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other sums mentioned in the plaint. The result, therefore, is that this appeal fails and must be dismissed. Having regard to all the circumstances, I would leave the parties to bear their own costs throughout in respect of the claim for Rs. 882-12-0, but would order the plaintiff-appellant to pay the costs of the defendants-respondents on the remainder of his claim, in all Courts.

JAI LAL J.—I agree.

JAI LAL J.

*A. N. C.*

*Appeal dismissed.*

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## APPELLATE CIVIL.

*Before Tek Chand and Din Mohammad JJ.*

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*May 3.*

KESRI MAL-UMRAO SINGH (DEFENDANTS) Appellants

*versus*

TANSUKH RAI-KIDAR NATH AND OTHERS (PLAINTIFFS) Respondents.

**Civil Appeal No. 380 of 1933.**

*Transfer of Property Act, IV of 1882, Section 100: Cash credit account—secured by a registered mortgage on immoveable property—whether valid and whether covers interest in excess of the limit of the cash credit—Indian Limitation Act, IX of 1908, Article 116—whether applies to the personal liability of the mortgagor.*

The defendants opened a cash credit account with the predecessors of plaintiff up to a limit of Rs. 4,000 and as collateral security for the repayment of the amount to be advanced in this account they created a charge on their shop by means of a registered document on 29th September, 1920. The plaintiff obtained a promissory note for Rs. 4,000 from the defendants the next day, *i.e.* 30th September, 1920, and paid them forthwith the whole amount of Rs. 4,000. Thereafter defendants made various payments to the plaintiff and drew out further

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sums in the account but at no time did the amount due by the defendants exceed Rs. 4,000. The defendants struck a balance of Rs. 3,450 in plaintiff's favour on 31st March, 1926, and on 2nd December, 1930, plaintiff brought the present suit for Rs. 5,000 being the amount due on the balance and interest thereon. It was found by the High Court in conformity with the lower Courts that the nature of the dealings between the parties was that the defendants had a running account with the plaintiff on the usual cash credit system and for the payment of all advances in this account the shop in question was made collateral security, subject to the maximum principal sum borrowed not exceeding Rs. 4,000, and that the charge on the shop was not intended to be limited to the first advance of Rs. 4,000 but was to include all advances in the account. It was contended *inter alia* on behalf of the defendants that for a document to create a charge on immoveable property under section 100 of the Transfer of Property Act, it must be a document which creates such charge immediately on its execution and not one which merely creates a charge that operates at some future time.

*Held* (overruling the contention), that for the creation of a valid charge it is not a necessary condition that there should be a pre-existing liability. On the other hand a charge as well as a mortgage can be validly created for the discharge of a future and contingent liability.

*Imbichi* v. *Achampat Avukoya Haji*, per Coutts-Trotter J. (1), relied upon.

Case law discussed.

*And*, therefore, the document in the present case, created an immediate charge on the shop in dispute, although the liability was contingent.

*Held further*, that the charge extended to the amount claimed in excess of Rs. 4,000, being interest on the balance of Rs. 3,450, which became due by reason of the failure of the defendants to pay it on due date.

*Held also*, that the transaction in the present case being evidenced by a registered document was governed by Article 116 of the Indian Limitation Act and therefore the period

(1) (1917) 39 I. C. 867.

during which the personal liability of the defendants could be enforced was six years from the date when the amount became payable.

*Ganesh Lal Pandit* v. *Khetramohan Mahapatra* (1), distinguished.

*Chengalamma Guru* v. *Veeraraghava Naidu* (2), and *Ratnasabapathy Chettiar* v. *Devasigamony Pillai* (3), relied upon.

*Second Appeal from the decree of Mr. L. Middleton, District Judge, Rawalpindi, dated 14th November, 1932, affirming that of* Lala *Purshotam Lal, Senior Subordinate Judge, Rawalpindi, dated 21st April, 1932, granting the plaintiffs a decree for Rs. 6,564-14-3 with interest.*

HAR GOPAL, for FAKIR CHAND, for Appellant.

J. N. AGGARWAL and J. L. KAPUR, for Respondents.

TEK CHAND J.—This second appeal arises out of a suit brought by the plaintiff-respondent against the defendant-appellant for recovery of Rs. 5,000 with future interest, by sale of a certain shop situate at Sadr Bazar, Rawalpindi. The trial Court granted the plaintiff a preliminary decree (in Form 4, Appendix D, Civil Procedure Code), for recovery of the amount claimed by sale of the shop. This decree has been affirmed on appeal by the District Judge, and the defendants have preferred a second appeal to this Court. TEK CHAND J.

The relevant facts are that the defendants, in order to raise money for the extension of their business, opened a cash credit account with the predecessor-in-interest of the plaintiff, up to a limit of Rs. 4,000 and as collateral security for the repayment of the

(1) (1926) I. L. R. 5 Pat. 585, 591 (P.C.). (2) (1928) 55 Mad. L. J. 506.
(3) (1929) I. L. R. 52 Mad. 105 (F.B.).

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amount to be advanced in this account they created a charge on the shop in question, undertaking not to alienate or encumber it during the continuance of the account. A document (Ex. P. 1) reciting the above terms and making the shop collateral security for the amount to be advanced in the account was executed by the defendants and registered on the 29th of September, 1920, and the next day, *i.e.*, on the 30th of September, 1920, the plaintiff obtained a promissory-note for Rs. 4,000 from the defendants, as is usually done by Banks in dealing with their customers in cash credit account. On execution of the promissory-note the defendants drew Rs. 4,000 forthwith from the plaintiff. Thereafter the defendants made various payments to the plaintiff in the account and also drew further sums from him, but at no time did the amount due by the defendants exceed Rs. 4,000. All transactions between the parties were entered in an account in the plaintiff's *bahi*. On the 31st of March, 1926, the defendants went through the account and struck a balance in the plaintiff's *bahi* showing Rs. 3,450 as due to the plaintiff on that day.

On the 2nd of December, 1930, the plaintiff brought an action for recovery of Rs. 5,000 made up of—

(1) Rs. 3,450 the amount due on 31st March, 1926, when the last balance was struck, and

(2) Rs. 1,550 interest which had accrued thereon from that date till the institution of the suit.

It was alleged in the plaint that the plaintiff was entitled to bring the shop to sale in order to realize the amount claimed, together with future interest at the stipulated rate, and it was prayed that a decree be passed therefor.

The defendants pleaded that Ex. P. 1 did not create a charge on the shop in question and, in the alternative, it was urged that the charge, if created at all, was limited to the specific sum of Rs. 4,000 which had been borrowed at the time of the execution of the promissory-note on the 30th of September, 1920, and as that amount had been repaid in full in June, 1921, the charge had ceased to exist and the shop was not liable for the amount subsequently advanced or the interest due thereon. It was further pleaded that the maximum limit of the alleged charge being Rs. 4,000 the amount of interest due over and above that sum could not be realized from the property.

The Courts below have overruled these objections and, as already stated, have passed a preliminary decree in terms of Order XXXIV, rule 4, Civil Procedure Code.

Before us the appellant's learned counsel has re-agitated the points above mentioned and we have heard elaborate arguments on both sides. The first contention raised is that the document, Ex. P. 1, dated the 29th of September, 1920, and the promissory note executed the next day were two independent transactions, but after examining the document, the promissory note, the entries in the *bahi* and the other evidence on the record, I have no doubt that the finding of the Lower Courts on this point is correct and that the true nature of the dealings between the parties was that the defendants had a running account with the plaintiff on the usual cash credit system and for the repayment of all advances in this account the shop in question was made collateral security, subject to the maximum principal sum borrowed not exceeding Rs. 4,000. It is obvious that

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the charge on the shop was not intended to be limited to the first advance of Rs. 4,000 as alleged by the defendants, but it was to include all advances in the account.

The second point urged is that, even if this was the real nature of the transaction, the document (Ex. P. 1) did not create a valid charge on the property mentioned therein. It was contended that under the law in India, as enacted in section 100 of the Transfer of Property Act, the principles of which have been held applicable to this Province, a charge can be validly created only in respect of a pre-existing liability, and as at the time of the execution of Ex. P. 1, no money had been advanced by, or was due to, the plaintiff the document could not operate as a charge. In support of this argument reliance was placed on *Madho Misser* v. *Sidh Binaik Upadhya* (1), which was followed by the Allahabad High Court in *Harjas Rai* v. *Naurang* (2) and by a Division Bench of this Court in *Abdul Samad* v. *Municipal Committee, Delhi* (3). In these cases it was observed that "for a document to create a charge on immoveable property under section 100, Transfer of Property Act, it must be a document that creates such charge immediately on its execution and not one that merely creates a charge that operates at some future time." It is not necessary for our present purposes to examine the terms of the documents which were under consideration in the Calcutta, Allahabad and Lahore cases aforesaid, or to see whether the ultimate decision in each case could or could not be supported on the construction put thereon. But with all respect to the learn-

(1) (1887) I. L. R. 14 Cal. 687. (2) (1906) 3 All. L. J. 220.
(3) (1922) 67 I. C. 939

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ed Judges who decided those cases, I feel bound to say that the broad proposition of law enunciated therein, cannot be supported either on the wording of section 100 or on general principles. The observations in *Madho Misser* v. *Sidh Binaik Upadhya* (1) and *Harjas Rai* v. *Naurang* (2) have been adversely commented upon by Ghose in his standard work on the *Law of Mortgages in India* (Volume I, page 158, 5th Edition), and by Mulla in his recently published *Commentary on the Transfer of Property Act* (page 502) and have been specifically dissented from by the Madras High Court in *Balasubramania Nadar* v. *Sivaguru Asari* (3), *Imbichi* v. *Achampat Avukoya Haji* (4) and *Sesha Iyer* v. *Srinivasa Ayyer* (5), and the Patna High Court in *Nand Lal* v. *Dharamdeo Singh* (6) and *Murat Singh* v. *Pheku Singh* (7). As pointed out by Coutts-Trotter J. in a charge to secure a liability which is not existent *in præsenti* but is contingent and liable to arise in the future, is valid under section 100 of the Transfer of Property Act. The learned Judge remarked that if the decisions in *Madho Misser* v. *Sidh Binaik Upadhya* (1) and *Harjas Rai* v. *Naurang* (2) "are supposed to enunciate the proposition that wherever you have a charge to secure a liability, which is not a liability existent *in præsenti*, but will arise, if at all, in the future, that cannot be a present charge within the meaning of the Transfer of Property Act, then I think this Court is bound to say that those decisions, if they meant that, are bad law and should not be followed." The learned Judge then

(1) (1887) I. L. R. 14 Cal. 687.
(2) (1906) 3 All. L. J. 220.
(3) (1911) 11 I. C. 629.
(4) (1917) 39 I. C. 867.
(5) (1922) 70 I. C. 362.
(6) (1924) 78 I. C. 457.
(7) (1928) I. L. R. 7 Pat. 584.

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proceeded to give the instances of a Government servant giving security of a fidelity-bond or other security for the faithful discharge of his duties, and of a person who, while his account is in credit at the bank, deposits his title-deeds to secure a possible future overdraft, and observed that it was idle to contend that these were not perfectly good charges on the property over which they purported to operate, notwithstanding the fact that the indebtedness in both cases was future and contingent.

This, if I may say so with all respect, is a correct exposition of the law. I have no doubt that for the creation of a valid charge it is not a necessary condition that there should be any pre-existing liability. On the other hand, as observed by Ghose, a charge may undoubtedly be created, as well as a mortgage, for the discharge of a contingent liability. In such a case as soon as the promise is made, the promisee is entitled to the specified property as security for the due performance of the promise. I hold, therefore, that the document, Ex. P. 1, created an immediate charge on the shop in dispute, although the liability was contingent, and that the plaintiff is entitled to realize by sale of the shop the amount due to him on foot of the account.

The next point for consideration is whether the charge is limited to the sum of Rs. 4,000 only or extends to the excess amount claimed, which consists of interest on Rs. 3,450, which was the principal sum found due when the last balance was struck. As has been well observed by the learned Subordinate Judge, if there had been no subsequent dealings between the parties after the first advance of Rs. 4,000 made on the 30th of September, 1920, and the plaintiff had to

file a suit after two or three years to recover his dues, it would be absurd to contend that the property could be sold only for the realization of the principal amount and not for interest accrued thereon or costs of the suit. As already stated, the last balance was for Rs. 3,450 which is below the maximum limit fixed, and if the amount due has exceeded Rs. 4,000 by reason of the failure of the defendants to pay the interest on the due date, the charged property cannot escape liability therefor.

Mr. Har Gopal next drew our attention to the decree passed by the trial Court and affirmed by the District Judge, which is in terms of Form 4, Appendix D, Civil Procedure Code. It provides, *inter alia*, that in the event of the net proceeds of the sale of the shop being insufficient to pay in full the amount due, the plaintiff shall be at liberty to apply for a personal decree against the defendants for the balance. Counsel made a half-hearted attempt to argue that no personal decree could have been passed in this case. This contention is obviously without force for, as shown above, the dealings between the parties were in a running account and the mere fact that a shop had been offered as collateral security did not relieve the debtors of their personal liability. Both counsel have cited a large number of rulings before us, but it is not necessary to discuss them, as each case proceeded on its own peculiar facts. No hard and fast rule can be laid down, and the decision in every case must depend on the terms of the agreement between the parties. Having regard to the nature of the dealings between the plaintiff and the defendants in the case before us I have no doubt that the plaintiff is legally entitled to claim a personal decree against the defendants in the

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event of the sale-proceeds of the charged property being found insufficient to meet his dues.

It was, however, contended that the claim for a personal decree was barred by limitation, as the last balance had been struck on the 31st March, 1926, and the suit brought more than three years after that date. In my opinion, this contention also is without substance. The transaction in this case was evidenced by a registered document and, therefore, under Article 116 of the Indian Limitation Act the period during which the personal liability of the defendants could be enforced was six years from the date when the amount became payable, and admittedly this had not expired when the plaintiff instituted the suit. Mr. Har Gopal referred us to certain observations in the judgment of their Lordships of the Privy Council in *Ganesh Lal Pandit* v. *Khetramohan Mahapatra* (1) and sought to argue that that case must be taken to have overruled the long series of decisions in this country in which Article 116 has been held applicable to such cases. A careful perusal of the judgment of their Lordships shows, however, that this is not so. In that case the suit had been brought *ten* years after the execution of the deed, and the real question for decision was whether a claim for personal liability was governed by Article 132, which prescribes a period of 12 years for suits described therein. Their Lordships having answered that question in the negative, it was not necessary for them to decide whether the suit was governed by Article 116 or Article 65, as in either case it was time-barred. Moreover it appears from the judgment, that there was some defect in the registration of the document sued upon, and for this reason

(1) (1926) I. L. R. 5 Pat. 585, 591 (P.C.).

their Lordships seem to have treated the claim as one based on an unregistered bond, for which the period of limitation is three years only. The whole question has been discussed at great length by the Madras High Court in *Chengalamma Guru* v. *Veeraraghava Naidu* (1) and again in *Ratnasabapathy Chettiar* v. *Devasigamony Pillai* (2), and in the latter case after a review of all the authorities it was held that the construction sought to be put on the remarks of their Lordships in *Ganesh Lal Pandit* v. *Khetramohan Mahapatra* (3), was incorrect and that the law was, as it has always been, that where a mortgage-deed containing a personal covenant to pay the mortgage money was registered, the article of the Limitation Act applicable to a claim based on a personal covenant to recover the balance of the mortgage amount after the sale of the mortgaged property was article 116, which provided a period of six years from the due date. I have, therefore, no hesitation in rejecting the appellants' contention and hold that the decree of the lower Courts reserving liberty to the plaintiff to apply under Order XXXIV, rule 6, in the event of the sale proceeds being found insufficient to discharge the amount due, is correct.

There is, however, a slight mistake in the calculation of the amount due on the date of the institution of the suit. As already stated the last balance was struck by the defendant in plaintiff's *bahi* on the 31st March, 1926, when Rs. 3,450 was found due. This *bahi* shows, that after that date the defendant paid to the plaintiff Rs. 200 on the 24th June, 1926, and Rs. 300 on the 26th May, 1928, or Rs. 500 in all.

(1) (1928) 55 Mad. L. J. 506. (2) (1929) I. L. R. 52 Mad. 105 (F.B.).
(3) (1926) I. L. R. 5 Pat. 585 (P.C.).

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Both counsel agree, that after giving credit to the defendant for these sums the amount due on the date of the suit including interest and compound interest at the stipulated rate was Rs. 4,863-15-6 and not Rs. 5,000 as stated in the plaint. All subsequent calculations must, therefore, be made on this basis. In its decree, the trial Court had fixed the 1st of June, 1932, as the date of payment, but as that date has long since passed, it was agreed by both counsel before us that the date of payment be now fixed as 1st of June, 1934, and all calculations made accordingly. Both counsel are agreed that the amount due on 1st June, 1934, would be Rs. 7,378-4-3. The decree of the lower Court will be amended accordingly. If the defendant fails to pay the amount on that date a final decree will be passed. In all other respects the decree of the Lower Appellate Court shall stand.

I would accordingly accept the appeal to the extent indicated above and in modification of the decree of the lower Court pass a decree in the above terms. The orders of the Lower Appellate Court as to costs in that Court shall stand, but, in this Court the plaintiff-respondent will get one-half costs of this appeal from the defendant.

DIN MOHAMMAD J.

DIN MOHAMMAD J.—I agree.

*A. N. C.*

*Appeal accepted in part.*