18th June 1930.

On the 16th December 1930, the present action was brought by the plaintiffs against Maghi Mal and the sons of Shankar Das asking for a decree for Rs. 6,000 " on the security of two-third share of the *haveli*." It was also prayed that a decree against the other property of the defendants and the person of Maghi Mal be passed. The sum claimed was made up of Rs. 5,000, which the plaintiffs had to pay to the mortgagees on failure of the defendants to redeem the mortgage in accordance with the stipulation in the sale deed, and Rs. 1,000 as damages.

The defendants pleaded *inter alia* that the suit was not maintainable under Order XXII, rule 9, by reason of the abatement of the former suit against Maghi Mal and Shankar Das, and that it was time-barred. The learned Subordinate Judge has sustained the first objection, and has also held the suit to be barred by limitation under article 116 of Act IX of 1908 against defendants 2 and 3, the claim against the first defendant having been found to have been within time by reason of an acknowledgment of liability made by him within six years of the suit.

In my opinion there is no substance in the plea that Order XXII, rule 9 is a bar to the maintainability of this suit. The present defendants were admittedly *pro forma* parties to the previous suit and it is clear from the plaint in that case that no cause of action had

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been disclosed, nor any relief claimed, against them. It is also beyond question that the nature of the two suits is wholly dissimilar. The former suit was one against the mortgagees for redemption of the mortgage which had been effected in their favour by the predecessors-in-interest of the plaintiffs in 1902; while the present suit is for recovery from the vendees of the amount which they had undertaken to pay to the mortgagees but which, on their failure to do so, the plaintiffs had been compelled to pay from their own pocket in order to avoid further loss to themselves. The causes of action for the two suits are thus entirely different. Indeed, it is obvious from the plaint in the present case that the alleged cause of action for it arose after, and in consequence of, the decision in the previous suit. The finding of the Subordinate Judge appears to have been based on a misunderstanding of para. 10 of the plaint in the former suit and cannot be maintained. I hold, therefore, that Order XXII, rule 9, which bars a fresh suit based on the *same* cause of action on which an earlier suit had been instituted has no application to the facts of this case.

In deciding the question of limitation, the allegations in the plaint and the relief sought have to be carefully examined. As stated already, the plaintiffs in the first instance ask for a decree for the recovery of a certain sum of money " on the security of two-thirds of the *haveli* " and the ground of their claim is that ' as unpaid vendors,' and also because they have had to pay to the mortgagees the amount due on foot of the mortgage, which under the terms of the sale the defendants were bound to pay, they have a charge on this part of the *haveli* for the sum sued for. It is clear that in this part of the claim, as laid in the

plaint, the plaintiffs seek to enforce payment of money alleged to be charged on immovable property, and as such it is governed by article 132 of the Indian Limitation Act, which prescribes a period of twelve years from the date when the money became due. In this view of the case, the claim is obviously within time.

The learned Subordinate Judge has dealt with the question simply from the point of view of the alternative claim for relief against defendant No. 1 personally and against the property of defendants 2 and 3, and has followed *Raghubar Rai* v. *Taij Rai* (1). That case is clearly distinguishable, as there the vendor had not paid off the creditors and the question whether a second cause of action would arise if and when the plaintiff had made the payment and sustained the actual loss, was not finally decided (see p. 437 of the report). The learned Judges, however, made certain observations which lend support to the view that a second cause of action would not arise in such a contingency. These observations, which were admittedly in the nature of *obiter dicta*, were considered by a Division Bench of the same Court in *Sarju Missra* v. *Ghulam Hussain & Co.* (2), and it was held that a claim of this kind brought after the plaintiff had paid the amount to the creditor to avoid loss to himself, is governed by article 61 and that the *terminus a quo* is the date of the payment. The same view had been taken previously at Allahabad in *Hakim Ali Khan* v. *Dalip Singh* (3), and was again adopted in *Dinanath Mahish* v. *Naba Kumar Hajia* (4) and *Shib Lal* v. *Munni Lal* (5). It may be mentioned, however, that

(1) (1912) 14 I. C. 244: I. L. R. 34 All. 429.
(2) (1921) 63 I. C. 87.
(3) (1913) 19 I. C. 676
(4) (1922) 70 I. C. 542.
(5) (1922) I. L. R. 44 All. 67, 71.

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Raghubar Rai v. *Taij Rai* (1) was followed, though not without hesitation, by a Single Bench at Allahabad in *Ram Narain* v. *Nihal Singh* (2), and also by a Single Bench of our own Court in *Mehar Chand* v. *Shanti Swarup* (3), but it appears that in neither case was the attention of the learned Judge drawn to the subsequent rulings of the Allahabad Court cited above in which a contrary opinion had been expressed. Moreover, in *Mehar Chand* v. *Shanti Swarup* (3), the suit was within time whether article 116 or article 61 applied and, it was not necessary to decide which of these articles really governed the case.

The question again came up for consideration before the Allahabad Court in *Kedar Nath* v. *Har Govind* (4), where Kanahaya Lal J. held that the limitation for a suit to recover damages in such a case is that provided in article 83 and that time runs from the date when plaintiff pays off the person to whom the money had to be paid. The other learned Judge, Ashworth J., however, held that the suit was one based on a breach of a registered contract and, therefore, governed by Article 116 and that the starting point for limitation was the *date* of actual injury to the plaintiff, that is to say, the date on which payment was made by him. As the particular suit which the learned Judges were deciding was within time according to either view, it was not thought necessary to refer the matter to a third Judge for decision as to which of these two views was correct.

In *Ram Rachya Singh Thakur* v. *Rughunath Prasad Missar* (5), a Division Bench of the Patna

(1) (1912) I. L. R. 34 All. 429.
(2) (1925) 87 I. C. 804.
(3) (1929) 118 I. C. 445.
(4) (1926) 95 I. C. 913.
(5) (1929) I. L. R. 8 Pat. 860.

High Court, following *Daswant Singh* v. *Syed Shah Ramjan Ali* (1), held that article 116 was applicable to such cases, and that the *terminus a quo* was the date on which the contract was deemed to have been broken, *viz.* the date when either there was repudiation of liability under it, or when the contract had become impossible of performance on account of the debt having been satisfied by the plaintiff. As the suit was within time from either of these dates it was not definitely decided as to which of them was the real starting point of limitation. The learned Judges, however, considered at great length the *obiter dictum* in *Raghubar Rai* v. *Taij Rai* (2), that time ran from the date of the execution of the sale deed, and held that it was unsound.

In Calcutta the only case bearing on the point, which I have been able to find is *Talukdari Settlement* v. *Bhaijibhal Ishwardas* (3), where Lawrence Jenkins C. J. and Chatterji J. held that where a person purchases an equity of redemption subject to a mortgage and pays merely for the value of that equity, he contracts to protect his vendor from the obligation of the mortgage and the buyer's contract with the mortgagor is that the debt shall not fall upon him. Such a contract is one of indemnity and the buyer is bound without any specific contract to indemnify the seller. The learned Judges were of opinion that if in such cases the vendor has to pay the mortgagee and sues the vendee to recover the amount so paid, the suit is governed by article 83 extended by article 116, and that the starting point of limitation is the date when the plaintiff is actually damnified.

(1) (1907) 6 Cal. L. J. 398. (2) (1912) I. L. R. 34 All. 429.
(3) (1912) 16 I. C. 73.

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In this connection, it might be useful to refer to a decision of our own Court reported as *Abdul Aziz Khan* v. *Muhammad Bakhsh* (1), in which article 116 was applied, the starting point being held to be the date on which the plaintiff was damnified. It may, however, be stated that the facts of that case were not on all fours with those of the case before us.

After a careful consideration of the allegations in the plaint, and having regard to the authorities discussed above, I am of opinion that the *obiter dicta* in *Raghubar Rai* v. *Taij Rai* (2), which the learned Subordinate Judge has followed, do not lay down the law correctly and that this part of the plaintiffs' claim is governed either by article 116, read with article 88, under which the plaintiffs could bring their suit within six years from the date when they actually sustained the loss, or, article 61 under which they could sue within three years from the date of the payment. It is not necessary for the purposes of the present case to express a final opinion as to which of these two articles is applicable, for in either case the suit is within time, having been instituted within three years from the 15th February 1928 when the plaintiffs made the payment to the mortgagees.

I would accordingly accept the appeal, set aside the judgment and decree of the Subordinate Judge and remand the case under Order XLI, rule 23 for trial on the merits. Court fee on appeal shall be refunded; other costs shall be costs in the cause.

MONROE J.

MONROE J.—I agree.

N. F. E.

Appeal accepted.
Case remanded.

(1) (1921) 64 I. C. 431. (2) (1912) I. L. R. 34 All. 429.