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have to accept first of all that the rule as to privacy applied in this neighbourhood; and, secondly, that it applies to the plaintiff. That being so, the questions whether his privacy was real before the present additions to the defendant's house, and whether that privacy is now invaded by reason of those additions, are both purely questions of fact. They are not, and cannot, as far as I can see, be questions of law. The Judge below has found on those questions of fact. He is right in his application of the law, and I think his decision must be affirmed and the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

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KRISHNAJI SAKHARAM DESHPANDE (ORIGINAL DEFENDANT), APPELLANT *v.* KASHIM *valad* MOHIDINSAHEB HAVALDAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), section 20, Article 116—Mortgage of Vatan lands—Death of mortgagor—Mortgagor's son recovering possession of lands—Suit by mortgagee to recover mortgage money—Limitation—Covenant in the mortgage deed to pay mortgage money.

In 1893, certain Vatan lands were mortgaged with possession for Rs. 2,000 for a period of twelve years by the Vatandar. The mortgage deed contained a covenant: "If there be any hindrance to the continuance of the land, I shall pay the said sum together with interest thereon at the rate of one per cent. per mensem out of my other estate and personally in the year in which the hindrance may arise". The mortgagor having died in 1901, his son recovered possession of the lands in 1914 on the ground that on the death of the mortgagor the mortgage became void under section 5 of the Bombay Hereditary Offices Act, 1877. The mortgagee thereupon sued to recover the mortgage amount with interest relying upon the personal covenant in the deed:—

Held, that the claim was barred by limitation.

* Second Appeal No. 233 of 1917.

Held, further, that the covenant in the mortgage deed only meant that the mortgagor was personally liable to pay the amount if any hindrance to possession was caused in his life-time.

Held, also, that inasmuch as the mortgage came to an end in 1901, the possession of the mortgagee became that of a trespasser, and the receipt of rent or profits after 1901 could not be deemed to be payment for the purpose of section 20 of the Indian Limitation Act, 1908.

SECOND appeal from the decision of A. Montgomerie, Assistant Judge of Belgaum, reversing the decree passed by N. J. Wadia, Assistant Judge of Belgaum.

Suit to recover a sum of money due on a mortgage.

The mortgage in question was passed on the 6th May 1893 by the defendant's father to the father of the plaintiffs for Rs. 2,000. It was for a period of 12 years and referred to Vatan lands. The deed of mortgage contained the following covenant :—

"If there be any dispute about the land on the part of the Bhaubands or of any body else, I shall settle the same. If there be any hindrance to the continuance of the land, I shall pay the said sum together with interest thereon at the rate of one per cent per mensem out of my other estate and personally in the year in which the hindrance may arise."

On the 8th April 1901 the mortgagor died. The mortgage thereupon became void under section 5 of the Bombay Hereditary Offices Act. The mortgagee, however, remained in possession of the lands after the mortgagor's death.

In 1913, the mortgagor's son sued to recover possession of the lands with mesne profits for the years 1910 to 1913, on the ground that the mortgage had become void under section 5 of the Bombay Hereditary Offices Act on the mortgagor's death. The suit was decreed and the mortgagor's son obtained possession of the lands on the 21st March 1914.

On the 2nd June 1914, the mortgagee's son sued to recover the mortgage amount with interest from the mortgagor's son.

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The trial Court dismissed the suit on the ground that it was barred by limitation. It was of opinion that the personal remedy enured only till the 6th May 1911, i.e., up to six years after the termination of the period of twelve years on the 6th May 1905. It was also of opinion that on the death of the mortgagor in 1901, the possession of the mortgagee became that of a trespasser and the payment of rent by him up to 1909 did not serve as payment within the meaning of section 20 of the Indian Limitation Act, 1908.

On appeal, however, the lower appellate Court came to the conclusion that the suit was not barred by limitation, on the following grounds:—

Plaintiffs now sue to recover the money either on the mortgage or on the personal promise to pay. The lower Court has held that the suit is barred by limitation. So far as the charge on the land is concerned, the bond became absolutely void in 1901 on the death of the mortgagor, who had only a life interest in the property; so that plaintiffs cannot recover by sale of their security. Whether they can recover or not from the defendant personally or rather from the estate of defendant's father depends on the period of limitation. If plaintiffs were confined to their promise to repay the mortgage money within twelve years from the date of bond, they would certainly, as found by the lower Court, be out of time. From the time when the mortgage became void plaintiffs were in possession as trespassers and their possession does not avail them under section 20 of the Limitation Act. The lands were not during that period "mortgage lands" within the meaning of the section. The twelve years stipulated for expired in 1905 and recoveries made of that period did not extend the time. The suit, therefore, should have been brought within six years from 1905. It was not brought till 1914; and so far as it is based on a promise to pay within twelve years it is out of time. But there is a stipulation in the mortgage, which I have already translated. That stipulation is a contract that if and when the mortgagee is deprived of possession the personal estate of the mortgagor shall be liable. Now possession is a pure question of fact. Plaintiffs were actually in possession up till in 1914. And though as a matter of fact the order of the Court in original Suit No. 106 of 1913, granting mesne profits against them has deprived them of the fruits of the possession, their cause of action did not arise until they were actually dispossessed. I, therefore, find that the suit has been brought within time.

A decree was accordingly passed in the plaintiffs' favour awarding the amount of the mortgage with interest.

The defendant appealed to the High Court.

S. S. Patkar and *D. R. Manerikar*, for the appellant:—The present suit is barred by *res judicata* in virtue of the decision in Suit No. 106 of 1913 under Explanation IV, section 11 of the Civil Procedure Code of 1908. The covenant contained in the mortgage deed on the strength of which the lower Court held the plaintiff's suit to be in time "might and ought to have been made a ground of defence" in that suit. The present suit is not at all based on the covenant. The cause of action is given as having arisen on the 21st of March 1911 the date of decision of the Suit No. 106 of 1913. The lower Court has made out an entirely new case for the plaintiffs. Besides, the very fact that interest is claimed in this suit from 1909-1910 onwards, i.e., from the period when mesne profits were allowed in the previous suit and not from the date of actual dispossession, clearly shows that the suit was not based on the covenant. The covenant in question is the usual covenant for quiet enjoyment, which is found in every usufructuary mortgage. It is not at all independent of the mortgage and was good so long as the mortgage subsisted, i.e., in the present case during the life-time of the original mortgagor. The very words of the covenant show that it can have no independent existence apart from the mortgage. As the mortgage was good during the life time of the mortgagor under section 5 of the Vatan Act, the covenant could only refer to the life-time of the mortgagor. What must be considered taken as security for the debt is the right which the mortgagor possessed at the time of the mortgage and nothing more: *Gangabai* v. *Baswant* [1].

[1] (1909) 31 Bom. 175.

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The parties to the deed knew the Vatan nature of the property and must be taken to have contracted with reference to the existing law. The covenant relied on must therefore be interpreted and construed as securing mortgagee's title to retain possession as long as the mortgagor could assert it under the Vatan law and no longer. The mortgagor cannot be expected to guarantee quiet possession to the mortgagee after his own death. The covenant could not survive the original mortgagor.

A similar covenant has been interpreted in *Parshottam Veribhai* v. *Chhatrasangji* [1] as not enuring beyond the life-time of the mortgagor. Further, the covenant is merely a personal covenant not binding upon the sons of the mortgagor. It does not refer in terms to his heirs and successors as did the covenant under consideration in *Parshottam Veribhai's case* [1].

Jayakar with *S. G. Desai*, for the respondents:—As regards the question of *res judicata* we say that the present suit is not barred by *res judicata* by the decision in the previous suit because we could not rely on the covenant in question in that suit as we were then in possession and there was no breach of the covenant. The cause of action for the present suit arose only on the date of the decision in Suit No. 106 of 1913, when a decree for possession was passed against us in favour of the appellants.

As regards the covenant under consideration, we submit that it is an independent covenant and that though the mortgage deed may be void under the Vatan Act yet the covenant to pay the mortgage money though contained in the same instrument is good: see *Javerbhai Jorabhai* v. *Gordhan Narsi* [2].

Besides, a Hindu son is under a pious obligation to pay off all the debts of his father which are not tainted with illegality or immorality.

(1) (1916) 41 Bom. 546. (2) (1914) 39 Bom. 358.

Lastly, we submit that our suit is saved from limitation under section 20 of the Indian Limitation Act as we were in possession as mortgagee till our dispossession in 1914.

SHAH, J. :—The facts which have given rise to this second appeal are these :—

On the 6th of May 1893 the present defendant's father passed a possessory mortgage for Rs. 2,000 in favour of the plaintiffs' predecessor-in-title. The mortgage related to Vatan property. On the 8th of April 1901, the defendant's father died. The present defendant filed Suit No. 106 of 1913 to recover possession of the land and in the alternative for redemption of the mortgage. In April 1914, a decree was passed in favour of the plaintiffs in that suit awarding them possession with mesne profits for three years. The present suit was filed by the heirs of the mortgagee to recover Rs. 3,000 (Rs. 2,000 as principal and Rs. 1,000 as interest), on the 2nd of June 1914.

The trial Court held that the money claim was barred by limitation and dismissed the suit. In appeal the lower appellate Court came to the conclusion that the possession was in fact taken from the plaintiffs in 1914, that under the covenant the cause of action arose at the date of dispossession, and that the claim was within time. In the result the plaintiffs' claim was allowed.

The defendant has appealed to this Court, and it is urged in support of the appeal that the plaintiffs' claim is time-barred and that the point relied upon by the plaintiffs relating to the covenant in the deed is *res judicata* in virtue of the decision in Suit No. 106 of 1913.

In the view which we take of the point of limitation urged in this appeal it is not necessary to express any

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opinion as to the point of *res judicata* raised on behalf of the defendant.

Apart from the effect of the covenant to which we shall presently refer, it is clear that under the document the money was payable in twelve years from the date of the document and that the suit not having been filed within six years from the expiry of the twelve years mentioned in the deed, it is time-barred. The covenant relied upon by the plaintiffs runs as follows: "If there be any dispute about the land on the part of the Bhaubands or of anybody else, I shall settle the same. If there be any hindrance to the continuance of the land, I shall pay the said sum together with interest thereon at the rate of one per cent. per mensem out of my other estate and personally in the year in which the hindrance may arise." The lower appellate Court has construed this covenant as meaning that the mortgagor undertook to pay the amount in the year in which the hindrance would arise, and as the hindrance arose when the possession was disturbed, the liability to pay under this covenant arose at the date of the hindrance. It seems to us, however, that on a proper construction of this covenant it really means that the mortgagor undertook personally to pay the amount if any hindrance was caused to the possession during his life-time. The mortgaged property being Vatan land, the mortgage could have operation only during the life of the mortgagor. Under section 5 of the Bombay Hereditary Offices Act, it is not competent to a Vatandar, without the sanction of Government, to mortgage for a period beyond the term of his natural life any Vatan property to any person who is not a Vatandar of the same Vatan. It is not disputed now—and in fact it has been held in the suit of 1913—that this mortgage was operative only during the life-time of the mortgagor according to law. It is clear from the

reasoning in *Parshottam Veribhai* v. *Chhatrasangji Madhavsangji* [(1)] that the parties must be taken to have contracted with reference to the existing law Reading the covenant in that light, the mortgagor must be taken to have agreed to pay the amount personally if any hindrance were caused during his life-time. The covenant does not refer in terms to his heirs and successors. The mortgage as such came to an end on the death of the mortgagor; and the purpose of the covenant was fulfilled when no hindrance was in fact caused during the life-time of the mortgagor. We are, therefore, of opinion that the date of the subsequent dispossession or the hindrance caused to the enjoyment of the property after the death of the mortgagor has nothing to do with the question of limitation, and that the time cannot be taken to commence to run against the plaintiffs from the date of such hindrance.

It is urged on behalf of the respondents that in any case the suit is saved under section 20, sub-section (2) of the Indian Limitation Act which provides that "where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-section (1)." It is clear that after the death of the mortgagor in the present case the possession of the original mortgagee was the possession of a trespasser claiming a limited interest in the property as a mortgagee, but not the possession of a mortgagee. Within twelve years from the death of the mortgagor the person entitled to the property put forward effectively a claim to this property against him, and, in our opinion on the facts of this case, sub-section (2) of section 20 has no application. The plaintiffs' claim, therefore, is clearly timebarred.

(1) (1916) 41 Bom. 546.

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The result therefore is that we allow the appeal, reverse the decree of the lower appellate Court, and restore that of the trial Court with costs of this appeal and in the lower appellate Court on the plaintiffs.

The cross-objections are dismissed with costs.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Shah, and Mr. Justice Crump.

1919 November 25.

DNYANU *bin* PANDU CHAVAN (ORIGINAL PLAINTIFF) APPELLANT, *v.* TANU KOM BALARAM CHAVAN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Adoption—Junior daughter-in-law adopting a son with the consent of her father-in-law—Validity of the adoption.

P, a Hindu, had a son living in union with him. The son died during P's life-time leaving him surviving two widows. Of the two widows, the junior had a son, who also died a minor without attaining ceremonial competence. P adopted the plaintiff as his son. Later, the junior widow adopted defendant No. 11 with the consent of P. The plaintiff sued contending that the adoption of defendant No. 11 was invalid :—

Held, that the adoption of defendant No. 11 was valid under Hindu law.

The preferential right of the senior widow to make an adoption exists when the widows inherit the property of their husband, that is, when the husband is a separated member of the family. Even then it is subject to any authority given by the husband to the junior widow to adopt or any express or implied prohibition by the husband against the senior widow.

The doctrine of the preferential right of the senior widow to adopt is not extended to a case where the husband dies in union with his father, and where the widow can adopt if at all with the consent of her father-in-law.

Vithoba v. *Bapu*[1], referred to.

* Second Appeal No. 502 of 1918.

(1) (1890) 15 Bom. 110.