

Gharpure (in reply) :—There is nothing in section 3, clause (g), which excludes suits like the present from its operation, but on the contrary it distinctly relates to suits for possession of mortgaged property.

JENKINS, C. J. :—In our opinion this suit does not fall under Chapter II of the Dekkhan Agriculturists' Relief Act, because it is a suit based on a dispossession of an existing possession, so that the reference to the mortgage in the plaint was incidental and not really necessary. Therefore the case falls within the principle of *Mulchand v. Rarji* ⁽¹⁾.

We accordingly confirm the decree with costs.

Decree confirmed.

(1) (1883) P. J., p. 184.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

RANGNATH SAKHARAM (ORIGINAL PLAINTIFF), APPELLANT, v. GOVIND NARASIN V AND OTHERS, SONS AND HEIRS OF DECEASED NARASIN V SAKHARAM (ORIGINAL DEFENDANTS), RESPONDENTS.*

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June 21.

Indian Contract Act (IX of 1872), section 16—Amending Act VI of 1899—Fraud—Voidable Contract—Defendant entitled to plead fraud—Lapse of time—Undue influence.

Fraud does not make a transaction void but only voidable at the instance of the person defrauded.

The plaintiff sued in 1900 to recover from the defendant the amount due for interest on a mortgage-bond dated the 15th April, 1893, by sale of the mortgaged property. The defendant contended that he did not execute the bond with free consent and that it was obtained from him under pressure of criminal proceedings.

Held, that the defendant was entitled to resist the claim made against him by pleading fraud, and that he was entitled to urge that plea though he had not brought a suit to set aside the transaction.

Held, further, that under the circumstances he was not precluded from urging that plea by lapse of time: *Jagabai v. Ambashankar* ⁽¹⁾ distinguished.

* Second Appeal No. 790 of 1903.

(1) (1883) 12 Bom. 401.

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SECOND APPEAL from the decision of W. Baker, Assistant Judge of Ratnagiri, confirming the decree of K. S. Bodas, Subordinate Judge of Chiplun.

The plaintiff sued in the year 1900 to recover from the defendant, who was plaintiff's brother, Rs. 98 on account of interest for seven years due on a mortgage-bond, dated the 15th April, 1893, by sale of the mortgaged property subject to the lien for the recovery of the principal and further interest under the bond and the deficit, if any, from defendant personally.

The defendant contended that he did not execute the bond with free consent, and that it was obtained from him under pressure of criminal proceedings instituted at the instance of the plaintiff.

The Subordinate Judge dismissed the suit holding, on the evidence, that the defendant did not execute the mortgage-bond in suit with free consent.

On appeal by the plaintiff the Judge confirmed the decree.

The plaintiff having preferred a second appeal,

P. P. Khare appeared for the appellant (plaintiff):—We first contend that the Courts below erred in upholding the defendant's plea of undue influence because it was time-barred. The mortgage was effected on the 15th April, 1893, and he ought to have brought a suit to set aside the mortgage on the ground of undue influence within three years from that date. It is, therefore, not now open to him to set up that plea: *Jugaldas v. Ambashankar*⁽¹⁾.

Next we contend that the facts of the case do not warrant the finding of undue influence. The mortgage was executed by the defendant on the 15th April, 1893, and the criminal case was compromised the day previous. There is no evidence that we induced the defendant to pass the mortgage-deed. The defendant was discharged by the Magistrate under section 253 of the Criminal Procedure Code of 1882. Mere promise of forbearance from proceeding in Court is not a sufficient ground for the inference that the mortgage was induced by undue influence: *Mercer v. Whall*⁽²⁾; *Wilby v. Elgee*⁽³⁾.

(1) (1886) 12 Bom. 501.

(2) (1845) 5 Q. B. 447.

(3) (1875) L. R. 10 C. P. 497.

S. S. Patkar appeared for the respondent (defendant) :—Our plea of undue influence is not time-barred. The articles of the Limitation Act apply to suits and not to pleas by way of defence. The ruling in *JugalDas v. Ambashankar*⁽¹⁾ turns upon the facts of that particular case, and it is explained in *Hargovandas v. Bajibhai*⁽²⁾. It has been held that a defendant's defence is not affected by limitation: *Sobhanadri v. Chalananna*⁽³⁾; *Krishna Menon v. Kesavan*⁽⁴⁾: see also *Jodraj v. Dinkar Sakharam*, First Appeal No. 47 of 1902, decided on the 27th February, 1903.

The facts as found fully support the finding of undue influence. The first Court found that the agreement of the mortgage was concluded on the 14th April and the *vajinama* in the criminal case was given afterwards. The Judge in appeal held that the transaction was entered into by the defendant under undue influence amounting well-nigh to coercion. We rely on section 16, clause (b), of the Contract Act and the Amending Act VI of 1889. The Courts below have come to the conclusion that the defendant, when he entered into the contract, was a person whose mental capacity was temporarily disturbed by mental distress brought on by the criminal prosecution. Our contention is fortified by *Williams v. Bayley*⁽⁵⁾.

Further, the criminal prosecution was for a non-compoundable offence. Therefore the mortgage in suit, which was virtually an agreement to stifle a criminal prosecution, cannot be enforced, it being opposed to public policy: *Dalsukhram v. Charles De Bretton*⁽⁶⁾; *Keir v. Leeman*⁽⁷⁾; *Srirangachariar v. Ramasami*⁽⁸⁾; *Lound v. Grimwade*⁽⁹⁾. The cases relied on refer to civil proceedings, therefore they do not apply.

JENKINS, C. J. :—The plaintiff by this suit seeks to recover Rs. 98 as interest for seven years on the footing of a mortgage-bond dated the 15th April, 1893.

The defendant has pleaded that he did not execute the mortgage with free consent, and both the lower Courts have held this

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(1) (1888) 12 Bom. 501.

(5) (1866) L. R. 1 H. L. 200.

(2) (1889) 14 Bom. 222.

(6) (1904) 28 Bom. 326; 6 Bom. L. R. 73.

(3) (1898) 17 Mad. 225.

(7) (1844) 6 Q. B. 308.

(4) (1897) 20 Mad. 305.

(8) (1894) 18 Mad. 189.

(9) (1888) 39 Ch. D. 665.

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plea is made out on the ground that the defendant was induced to execute the document by undue influence.

The plaintiff has appealed, and urges two points: first, that the plea of undue influence cannot be sustained, because it is barred by the Limitation Act, and secondly, that the facts do not support the finding of undue influence.

In support of the plea of limitation reliance is placed on the decision of Sir Charles Sargent in *Jugaldas v. Ambashankar*,⁽¹⁾ but when the facts are examined, it is apparent that the argument now advanced is not supported by the actual decision in the case. There the plaintiffs sued to recover from the defendant Rs. 960 as arrears of rent. The defendant sought to set up as an answer to the claim that the defendant's original landlord had been defrauded by the plaintiffs and that the conveyance by the original landlord to the plaintiffs in that suit was vitiated by fraud.

Now fraud does not make a transaction void, but only voidable at the instance of the person defrauded. The fraud (assuming for the sake of argument that there was fraud in the strict sense of the term) in that case, entitling the defrauded party to avoid, was exercised not upon the defendant, but upon one not a party to that suit who had not avoided the transaction. Under these circumstances it is obvious that it was not open to the defendant in that suit to plead that the transaction was void as against him. It is quite true that Sir Charles Sargent alludes to the fact that the person alleged to have been defrauded had not taken effective steps to impeach the sale, and the relevancy of the allusion is that not having done so, it was not open to the defendant to say that the transaction was void. When the facts of the case are once understood it will be seen that it lays down nothing which is contrary to the doctrine that prevails in the other Courts in India.

A defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea though he may not have himself brought a suit to set aside the transaction, and is not, in circumstances like the present, precluded from urging that plea by the lapse of time.

(1) (1888) 12 Bom. 50J.

We, therefore, think that the learned Judges in the lower Courts were right in the view they took.

This brings us to the second point, that the facts do not support the plea of undue influence.

Undue influence has been defined in some detail by Act VI of 1899, where it is (among other things) provided "that a person is deemed to be in a position to dominate the will of another where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of mental distress." Both the Courts have come to the conclusion that the respondent before us was at the time when he made his contract a person whose mental capacity was temporarily affected by mental distress, and, in our opinion, there is sufficient in the facts to justify that conclusion.

For these reasons we think the decree of the lower Court should be confirmed with costs.

Decree confirmed.

ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batchelor.*

HAJI HASSUM OOMER AND ANOTHER (PLAINTIFFS), APPELLANTS, v.
NUR MAHOMED AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Limitation—Appeal—Copy of Judgment—Act XV of 1877, section 12,
Art. 151—Practice.*

The time that elapses between the date of an application for a copy of the judgment complained of and the date of issue of such copy to the applicant is to be excluded in computing the period of limitation prescribed for an appeal.

ON the 13th August, 1903, Judgment in this suit was delivered by Russell, J., in the lower Court. On the 22nd August the plaintiffs applied for a copy of the Judgment, which was issued to them on the 28th August. The decree in this suit was drawn up on the 31st August, and on Monday, 7th September, 1903, the plaintiffs filed the present appeal.

* Appeal No. 1297 of 1903; Suit No. 117 of 1902.

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August 11.