

fault with in respect of three matters, (C), (E), (F), in which the District Judge thought he was guilty of gross negligence. The period of limitation to make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust is three years from the trustee's death. It is not alleged that Bái Amrat has herself committed any fraud or waste. She was ready to assign over the securities and she applied to the District Court for the appointment of trustees. As against Amratbái, therefore, the claim in regard to outstandings and loss of interest (E), (F) is not of the nature contemplated by section 10 of the Limitation Act, namely, a claim to follow up specific property, and section 10, therefore, does not protect the present claim which is barred under article 98—*Shápurji Nowroji v. Bhikaiji*⁽¹⁾; *Sethu v. Subramanaya*⁽²⁾; *Chintamoni v. Sarup*⁽³⁾. The claim marked (C) [the silver censer] is of that nature, but it is of too trivial a character to require further notice.

We are, therefore, of opinion that both the objections urged by appellant's counsel are valid in law, and we uphold them accordingly. We amend the decree by limiting its relief to the two points covered by the sanction.

Decree amended.

(1) I. L. R., 10 Bom., p. 242.

(2) I. L. R., 11 Mad., p. 274.

(3) I. L. R., 15 Cal., p. 703.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

YASHVANT NA'RA'YAN KA'MAT (ORIGINAL PLAINTIFF), APPELLANT, v.
VITHAL DIVAKAR PARULEKAR AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1895.

November 25.

Mortgage—Right of mortgagee to sell mortgaged property—Regulation V of 1827—Transfer of Property Act (IV of 1882), Sec. 67—Covenant to pay interest—Separate suit to recover arrears of interest—Civil Procedure Code (Act XIV of 1882), Sec. 43.

The breach of covenant in a mortgage-bond to pay interest each year which covenant is not confined to the fixed period of the mortgage and is distinct from and

* Second Appeal, No. 316 of 1894.

1895.

YASUVANT
v.
VITHAL.

independent of the claim of the mortgagee to recover the principal sum, and the performance of which is secured in a different manner, gives rise to a distinct cause of action which can be sued upon without suing for the principal, and a decree obtained on such bond for overdue interest does not, under section 43 of the Civil Procedure Code (Act XIV of 1882), bar a subsequent suit to recover the principal and interest by sale of the mortgaged property.

Where a mortgage provides that possession of the mortgaged property, if taken by the mortgagee, is only to be taken for securing due payment of the interest, the mortgagee paying the balance (if any) of the profits to the mortgagor, the mortgage is not a usufructuary mortgage, but a simple mortgage, and is governed by the general law applicable to mortgages of this nature. In such a case, although there is no covenant to pay the principal other than that implied in the statement that the principal has been received, and that the property has been mortgaged for the stipulated term of years, and although there is no express provision that it is to be recovered from the mortgaged property, Regulation V of 1827 gives the mortgagee the right to bring the property to sale, and section 67 of the Transfer of Property Act (IV of 1882) confers upon him the same privilege.

SECOND appeal from the decision of T. Walker, Assistant Judge of Ratnágiri, confirming the decree of Ráo Sáheb Náráyan Bálkrishna, Second Class Subordinate Judge of Málvan.

The plaintiff sued in the year 1892 to recover from the defendant personally, or by sale of property mortgaged to the plaintiff, Rs. 1,000 principal and Rs. 818-12-0 interest due on a bond dated the 24th March, 1893. The following is the translation of the material portion of the mortgage-bond:—

“I (the mortgagor) on this day pass this mortgage-deed in writing as follows:—I, for my own necessity, took from you Rs. 1,000 in cash of the Queen's currency. I received the same. In security for the above I mortgage the property situate at mouje Málvan.....And as I have kept with me the possession of the property I have agreed to pay interest on your money at the rate of Rs. 7-8-0 per cent. per annum, and the period of this mortgage is fixed at five years. As to the assessment to be paid to Government in respect of the plots, I will pay the same to Government directly, and I will continue to pay rupees seventy-five every year as interest. In the year in which interest will remain unpaid I will deliver the property into your possession without any objection. And out of the income which may be realized you are to pay me the amount in respect of Government assessment, and out of the remaining profits you should take your interest, and the balance, if any remaining, should be paid to me. If perchance the income is not sufficient for the assessment and your interest as mentioned above I will pay the deficit occurring every year. By the time I redeem the mortgage, should I fail to pay the same, I will, before redeeming the mortgage, pay the deficit occurring in respect of the income, the amount of Government assessment which you may perchance be obliged to pay, as also any increase made in the present assessment or any other cess which may be levied together with interest at 9 per cent. per annum, and then redeem the mortgage.”

The defendants pleaded (*inter alia*) that the plaintiff had, in the year 1882, sued and obtained a decree for interest only, that the right to recover principal as well having then accrued, the suit was barred by section 43 of the Civil Procedure Code (Act XIV of 1882), and that the claim as against the defendants personally was barred by limitation.

The Subordinate Judge rejected the claim.

On appeal by the plaintiff the Judge confirmed the decree. After referring to the authorities cited by the parties the Judge said :—

“The mortgage-bond (Exhibit 4) provides that the interest on the principal amount of Rs. 1,000 should be Rs. 75, and if the mortgagor failed to pay that sum to the mortgagee, the latter should take possession of the property specified in the deed. This is the only remedy provided, and I can find no reason to suppose that it was ever the intention of the parties that the property should be sold in payment of either principal or interest; nor is it anywhere provided that the mortgagor is personally liable for the debt. I am, therefore, of opinion that neither of the reliefs sought by plaintiff can be granted. Whether he is now barred by section 43 from suing for foreclosure is a point I am not now called upon to decide, but I will not allow an amendment of the plaint to that effect as an alternative relief, as Mr. Namjoshi suggests.

“Exhibit 9 shows that the plaintiff sued for interest from 1875 to 1881, due on this mortgage-bond. I am not called upon to criticise that decision, but I think that plaintiff's remedy was to sue for possession, and, perhaps, also, for foreclosure; but as I am doubtful whether he was bound to demand his principal, I have some hesitation in thinking that the present demand for it is barred by section 43. While, therefore, I decide that the property cannot be sold, nor can a personal decree be granted against defendants, I will decide that issue in plaintiff's favour.”

The plaintiff preferred a second appeal.

Branson with *Vásudev G. Bhandárkar* for appellant (plaintiff) :—The lower Courts have refused to give us any relief at all on the ground of limitation, and also because there is no covenant in the deed to pay the principal amount. We submit that though our personal remedy may be barred, still on principle we are entitled to recover the debt by sale of the mortgaged property. There can be no dispute that the transaction is a mortgage, and that being so it must carry with it the remedies which are open to a mortgagee—*Musáheb Zaman Khán v. Inayat-Ul-Lah*⁽¹⁾; *Motirám v. Vitai*⁽²⁾; *Datto Dudheshvar v. Vithu*⁽³⁾.

(1) I. L. R., 14 All., 513.

(2) I. L. R., 13 Bom., 90,

(3) I. L. R., 20 Bom., 408.

1895.

YASHVANT
v.
VITHAL.

Míncksháh J. Taleyárkhán, for respondents (defendants):—The plaintiff cannot bring the property to sale, the mortgage being a usufructuary mortgage without any covenant to pay the principal—*Shaik Idrus v. Abdul Rahiman*⁽¹⁾; *Hikmatulla Khán v. Imam Ali*⁽²⁾; *Saibáshiv Abaji Bhat v. Vyankatráo Rámráo*⁽³⁾. Interest being not paid, the plaintiff ought to have brought a suit for possession and ought to have retained possession till the debt was paid off. But he did not ask for possession in the suit of 1882, and now he is debarred under section 43 of the Civil Procedure Code (Act XIV of 1882). In that suit he ought to have asked for possession in addition to interest, because the principal had then become due—*Duncan Brothers v. Jeetmull*⁽⁴⁾; *Subbaraya Kamti v. Krishna Kamti*⁽⁵⁾; *Anderson, Wright and Co. v. Kalgarla Surji Nartain*⁽⁶⁾. Section XV of Regulation V of 1827 provides a remedy for possession, so also section 67 of the Transfer of Property Act.

Branson, in reply:—This mortgage is not a usufructuary mortgage, while the mortgages in the cases relied on were so. The covenant was to take possession only on failure of payment of interest and to deduct interest from the produce and to hand over the balance to the defendant. Section 43 of the Civil Procedure Code (Act XIV of 1882) does not bar our suit because the document expressly refers to two agreements, one as to the payment of interest, a liability arising every year, and the other as to the payment of principal which did not arise until after the lapse of five years. The causes of action are totally different.

FARRAN, C. J.:—This was a suit by the plaintiff to recover from the defendants personally, or by sale of the mortgaged property, Rs. 1,000 principal and Rs. 818-12-0 interest. The claim against the defendants personally is clearly barred, so that portion of the relief sought may be disregarded.

The mortgage-bond on which the suit is founded is dated the 24th March, 1873. The material parts of it are as follows:—
(His Lordship read the bond and continued.)

(1) N. L. R., 16 Bom., 303.

(4) I. L. R., 19 Cal., 372.

(2) I. L. R., 12 All., 203.

(5) I. L. R., 6 Mad., 159.

(3) P. J., 1895, p. 95; I. L. R., 20 Bom., 296.

(6) I. L. R., 12 Cal., 339.

1895.

YASHVANT

v.

VITHAL.

Upon reading the above mortgage it will be observed—(1) That there is no covenant to pay the principal other than that implied in the statement that the principal has been received and that the property has been mortgaged for five years, nor is there an express provision that it is to be recovered from the mortgaged premises. (2) That there is a distinct covenant to pay interest, and that the possession of the property, if taken by the mortgagee, is only to be taken for the purpose of securing due payment of the interest, the mortgagee paying the balance (if any) of the profits to the mortgagor.

In 1882 the plaintiff sued for the interest in arrear from 1875 to the end of 1881 and obtained a decree. He did not then sue for possession of the mortgaged premises nor for the principal. It is now contended that his present claim is in consequence of that action barred by the provisions of section 43 of the Civil Procedure Code. We do not consider that the contention is well founded. The mortgage-deed contains a covenant to pay interest each year. This covenant, which is, we think, not confined to the fixed period of the mortgage, is distinct from and independent of the claim of the mortgagee to recover the principal sum, and its performance is secured in a different manner. Its breach, we consider, gives rise to a cause of action which can be sued upon without suing for the principal. It is similar to the covenant to pay interest which is inserted in well-drawn English mortgage-deeds for the purpose of enabling the mortgagee to sue for overdue interest without calling in the principal after the date fixed for the payment of the latter. See Davidson on Conveyancing, Vol. II, p. 391 (Tit. Mortgage). The cases cited to us, *Duncan Brothers v. Jeetmull*⁽¹⁾, *Anderson v. Kalagarla*⁽²⁾ and *Taruck Chunder v. Panchu Mohini*⁽³⁾, which show that all existing breaches of the same contract must be joined in the same suit although they may have arisen at different times, do not apply, as here there are two separate contracts contained in the same instrument. *Subbaraya v. Krishna*⁽⁴⁾ favours our opinion, but is not really in point. Nor is the case of *Hikmatulla v. Imam Ali*⁽⁵⁾ when it is carefully considered. There it was held that

(1) I. L. R., 19 Cal., 372.

(3) I. L. R., 6 Cal., 791.

(2) I. L. R., 12 Cal., 339.

(4) I. L. R., 6 Mad., 159.

(5) I. L. R., 12 Allah., 293.

1895.

YASHVANT
v.
VITHAL.

the cause of action in 1884 (the date of the suit for interest) was not the non-payment of the interest, but the mortgagor's non-delivery of possession of the mortgaged premises which gave the plaintiff the right to recover the principal and interest which formed but one cause of action. There was not (as here) a separate covenant for the payment of interest secured in a separate manner. On this point we agree with the judgment of the District Court. That Court has, however, held that the mortgage provides no remedy for the payment of the principal sum, and that "there is no reason to suppose that it was the intention of the parties that the property should be sold in payment of either principal or interest, nor is it anywhere provided that the mortgagor is personally liable for the debt." The case of *Shaik Idrus v. Abdul Rahiman*⁽¹⁾ is relied upon in support of that view. The mortgage in that case was a usufructuary mortgage and contained peculiar provisions from which the Court drew the conclusion that it was the intention of the parties that the land mortgaged to the plaintiff should not be sold in satisfaction of the mortgage-debt. The mortgages in the cases in which that authority was followed, *Sadāshiv Abāji v. Vyankatrāo*⁽²⁾ and Second Appeal No. 844 of 1893, were in similar terms, and the same conclusion was drawn. The present is not a usufructuary mortgage; and when the special stipulations for possession, which are inserted to secure the due payment of the interest during the continuance of the mortgage, are read as confined to the purpose to which they are expressly limited, the mortgage is a simple mortgage of the property in question for five years to secure an advance of Rs. 1,000 with a covenant by the mortgagor to pay interest thereon till the mortgage is redeemed at the specified rate and is governed by the general law applicable to mortgages of this nature. In such case Regulation V of 1827 gives the mortgagee the right to bring the property to sale, and section 67 of the Transfer of Property Act confers upon him the same privilege.

We must, therefore, reverse the decree of the District Judge and remand the appeal for re-trial, having regard to the above observations. Costs to abide the result.

Decree reversed and case remanded.

(1) I. L. R., 16 Bom., 303. (2) P. J. for 1895, p. 95; I. L. R., 20 Bom., 296.