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an error on the part of the plaintiff's pleader in drawing up the statement of the claim, and there is no reason why the plaintiff should be prevented from having the case tried, as it ought to be tried, namely, as a suit for compensation for non-delivery of goods entrusted to the Railway Company for carriage.

We must, therefore, make the Rule absolute, set aside the decree of the Full Court of the Small Cause Court, and remand the case for a retrial, when the defendant company will have to prove that the goods were lost, as a mere admission in their favour that the goods were lost is not sufficient. It may very well be that the defendants can prove very easily that the goods were lost, but still although it may be only a formal matter, it is a matter of principle, and the plaintiff would be entitled to cross-examine the defendants' witnesses in order to show that they were not protected by the risk note.

The petitioners will have costs in this Court. The costs of the Small Causes Court will abide the result of the case at the retrial.

SHAH, J. :—I agree.

Rule made absolute.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

VITHOBA MAHIPATI DHABADE AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS v. BALKRISHNA SAKHARAM KULKARNI, MINOR, BY HIS
GUARDIAN KHANDO GOVIND KULKARNI (ORIGINAL DEFENDANT).
RESPONDENT^o.

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January 20,

^o Second Appeal No. 578 of 1920.

*Indian Limitation Act (IX of 1908), section 20, clause (2), Article 116—
Bombay Hereditary Offices Act (Bombay Act III of 1874), section 5†—
Mortgage of Kulkarni Watan with possession—Personal covenant by mortgagor
to repay mortgage money—Further covenant to pay if mortgagee dispossessed—
Death of mortgagor—Mortgagee deprived of possession of the mortgaged pro-
perty after the death of mortgagor—Suit by mortgagee to recover the mortgage
amount under the personal covenant—Mortgagee in possession receiving profits
—Payment in lieu of interest—Extension of the period of limitation.*

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In 1897, a Watandar mortgaged his Kulkarni Watan with possession to the plaintiff for a term of ten years. The deed of mortgage, which was registered, contained a personal covenant to pay the principal at the stipulated time and a further covenant that if the mortgaged land before the expiry of the stipulated period or any time thereafter, passed out of the mortgagee's possession on one cause or another, the mortgagor should be personally liable to pay the principal together with interest from the date the mortgagee was deprived of the possession. The mortgagee went into possession of the property and enjoyed its profits in lieu of interest till 1912 when the mortgagor died. On the mortgagor's death, his alienation having come to end, the defendant who was his son, dispossessed the plaintiff by the help of the Revenue authorities. In 1917, the plaintiff sued the defendant to recover the mortgage amount under the personal covenant :—

Held, that the agreement was not void under section 5 of the Watan Act, and the suit was not barred by limitation, the period of limitation under Article 116 of the Indian Limitation Act, 1908, as regards the personal liability of the mortgagor to repay the debt, being extended by section 20,

† The section runs as follows :—

5. (1) Without the sanction of Government it shall not be competent—

(a) to a Watandar to mortgage, charge, alienate or lease, for a period beyond the term of his natural life, any Watan, or any part thereof, or any interest therein, to or for the benefit of any person who is not a Watandar of the same Watan ;

(b) to a representative Watandar to mortgage, charge, lease or alien, to any right with which he is invested as such, under this Act.

(2) In the case of any Watan in respect of which a service commutation settlement has been effected, either under section 15 or before that section came into force, clause (a) of this section shall apply to such Watan unless the right of alienating the Watan without the sanction of Government is conferred upon the Watandars by the terms of such settlement or has been acquired by them under the said terms.

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clause 2, of the Act to six years from the date when the mortgagee as such last received the profits in lieu of interest before the mortgagor's death.

Per MACLEOD, C. J.:—"There is nothing to prevent a Watandar when mortgaging Watan property, although the mortgage admittedly would not be effective beyond the life-time of the Watandar mortgagor in ordinary circumstances, from personally covenanting to pay the mortgage amount."

Per SHAH J.:—"I have grave doubts as to the application of this covenant to dispossession in consequence of the mortgage coming to an end on the death of the mortgagor in virtue of the provisions of the Bombay Hereditary Offices Act. That contention is opposed to the decision in *Krishnaji Sakharam v. Kashim*⁽¹⁾".

SECOND appeal from the decision of N. B. Deshmukh, Assistant Judge of Belgaum, confirming the decree passed by R. N. Nadgir, Subordinate Judge at Athni.

Suit to recover a sum of money.

The sum of money claimed was due on a mortgage executed by defendant's father Sakharam to the plaintiff in 1897. The mortgage was for Rs. 460. The land mortgaged was Kulkarni Watan land of the mortgagor. The mortgage was with possession and was for a period of ten years. The deed of mortgage contained a personal covenant to pay the principal amount at the stipulated time, and also a further covenant which ran as follows:—

"In case the land went out of your possession on account of any cause whatever either during the period of time agreed upon for repayment of the mortgage debt or at any time afterwards, I will pay from my person the amount secured by the mortgage together with interest one per cent per mensem from the date of dispossession."

The mortgagor died on the 24th February 1912.

The plaintiff who was in possession of the land all along received its profits in lieu of interest. On the death of the mortgagor his son the defendant applied to the Revenue authorities to recover possession of the land on the ground that his father's alienation ceased

⁽¹⁾ (1919) 44 Bom. 500.

on his death to be operative under section 5 of the Bombay Hereditary Offices Act, 1874. The defendant was placed in possession of the land on 15th April 1914.

On the 23rd May 1917, the plaintiff sued to recover the mortgage amount from the defendant under the personal covenant.

The Subordinate Judge dismissed the suit as time-barred, for the following reasons :—

“It has been held by the Bombay High Court that the alienations made by Watandars are void after their death and that adverse possession begins to run against their heirs from the death of the alienating Watandar (5 Bom. 437). Thus in the present case the mortgage became void since the death of Sakharam in 1908. The possession of the plaintiff, therefore, from 1908 onwards was that of trespassers and the mortgage having become void in 1908, the consideration thereunder also failed in the same year. This principle has been enunciated in the case reported in I. L. R. 19 Cal. 123 and has been followed in I. L. R. 39 Bom. 358 and I. L. R. 40 Bom. 614. The suit, therefore, ought to have been brought within 3 or 6 years from the date of the failure of consideration in 1908. The same having been filed in 1917 is clearly out of time.”

On appeal the Assistant Judge confirmed the decree on the following grounds :—

“I hold that the plaintiff's claim is barred by limitation, either under Article 62 or under Article 97 of the Limitation Act which alone applies to this case. It may be noted that so far as the terms of the mortgage deed are concerned, the claim to enforce personal remedy was already barred in the year 1914 or 1915 as the debt was made repayable within 10 years from the date of the mortgage-deed, and the suit to recover the debt by enforcing personal remedy was already barred under Article 116 some three years before the date of the present suit.”

The plaintiff appealed to the High Court.

A. G. Desai, for the appellants.

H. B. Gumaste, for the respondent.

MACLEOD, C. J. :—The plaintiffs sued to recover Rs. 625-9-0 from the property of the deceased father of the defendant, and from the defendant personally,

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alleging that the defendant's father Sakharam mortgaged to the plaintiffs' deceased father Mahipati Kulkarni-Watan land for Rs. 460 on the 21st August 1897; and that the plaintiffs' father, and after his death the plaintiffs, had been in possession of the land until 1914 when the defendant dispossessed them through the Revenue authorities under the Watan Act.

The suit was dismissed by the trial Court on the ground that it was barred by limitation. But it is admitted now that the trial Judge had not the materials before him for ascertaining the real date of the death of the defendant's father. He considered that the defendant's father had died in 1908, and as the suit was filed in 1917, it was clearly barred. In appeal it was admitted after the production of further evidence that the defendant's father died on the 24th February 1912. The reason, therefore, for the judgment of the trial Court failed. But the learned appellate Judge dismissed the appeal on another ground, namely, that the agreement in the plaint mortgage was void under section 5 of the Watan Act. There, I think, with due respect, the learned Judge was wrong. There is nothing to prevent a Watandar when mortgaging vatan property, although the mortgage admittedly would not be effective beyond the life-time of the Watandar-mortgagor in ordinary circumstances, from personally covenanting to pay the mortgage amount. In the plaint mortgage, which was a mortgage with possession in lieu of interest for a period of ten years, the mortgagor covenanted to pay the principal at the stipulated time and get the land released. He further covenanted that if the aforesaid land before the expiry of the stipulated period, or any time thereafter, passed out of the mortgagee's possession on one cause or another the mortgagor should be personally liable to pay the principal together with the interest at twelve per cent. per annum

from the date the mortgagee was deprived of the possession.

Really the only question is, from what date limitation runs against the mortgagee on that covenant. He has been dispossessed because the mortgagor-Watandar died. I think in the first instance limitation would run from the expiry of the mortgage period. But for the first time the appellants have claimed that the period of limitation was extended under section 20 of the Indian Limitation Act, because, the mortgagee being in possession of the property and, according to the terms of the mortgage, receiving the produce of the mortgaged land in lieu of interest, such receipt of produce in lieu of interest must be deemed to be payment for the purpose of sub-section (2) of section 20 of the Indian Limitation Act, and that being the case, there can be no doubt limitation would only begin to run from the date of last payment, which certainly was not earlier than the 24th February 1912 when the Watandar-mortgagor died, and the contract being registered, under Article 116 the plaintiff would have six years within which to sue for the debt from that date. In my opinion the suit is not barred by limitation, and the agreement is not void under section 5 of the Watan Act. Therefore, the decree dismissing the suit must be set aside and the case remanded to the trial Court to continue the hearing. The costs in the trial Court will be costs in the cause. Each party will bear his own costs in the first appeal Court and in this Court.

SHAH, J. :—It is clear from the arguments before us, as also from the memorandum of appeal, that the plaintiffs principally relied upon a covenant in the mortgage bond as to dispossession. I have grave doubts as to the application of this covenant to dispossession in consequence of the mortgage coming to an end on the death of the mortgagor in virtue of the provisions

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of the Bombay Hereditary Offices Act. That contention is opposed to the decision in *Krishnaji Sakharam v. Kashim*⁽¹⁾ in which there was a similar covenant to be construed ; and if the decision of this case depended upon the construction of this covenant, I should have found it difficult to accept the contention. It is clear, however, from the terms of the mortgage bond that the mortgagor covenanted personally to repay the amount, and that the amount of the mortgage became payable under the terms of the mortgage bond in 1907. Since 1907, in virtue of the provision of section 20, sub-section (2) of the Indian Limitation Act, there was a fresh starting point for the period of limitation each time the mortgagee received the produce of the mortgaged land in lieu of interest up to February 1912, when the mortgagor died. It is clear that up to that time the mortgage was valid, and that during the continuance of the mortgage the provisions of section 20, sub-section (2), would apply. That being so, it follows that as regards the personal liability of the mortgagor to repay the debt the period of limitation under Article 116, which would apply to this case, would be six years from the date when the mortgagee as such last received the profits in lieu of interest before his death, that is, in this case practically from the date of his death. The plaintiffs' claim to recover the mortgage amount from the heir of the mortgagor is in time on that basis. I, therefore, concur in the order proposed by the Chief Justice.

Decree reversed : case remanded.

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⁽¹⁾ (1919) 44 Bom. 500.