

## LETTERS PATENT APPEAL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justices, and  
Mr. Justice Holmwood.*

1907  
May 9.

RAHMAT KARIM

v.

ABDUL KARIM.\*

*Limitation—Mortgage—Personal Covenant—Registered mortgage bond—Supplemental decree—Transfer of Property Act (IV of 1882) s. 90—Limitation Act (XV of 1877) Sch. II., Arts. 116, 178.*

Article 178, Schedule II of the Limitation Act is limited to applications under the Code of Civil Procedure. It does not apply to an application by a mortgagee for a supplemental decree under section 90 of the Transfer of Property Act.

Where a registered mortgage contains a covenant to pay the mortgage money, the mortgagee would have, under article 116, Schedule II of the Limitation Act, six years to bring his suit on the covenant; and the question of limitation on an application for a supplemental decree under section 90 of the Transfer of Property Act is whether the personal remedy was barred at the date of the institution of the suit, and not whether it would be barred at the date of the application.

*Tiluck Singh v. Parsotein Proshad* (1); *Bai Manekbai v. Manekj Kavasji* (2) and *Purna Chandra Mandal v. Radha Nath Dass* (3) approved.

APPEAL by the plaintiff, Sheikh Rahmat Karim, under section 15 of the Letters Patent.

The plaintiff brought the suit, out of which the present appeal arose, on the 19th of April 1900, to enforce a registered mortgage bond dated the 22nd of April 1897. The mortgage contained a covenant to pay the mortgage money, and the date of payment mentioned in the bond was the 6th of May 1898. A decree for sale was made on the 19th of July 1900 and the mortgaged property was sold on the 17th of February 1902, the sale being confirmed on the 19th of March 1902. The amount for which

\* Letters Patent Appeal No. 80 of 1906, in Appeal from Appellate Decree No. 2171 of 1905.

(1) (1895) I. L. R. 22 Calc. 924.      (2) (1880) I. L. R. 7 Bom. 213.  
(3) (1906) I. L. R. 33 Calc. 867.

the property was sold being insufficient to satisfy the decree, the plaintiff on the 28th of March 1905 applied for a personal decree against the mortgagor under section 90 of the Transfer of Property Act.

On objection by the mortgagor, the Munsif held that the application was barred under Art. 178, Schedule II, of the Limitation Act, and his decision was affirmed by the District Judge on appeal.

The plaintiff appealed to the High Court. The appeal was heard by Mr. Justice Geidt, sitting alone, and was dismissed.

The plaintiff now appealed under section 15 of the Letters Patent.

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*Moulvie Mahomed Mustafa Khan*, for the appellant. Article 178 of the second schedule of the Limitation Act applies only to applications under the Code of Civil Procedure: *Tiluck Singh v. Parsotein Proshad* (1); the present application was under section 90 of the Transfer of Property Act and not under the Code. The case of *Ram Sarup v. Ghaurani* (2) relied on by Geidt J. has been dissented from in *Purna Chandra Mandal v. Radha Nath Dass*(3); it proceeds on the erroneous assumption that the application is made under the Code of Civil Procedure. The other High Courts apply art. 178 to application under section 90 because they hold such an application to be one for execution whereas this Court has uniformly held that such an application is not one in execution but is an application in a pending suit. Limitation for a suit to enforce personal covenant in a registered mortgage is six years under art. 116: *Miller v. Runga Nath Moullick*(4) and as the present suit was within time an application for a personal decree may be made at any time while the suit is pending. The Limitation Act does not provide for such an application; it has been held that there is no limitation for an application for an order absolute: *Tiluck Singh v. Parsotein Proshad* (1).

*Moulvie Syed Mahomed Tahir*, for the respondent. The question whether art. 178 applies to an application under section 90 was

(1) (1895) I. L. R. 22 Calc. 924.

(2) (1899) I. L. R. 21 All. 453.

(3) (1906) I. L. R. 33 Calc. 867.

(4) (1885) I. L. R. 12 Calc. 389.

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not before the Court in *Purna Chandra v. Radha Nath*(1) which only decided that such an application was not an application to take a step in aid of execution. The application was made more than six years after the due date mentioned in the bond and has rightly been held to be barred.

MACLEAN C.J. This appeal arises out of a mortgage suit. The mortgage was created on the 22nd of April 1897 and contained a covenant to pay the mortgage money. The due date was the 6th of May 1898. The suit was instituted on the 19th of April 1900, and a decree was made in that suit on the 19th of July 1900. It was a decree in effect ordering the property mortgaged to be sold to realise the judgment-debt. Some property was sold on the 17th of November 1902, and the sale was confirmed on the 19th of March 1902. On the 28th of March 1905, the mortgagee made an application under section 90 of the Transfer of Property Act, asking the Court upon the footing that the proceeds of the sale were insufficient to pay what was due to him, to pass a decree for the balance. The Court declined to pass any such decree, on the ground that the application was barred by limitation. The only question we have to consider on this appeal is whether it is so barred.

The view of the District Judge was confirmed by Mr. Justice Geidt from whom this appeal lies. Both the District Judge and Mr. Justice Geidt held that Article 178 of the Second Schedule of the Limitation Act applied to the case. Article 178 runs as follows:—For “applications for which no period of limitation is provided elsewhere in this Schedule, or by the Code of Civil Procedure, section 230, the period of limitation is three years to run from the date when the right to apply accrued.” It has, however, been held by a Division Bench of this Court in the case of *Tibuck Singh v. Parsotein Proshad*(2)—in which the decision was given some twelve years ago, and I am not aware that it has been dissented from—that that Article is limited to applications under the Code of Civil Procedure. That case followed upon a Bombay

(1) (1906) I. L. R. 33 Calc. 867.

(2) (1895) I. L. R. 22 Calc. 924.

case, *Bai Manekbai v. Manekji Kavaji*(1). These cases have not been noticed by Mr. Justice Geidt—at least I find no reference to them in his judgment. The case of *Tiluck Singh v. Parsotein Proshad*(2) was noticed by the learned District Judge. He practically declined to follow it. Whatever his individual opinion might have been, he was bound to follow it and should have left it to this Court to say whether the ruling was right or not. I think that the ruling is right and that the article does not apply. Then what is the position? The plaintiff in the ordinary way would have, under Article 116, six years to bring his suit on the covenant. The mortgage was registered. His suit was instituted on the 19th of April 1900, the due date of payment being the 6th May 1898. So far then, as the original claim went, the suit was well within time. Has he lost his right to a supplemental decree under section 90 of the Transfer of Property Act? At the time the decree was passed, the Court, whether at the request of the mortgagor or not, only passed a decree for the sale of the mortgaged property, cognizant that under section 90 of the Transfer of Property Act it could make a supplemental decree if such supplemental decree became necessary.

This subject has been dealt with in a recent case of *Purna Chandra Mandal v. Radha Nath Dass*(3) by a Division Bench of this Court and these Articles of the Limitation Act considered: and, one of the learned Judges at page 873 says this: “The Court in the first instance gives a decree for sale and then determines, if necessary, at a subsequent stage whether the plaintiff should have also a personal decree. In making this supplemental decree the Court has to consider, if any question of limitation arises, whether the personal remedy was barred at the date of the institution of the suit, and not whether it would be barred at the date of the application under section 90.” I think that is right. That being so, it seems to me that the view taken that the application is barred is not well-founded. But it has not been decided whether the balance is legally recoverable from the defendant otherwise than out of the property sold. The appellant concedes

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(2) (1895) I. L. R. 22 Calc. 924.

(3) (1906) I. L. R. 33 Calc. 867; 4 C. L. J. 141.

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that the case must go back to have that issue decided. We order accordingly.

The appellant must have his costs in all the Courts including the costs of this appeal and of the proceedings before Mr. Justice Geidt.

HOLMWOOD J. I agree.

*Appeal allowed.*

S. CH. B.