

of the High Court cannot be supported, and they will humbly advise Her Majesty to reverse that decision, and in lieu thereof to decree that the decree of the Subordinate Judge be confirmed, and that the appeal to the High Court be dismissed with costs. The appellant must also have his costs of this appeal.

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Appeal allowed.

Agents for the appellant: *Messrs. Barrow & Barton.*

Agent for the respondent: *Mr. T. L. Wilson.*

JUNESWAR DASS (DEFENDANT) v. MAHABEER SINGH AND OTHERS
(PLAINTIFFS).

P. C.*
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Dec. 16.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Act XIV of 1859, s. 1, cls. 10, 12, 16—Limitation—Interest in Immoveable Property.

B, having borrowed money from *A*, executed in his favor a bond (which was afterwards duly registered), in which he engaged to repay the amount with interest on a day named, and hypothecated certain lands by way of security, with a condition that, in the event of the said lands being sold in execution of decree before the day fixed for repayment, *A* should be at liberty at once to sue for the recovery of the debt. Before the term for repayment expired, the mortgaged lands were sold in execution of a decree obtained by another creditor on a second bond made by *B*, subsequently and subject to the bond made to *A*. In a suit by *A* against *B* and the purchasers of the lands at the execution-sale, *A* charged *B* personally, and also sought to realize the amount due on his bond by the sale of the mortgaged lands. *Held*, that the claim was in substance a suit for the recovery of immoveable property, or of an interest in immoveable property, within the meaning of cl. 12, s. 1, Act XIV of 1859, and, consequently, was governed by the twelve years' rule of limitation therein provided, and not by the rules provided by cls. 10 and 16 of the same section.

Semble. Although *A* was at liberty to sue from the date of the sale of the lands, limitation did not run against his claim from that date, but only from the date fixed in the bond for repayment.

APPEAL from a decision of the Calcutta High Court (PHEAR and AINSLIE, JJ.), dated 11th March 1872.

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, AND SIR M. E. SMITH.

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Between the years 1841 and 1851, Baboo Dyal Singh, and after his death, his son Baboo Ritbhunjun Singh, had, from time to time, borrowed sums of money from Mussamut Agur Konwar, granting her bonds for the repayment of the amount. On the 21st June 1856, Ritbhunjun Singh executed a fresh bond in substitution for the earlier bonds, which was afterwards duly registered, and in which, after reciting that a sum of Rs. 16,511, principal and interest, was due by him on the previous transactions, he bound himself personally to repay that sum with interest thereon in the month of Jeyt 1274 (June 1866), and hypothecated certain mouzahs belonging to him as security. The bond further contained a clause to this effect;—"Should the mouzahs mortgaged be sold in execution of decree or for arrears of revenue, the said lady shall in that case be at liberty, without waiting for the expiration of the term of payment, to institute a regular suit and to sell the moveable and immoveable properties of me the declarant and my heirs and thereby realize the amount in question." This bond was registered on the 23rd of June 1856.

In July 1864, one Juneswar Dass obtained a decree against Ritbhunjun Singh upon a mortgage bond executed by the latter on a date subsequent to that of the bond in favor of Mussamut Agur Konwar, and, on the 18th May 1865, the right and interest of Ritbhunjun in the aforesaid mouzahs were put up to sale in execution of that decree, and were purchased by the said Juneswar Dass and Mussamut Ruttunjote Konwar, with full notice of the incumbrance under the earlier bond.

Mussamut Agur Konwar had died in or before the year 1862. On the 30th August 1871, her representatives brought the present suit in the Court of the Subordinate Judge of Zilla Shahabad, against Ritbhunjun Singh, Juneswar Dass, and Mussamut Ruttunjote Konwar, to recover Rs. 26,793-5-9, principal and interest, due on the bond of the 21st June 1856, by the sale of the property thereby charged, and of other property, and from the person of the defendant Ritbhunjun Singh.

The defence was (*inter alia*) that the plaintiffs' cause of action under the bond arose on the 18th May 1865, when the mouzahs were sold at the execution sale; and that, consequently,

their suit, which was not instituted until more than six years from that date, was barred by limitation.

The Subordinate Judge held, that even assuming that the plaintiffs' cause of action accrued on the 18th May 1865, the day of the auction-sale, the suit was not barred, the limitation of twelve and not of six years being applicable to a claim to enforce a lien over immoveable property by bringing such property to sale; and on appeal by Juneswar Dass from that decision the High Court affirmed the judgment of the Subordinate Judge.

Juneswar Dass then appealed to Her Majesty in Council.

Mr. *J. H. W. Arathoon* for the appellant.—On the question of limitation, both the lower Courts are wrong. Where a claim to land rests on a written contract, the period of limitation is three years—*Rani Mewa Kuwar v. Rani Hulas Kuwar* (1). [SIR M. SMITH.—That is not the effect of the judgment in that case. We held there that the claim was not founded on contract, and that the lower Court had applied a wrong rule of limitation.] Here the plaintiffs sue on a money bond in which lands are pledged as security. In such cases, where the instrument is not registered, it has been held that the limitation applicable is that of three years provided by cl. 10, s. 1, Act XIV of 1859—*Parushnath Misser v. Shaikh Bundah Ali* (2). In the present case, the contract is registered, which would give a six years' term of limitation under cl. 16 of the same section and Act—*Seetul Singh v. Sooruj Buksh Singh* (3). The plaintiffs' cause of action arose on the 18th May 1865, when the lands pledged were sold in execution, since it was provided in the bond that on such a sale the creditor might sue at once without waiting for the day fixed for payment. The suit was not brought until the 30th August 1871, more than six years from the time when the cause of action arose.

Mr. *L. W. Cave*, Q.C. (Mr. *Horace Smith* with him) for the

(1) 13 B. L. R., 312; S. C., L. R., 1 Ind. Ap., 157.

(2) 6 W. R., 132.

(3) 6 W. R., 318.

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respondents.—The cases cited from the 6th volume of the Weekly Reporter have been overruled by the Full Bench of the Calcutta High Court in the case of *Surwan Hossein Khan v. Gholam Mahomed* (1), in which it was held that a suit like the present is a suit for the recovery of an interest in immoveable property within the meaning of cl. 12, s. 1, Act XIV of 1859, and governed by the twelve years' rule of limitation; see also *Mannu Lall v. Pegue* (2). There are numerous decisions of the Madras Court to the same effect—*Raja Kaundan v. Muttammal* (3). This is not a mere suit for repayment of money. Its substantial object is to enforce the lien against the defendants who bought the hypothecated lands at the execution-sale. As against them, the claim does not rest on contract. The plaintiffs have no contract with these defendants, and have no personal right against them. Even if it were held that the period of limitation is only six years, the suit would still be in time. Under the bond, the creditor had an option to sue when the lands were sold, but his proper cause of action did not arise till the day fixed by the bond for payment. The suit was brought within six years from that date.

Mr. *Arathoon* did not reply.

The judgment of their LORDSHIPS was delivered by

SIR M. E. SMITH (who having stated the facts of the case proceeded as follows):—

After the discussion which has taken place at the bar, there remain only two questions to be decided. The first is purely a question of fact. * * * *

The other question arises upon the period of limitation which is applicable to this case. As already observed, the instrument contains two distinct things: the obligation to pay the money, which binds the maker of it only, and the mortgage of the land; and the plaint in the present suit is properly framed upon the instrument in that aspect. It seeks to charge the first

(1) B. L. R., Sup. Vol., 879.

(2) 9 B. L. R., 175.

(3) 3 Mad. H. C. R., 92.

defendant, the maker of the bond, Ritbhunjun Singh personally, and it also claims to recover the amount of the principal and interest by the sale of the mouzahs (naming them), which were the hypothecated property included in the mortgage. It is contended for the appellant that the limitation contained in cl. 16, s. 1 of the Act XIV of 1859 is the proper limitation to apply to the case. That is a sweeping clause, which provides thus: "that to all suits in which no other limitation is hereby expressly provided, a period of six years from the time the cause of action arose." It is said that this is a suit brought to recover money lent, and the interest on that money, and that it falls within cl. 16, because, although cl. 10 applies to suits for money lent, it does not apply to them in the cases where the instrument shall have been registered within six months from the date, and this bond, having been so registered, is not within that section, and not being otherwise provided for, falls within the limitation of six years in cl. 16. Their Lordships, however, are clearly of opinion that neither of these clauses is applicable to this suit, which is brought, in substance, for the recovery of immoveable property, or of an interest in immoveable property, and falls therefore within cl. 12 of the first section. The object of the suit is to obtain a sale of the land as against the defendants grouped as defendants No. 2 and No. 3, who had become purchasers under a subsequent mortgage bond. It is therefore, as against them, a claim founded not upon the contract to pay the money, but upon the hypothecation of the land. Their Lordships would have been disposed so to apply the Statute of Limitations if the matter had been *res integra*, but it appears from the cases to which they have been referred by Mr. Cave that there has been a long and almost uniform current of decisions in the two provinces of Bengal and Madras, giving this construction to the Act. Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon that this suit would have been barred if the limitation of six years under cl. 16 had been applicable to it. They think, upon the construction of this bond, there would be good reason for hold-

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ing that the cause of action arose within six years before the commencement of the suit. However, it is sufficient to say that their Lordships think the limitation applicable to the case is that under cl. 12, s. 1 of the Limitation Act.

In the result, their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the appellant: Mr. *T. L. Wilson.*

Agents for the respondents: Messrs. *Watkins and Lattey.*

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

1876

March 1.

IN THE GOODS OF GLADSTONE (DECEASED).

Court Fees Act (VII of 1870), Sch. I., cls. 11 & 12—Probate Duty, Exemption from—Interest in Partnership Property.

The testator, a member of the firms of *G. A. & Co.*, of Calcutta, and *O. G. & Co.*, of Liverpool, died in England, leaving a will, of which he appointed *G* in England and *O* in Calcutta his executors. As a partner in the Calcutta firm, the testator was entitled to a share in an indigo concern and in certain immovable property in Calcutta, and his share in these properties was, on his death, estimated, and the money-value thereof paid to his estate by the firm in Liverpool, and probate duty had been paid thereon by *G* in obtaining probate of the will in England. Shortly after the testator's death, the indigo concern was contracted to be sold, and the testator's name appearing on the title-deeds as one of the owners, *O* applied for probate of the will, to enable him to join in the conveyance and in any future sale of the other immovable property. An unlimited grant of probate was made to *O*, who claimed exemption from probate duty in respect of the properties, on the grounds (a) that duty had already been paid in England on the testator's share in them, and (b) that there was no amount or value in respect of which probate was to be granted in India. *Held* on a case referred by the taxing officer, that *O*