ORIGINAL CIVIL.

Before Mr. Justice Rangnekar.

1934 August 30

VASANJI KALIANJI UKA (PLAINTIFF) *v.* ERACHSHA DOSSABHAI HARVER (DEFENDANT).*

Indian Limitation Act (IX of 1908), Art. 116—Registered deed of mortgage—Personal covenant to pay mortgage money—Suit on personal covenant—Limitation.

Where a deed of mortgage, containing a personal covenant to pay the mortgage money, is registered, the period of limitation for filing a suit to recover the money from the mortgagor personally is six years from the time when the money becomes payable. Such a suit is governed by Article 116 of the Indian Limitation Act, 1908.

Kameswar Pershad v. *Rajkumari Ruttan Koer*,(1) *Beti Maharani* v. *The Collector of Etawah*,(2) and *Ratnasabapathy Chettiar* v. *Devasigamony Pillai*,(3) followed.

Ganesh Lal Pandit v. *Khetramohan Mahapatra*,(4) distinguished.

SUIT to recover money due on the personal covenant in a mortgage deed.

The plaintiff (Vasanji Uka) advanced to the defendant (Erachsha Harver) a sum of money on a mortgage of his immoveable properties in Bombay and Thana on March 19, 1927. The moneys were repayable on March 19, 1929. The said mortgage deed contained, *inter alia*, a personal covenant by the mortgagor to repay the mortgage money. In virtue of the power given to the mortgagee under the said deed of mortgage, the plaintiff sold the mortgaged property on November 12, 1929. After giving credit to the mortgagor for the amount realised by the said sale, the mortgagee filed a suit on January 9, 1934 to recover the balance of Rs. 32,199-11-9 from the mortgagor personally.

The suit came on for hearing before Rangnekar J. At the hearing it was contended for the mortgagor that the suit was governed by Article 66 of the Indian Limitation Act, 1908, and as it was filed more than three years after the

*O. C. J. Suit No. 47 of 1934.

(1) (1892) 20 Cal. 79 : L. R. 19 I. A. 234, P. C.

(2) (1894) 17 All. 198 ; L. R. 22 I. A. 31, P. C.

(3) (1928) 52 Mad. 105, F. B.

(4) (1926) L. R. 53 I. A. 134 ; 5 Pat. 585, P. C.

money became due, the suit was barred by limitation. It was contended on behalf of the plaintiff that as the obligation arose on a registered deed, the suit was governed by Article 116 of the Indian Limitation Act, and as it was filed within six years of the time when the money became due, the suit was in time.

C. K. Daphtary, for the plaintiff.

M. C. Chagla, for the defendant.

RANGNEKAR J. This action raises a question under the Indian Limitation Act. The action is instituted by the mortgagee against the mortgagor on a personal covenant contained in the mortgage deed to recover the amount remaining due to him after the mortgage property was sold. The deed of mortgage is registered and is dated March 9, 1927, and the date of repayment was March 19, 1929. The mortgagee sold the property on November 12, 1929, in exercise of the power of sale reserved to him by the mortgage deed, and the deficiency was Rs. 32,199. The suit was filed on January 9, 1934. The only defence is that the suit is barred by the law of limitation. If the shorter period of three years under Article 66 or Article 115 applies, the suit would obviously be barred, but saved if the longer period of six years applied under Article 116 of the Indian Limitation Act of 1908, and this is the only question in the suit.

I shall first examine the articles of the Indian Limitation Act relevant to the question which I have to decide. Article 66 of the Indian Limitation Act is in these terms: "On a single bond, where a day is specified for payment", the period of limitation is three years, and the time from which the period runs is "The day so specified". Article 115 is: "For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for," limitation three years, and the

1934

VASANJI KALIANJI v. ERACHSHA DOSSABHAI

Rangnekar J.

time from which the period begins to run being, "when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases". Article 116 provides: "For compensation for the breach of a contract in writing and registered," the period of limitation is six years, and the *terminus a quo* is "When the period of limitation would begin to run against a suit brought on a similar contract not registered," i.e. under Article 115.

It is beyond controversy at the present day that the words "Compensation for the breach of a contract" in Articles 115 and 116 would include a claim for an ascertained sum of money payable under a contract. That has been the trend of decisions in this country and this view is accepted by the Privy Council. I need only refer to *Tricomdas Coverji Bhoja* v. *Gopnath Jiu Thakur*.[1]

The words "and not herein specially provided for" in Article 115 show that the article is a residuary article for actions *ex contractu* and the omission of these words in Article 116 is critical as pointed out by Lord Sumner in the Privy Council decision just referred to.

I may now refer to one more Article relating to suits on mortgage, and that is Article 132. It applies when the suit is "to enforce payment of money charged upon immoveable property," the period is twelve years, and the *terminus a quo* is "When the money sued for becomes due." The controversy as regards the applicability of this article was set at rest by the Privy Council decision in *Vasudeva Mudaliar* v. *Srinivasa Pillai*.[2] The Article applies to mortgage suits in which payment is sought to be enforced out of the immoveable property on which it is charged or which is mortgaged. This Article, therefore, cannot apply to the present suit, nor is it contended it does.

[1] (1916) 44 Cal. 759; L. R. 44 I. A. 65, P. C.

[2] (1907) 30 Mad. 426; L. R. 34 I. A. 186, P. C.

On the plain meaning of the Articles referred to above it is clear that the suit is governed by Article 116 as the mortgage is a registered mortgage.

The current of decisions in this country has been in favour of the view that Article 116 applies to all contracts in writing and registered including suits to recover money on a personal covenant in a registered bond or mortgage and to recover the deficiency arising out of a sale of the mortgaged property. This view finds support in the decisions of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan Koer*[1] and *Beti Maharani* v. *The Collector of Etawah*.[2]

Mr. Chagla, however, relies on the Privy Council decision in *Ganesh Lal Pandit* v. *Khetramohan Mahapatra*.[3] The question is whether the long train of decisions in this country on the point is overruled by this decision.

It is not easy to gather the facts which were before their Lordships of the Privy Council in what Mr. Ameer Ali, who delivered the judgment of the Board, calls "a complicated litigation". I shall, however, attempt to state the relevant material facts as far as I can. The property of a deceased Hindu had devolved on his widow Suryamani. She died in 1904 or 1905 leaving her surviving one married daughter Satyabhama. Before her death Suryamani had alienated some of the properties. The principal alienations were one by way of mortgage for Rs. 30,500 (in one part of the judgment the sum mentioned is Rs. 30,500 and in another Rs. 33,500), and the second by way of sale for Rs. 8,000. Both these transactions were entered into on July 23, 1884, and in favour of one Behari Lal. On July 29, 1884, Suryamani executed a power of attorney in favour of one Lakhan under which he was authorised to "execute and register a bond of Rs. 35,000 and a deed of sale of Rs. 8,000 in favour of Babu Behari Lal." This was as the dates show six days after the two deeds were executed.

(1) (1892) 20 Cal. 79 : L. R. 19 I. A. 234, P. C.

(2) (1894) 17 All. 198 ; L. R. 22 I. A. 31, P. C.

(3) (1926) L. R. 53 I. A. 134 ; 5 Pat. 585.

1934

VASANJI KALIANJI v. ERACHSHA DOSSABHAI

Rangnekar J.

On November 28, 1896, Behari Lal instituted a suit on the mortgage against Suryamani and against Satyabhama as surety, and the usual mortgage decree was made *ex parte* against them. It was executed in August, 1897, and the mortgaged property was sold and realised Rs. 33,000, the property being purchased by Behari Lal. The mortgage debt then amounted to Rs. 80,000. To pay the deficiency Suryamani entered into a *razinama* (compromise) by which she agreed to transfer to Behari Lal other properties, and in pursuance of it executed in 1899 a number of conveyances.

On September 17, 1916, Satyabhama instituted the suit, which gave rise to the appeal in the Privy Council, in which she challenged the validity *inter alia* of (1) the mortgage of 1884, (2) the sale deed of 1884, and (3) the transactions of 1899. These last transactions are mentioned in one place as conveyances and in another as kabalas.

It would be seen that Satyabhama's suit was brought nearly twelve years after the due date of the repayment of the mortgage amount, which was six months from the date of execution of the mortgage deed, i.e., six months after July 23, 1884. Their Lordships state in the judgment that the suit was not instituted until ten years after the debt became repayable. This seems to be a mistake which is repeated by the Madras High Court in a case to be presently adverted to.

So far the facts seem to be clear. The difficulty comes in as to the findings of the High Court referred to by their Lordships of the Privy Council. The findings of the High Court as stated at p. 136 of the report were: (1) "the principal mortgage purporting to have been executed by Suryamani was not executed in compliance with the provisions of the law so as to make it binding on Suryamani." (2) The defendants in Satyabhama's suit, who were claiming through Behari Lal, had established legal necessity in respect

of the mortgage and that consequently the sale under the mortgage was valid (p. 137). Stopping here, it seems to me, with the greatest respect, the two findings seem to be irreconcilable. (3) As regards the kabalas of 1899, the claim on the personal covenant for the balance of the mortgage debt was barred, and they were not binding on the reversioners (pp. 137 and 138).

As to the sale of July 23, 1884, the High Court held that it was not for justifiable necessity and that the same deed was not in fact executed by Suryamani.

These findings were challenged in the appeal before their Lordships.

All the findings seem to have been accepted by their Lordships, though as regards the mortgage there is no specific reference as there is with regard to the sale deed which, it will be remembered, was of the same date and was specifically included in the power of attorney given to Lakhan.

Their Lordships, after stating that they accepted the findings, proceeded to discuss the power of attorney, and after pointing out that it was executed six days after July 23, 1884, referred to the relevant sections of the Indian Registration Act, and concurred with the High Court that the sale deed was not validly executed and that it could not bind either Suryamani or the reversioners.

Then their Lordships turned to the transactions of 1899 and observed that they agreed with the High Court in holding that the claim on the personal covenant was barred before the date of the transactions. It must then follow that Satyabhama's contention that the alienations of 1899 were not binding on her as the same were for a debt which had become barred was accepted.

It is not clear which Article of the Indian Limitation Act was applied by the High Court in support of their opinion. Then there is one more difficulty. The decree of 1896

1934

VASANJI KALIANJI v. ERACHSHA DOSSABHAI

Rangnekar J.

set out in the judgment is first against Suryamani personally, and if the amount was not paid by her, then against the mortgage property by sale, and finally, in the event of a deficiency, against Satyabhama personally as well as her own property as a surety. Their Lordships then observed as follows (p. 139) :—

"The decree for the balance, if the sale of the mortgaged properties proved insufficient, was against Satyabhama, who had stood as surety on the mortgage. Satyabhama was afterwards absolved from all liability as surety in the High Court."

Their Lordships then referred to *Ramdin* v. *Kalka Pershad*,[1] and with approval to *Miller* v. *Runga Nath Moulick*.[2] They then observed (p. 140) :—

". . . the view taken by the High Court on the question of limitation is well founded. The cause of action on the personal covenant accrued to Behari Lal Pandit when Suryamani failed to pay the mortgage debt—namely, within six months from the date of the mortgage. And the claim had become barred under Article 66 long before the execution of the *razinama* and the conveyances thereunder."

It is these observations on which Mr. Chagla relies.

In *Ramdin* v. *Kalka Pershad*[1] the suit was brought nearly ten years after the mortgage money had become payable. The question which was raised was that as more than six years had elapsed, no personal decree could be made against the defendant. On the other hand it was argued that Article 132 applied both to the remedy by sale as well as to a decree for money on the personal covenant to pay contained in the mortgage deed. The latter contention was accepted by the District Judge but repelled by the High Court, and the view taken by the High Court was accepted by the Privy Council. The question is thus put by Lord FitzGerald (p. 14) :—

"The question submitted for their Lordships' consideration is, whether the lesser period of limitation, three or six years as the case may be, has barred the personal remedy against the mortgagee, even though the mortgage remains in full force, as against the mortgaged property."

[1] (1884) L. R. 12 I. A. 12 ; 7 All. 502. [2] (1885) 12 Cal. 389.

Lord FitzGerald began his judgment by stating that the suit was by the mortgagee "to enforce a mortgage not under seal dated January 25, 1870, etc.". It is, with respect, difficult to understand what this means under the law in this country. I venture to think, however, that the mortgage in that case was not registered and that probably accounts for the reference by his Lordship to the provisions of the Indian Limitation Act contained in Article 65—which now is Article 66—and also to the provisions relating to suits on foreign judgments and some compound registration securities. In this view the passage in the judgment, which I have quoted above, is significant. One thing, however, is clear and that is that the question was whether the shorter period of three or six years or the longer period of twelve years under Article 132 applied to the case, and it seems to me with due deference that there is nothing in that judgment to support what Mr. Ameer Ali observes in *Ganesh Lal Pandit's* case,[1] namely, (p. 139) :—

"In the case of *Ramdin* v. *Kalka Pershad*[2] it was held by the Judicial Committee that when a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realization of the mortgage debt out of the mortgaged properties, the claim would be barred in three years."

In *Miller* v. *Runga Nath Moulick*[3] the contention was that Article 132 applies to a claim to recover money charged upon immoveable property quite irrespective of the remedy asked for. The contention was negatived by the High Court. After pointing out the construction put upon Article 132 by the Privy Council in *Ramdin's* case[2] their Lordships of the Calcutta High Court observed (p. 395) :—

"The claim to make the defendants personally liable has therefore been rightly held to be barred by limitation, the present suit having been commenced more than six years after the accrual of the cause of action."

[1] (1926) L. R. 53 I. A. 134; 5 Pat. 585. [2] (1884) L. R. 12 I. A. 12; 7 All. 502.
[3] (1885) 12 Cal. 389.

1934

VASANJI KALIANJI v. ERACHSHA DOSSABHAI

Rangnekar J.

In that case also the suit was filed more than six years after the debt became payable and could only have been saved if it came under Article 132 of the Indian Limitation Act.

In *Ganesh Lal's* case,[1] therefore, as far as I can see, the position seems to me that the finding of the High Court, namely, that the mortgage purporting to be executed by Suryamani was not executed in compliance with the provisions of the law so as to make it binding on Suryamani, was accepted by their Lordships of the Privy Council, and taken together with the reference to the power of attorney in favour of Lakhan and to the Indian Registration Act means that the mortgage was not effected by a registered instrument and therefore there was no question of Article 116 coming into operation. Then as the headnote shows the only point raised was that Article 132 applied to the claim on the personal covenant in the mortgage. Unless that Article applied the suit clearly was barred as it was instituted more than six years after the date of repayment. The reference to *Ramdin's* case[2] and to *Miller* v. *Runga Nath Moulick*[3] shows that their Lordships were really considering the question whether the claim on the personal covenant was saved under Article 132 and in those cases it was held that Article 132 did not apply to suits based on a personal covenant for a personal decree against the mortgagor. Then if the mortgage was not validly executed by Suryamani, the question of limitation did not arise, and any opinion expressed by their Lordships, though entitled to great weight, would be obiter.

I have read and re-read the judgment carefully and with all the respect which is due to a pronouncement of the highest tribunal I confess there are difficulties in understanding the judgment. For one thing, even if the mortgage was not registered, it is difficult to see how Article 66 would

[1] (1926) L. R. 53 I. A. 134: 5 Pat. 585.

[2] (1884) L. R. 12 I. A. 12: 7 All. 502.

[3] (1885) 12 Cal. 389.

apply and not Article 115. It does not appear if Article 115 was referred to.

I am clear, however, that if their Lordships intended to overrule the long train of decisions in this country on the point as to the applicability of Article 116 to suits to recover money on a personal covenant in a registered bond or deed of mortgage, then I would have expected a clear pronouncement of their Lordships of the Privy Council to that effect, and I must, therefore, reject Mr. Chagla's argument.

The view I am taking is supported by a full bench decision of the Madras High Court in *Ratnasabapathy Chettiar* v. *Devasigamony Pillai*.[1] It was held there that where a mortgage deed containing a personal covenant to pay the mortgage money is registered, the Article of the Indian Limitation Act applicable to a claim, based on the personal covenant, to recover the balance due to the mortgagee after the sale of the mortgage property, is Article 116 which provides a period of six years from the due date, and not Article 66 or 67 of the Act. *Ganesh Lal's* case[2] was considered and distinguished and it was held that the Privy Council's decision had not overruled the current of decisions on the point in question. Kumaraswami Sastri J., who delivered the leading judgment, after pointing out that the mortgage in *Ganesh Lal's* case[1] was not registered, observed, however, as follows (p. 120) :—

"I think that these facts show that the mortgage document in question was not properly registered and so was to be treated as an unregistered document and if this is so, article 66 would be the article to be applied."

With great respect to the learned Judge I do not agree that if the mortgage was an unregistered document then Article 66 would be the Article to be applied. In my opinion the Article which, then, would apply would be Article 115. From a practical point of view there may be no difference as the period of three years limitation is common to both,

[1] (1928) 52 Mad. 105, F. B. [2] (1926) L. R. 53 I A. 134 : 5 Pat. 585.

1934

VASANJI KALIANJI v. ERACHSHA DOSSABHAI

Rangnekar J.

and I venture to think that that perhaps was in the mind of the learned Judge.

I must, therefore, hold that the suit is not barred by the law of limitation.

After I delivered my judgment the parties have agreed as to the amount due and payable by the defendant to the plaintiff, and my finding on issue No. 2 is : Rs. 31,000 with further interest from January 1, 1934, at twelve annas per cent. per Gujarati month, calculated as provided in the indenture of mortgage dated March 19, 1927, costs and interest on judgment at six per cent.

Decree accordingly.

Attorneys for plaintiff : Messrs. *Madhavji & Co.*

Attorneys for defendants : Messrs. *Minocheher, Mancher-shaw, Hiralal & Co.*

B. K. D.

ORIGINAL CIVIL.

Before Mr. Justice Kania.

1934
October 10

BAI UJAMBAI GOVINDJI, PLAINTIFF *v.* HARAKCHAND GOVINDJI, DEFENDANT.*

Bombay High Court Rules (Original Side), 1930, rule 620[1]—Indian Succession Act (XXXIX of 1925), sections 211, 250, 255, 256, 257—Joint Hindu family—Claim to property by a Hindu as surviving coparcener—Application for grant of Letters of Administration on behalf of a minor limited to period of minority—Will by last holder of property in a joint Hindu family—Whether a will can operate on joint family property after birth of a son.

A Hindu died making a will of his ancestral as well as self-acquired property appointing his wife as executrix. After the date of the will a son was born to the

*Testamentary Suit No. 3 of 1934.

[1] Rule 620 runs as follows :—"No person, who renounces probate of a will or letters of administration of the property of a deceased person in one character, shall, without the leave of the Judge, take out representation to the same deceased in another character."