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I think, therefore, it must be considered as settled that where a conveyance is set aside, as here, for fraud, the purchaser is not entitled to any allowance for repairs or lasting improvements.

The first and second defendants must be taken to have known that their conveyance was fraudulent; that, although it might stand as a valid security for the amount to which Chandrabhagabai might legally charge the property, that was the extent of its validity; that it would not entitle them to retain possession as against the true owners; and that their retention of such possession was wrongful. It follows that, although it might be that the repairs were required for the very upholding of the premises, yet inasmuch as the first and second defendants must be taken to have known that their possession was wrongful, the principle of law I have adverted to applies, and they must be held not to be entitled to the return of any moneys expended on such repairs or improvements.

The questions as to any and what account should go for rents and outgoings subsequent to the date of the conveyance, and as [463] to what sum should be allowed to the first and second defendants for expenses incurred in and about Chandrabhagabai's funeral ceremonies, will stand over for consideration until a future date. At present I make the following order only:—

Order.—That the sale by Chandrabhagabai to the first and second defendants be set aside, and that the conveyance do stand as a security for the sum of Rs.3, 500 *plus* the sum allowed for funeral expenses (to be afterwards ascertained) with interest thereon, at 9 per cent., from date of the decree until payment, payable to the first and second defendants; the said premises to be reconveyed by the first and second defendants to the plaintiff and the remaining defendants on the payment of the above sum with interest as aforesaid; the first and second defendants to pay to the plaintiff his taxed costs of suit, save and except the costs of the first and second issues; plaintiff to pay to the first and second defendants their costs of the first and second issues, to be deducted from the costs payable by the first and second defendants to the plaintiff.

7th October.—The parties appeared this day; and an agreement having been come to in the meantime with respect to the remaining provisions of the decree, a decree in the form agreed upon was passed accordingly.

Solicitors for plaintiff.—Messrs. *Nanu and Harmusjee.*

Solicitor for first and second defendants.—Mr. *Khanderav Moroji.*

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ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice.

PESTONJI BEZONJI *v.* ABDOOL RAHMAN BIN SHAIK BUDOO.*

[21st and 28th June, 1881.]

Civil Procedure Code—Act X of 1877, s. 43—Entitled to more than one remedy—Leave to omit to sue—First hearing—Mortgage—Suit on personal covenant—Limitation Act (XV of 1877), sch. II, art. 132—Money charged upon immoveable property.

The plaintiff held a mortgage of certain immoveable property given to him by the defendant to secure the repayment of a loan of money with interest. The plaint stated the fact of the mortgage, but prayed only for a money decree. The

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mortgage contained a personal undertaking to repay. Plaintiff's counsel, directly upon the case being called on for hearing and before the case had in any way been gone into, applied (under s. 43 of Act X of 1877, Civil Procedure Code) for leave to reserve his remedies [464] under the mortgage, taking then only a money decree, an application which, it is provided by that section, must be made "before the first hearing."

Held, that the application was not too late.

The said mortgage was dated 16th February, 1870, and the plaint in this suit was filed on the 28th April, 1881. The plaintiff maintained that he was not timebarred, as he had twelve years within which to bring the suit under art. 132 of sch. II of Act XV of 1877.

Held, that plaintiff was too late in bringing a suit for a money decree on the promise to pay in the mortgage, inasmuch as the article referred to was meant to apply to suits brought to enforce *against the property* payment of "money charged upon immoveable property," and not, under any circumstances whatever, to a suit for a mere money decree.

[Over., 6 B. 719 (723); F., 12 C.L.R. 165 (168); R., 7 A. 120 (123); 10 B. 519 (526); Expl., 11 M. 56 (59); D., 9 A. 591 (602).]

THE plaint in this suit alleged a loan of a sum of money by the plaintiff to the defendant and a mortgage, dated the 16th of February, 1870, of certain immoveable property of the defendant to the plaintiff to secure the same; and prayed for a decree for the money lent, with interest. The mortgage contained a personal covenant to repay the said loan after a certain date, then long since passed, with interest thereon at a stated rate.

The suit being called on for hearing.

Starling for plaintiff (defendant in person) now applied, under s. 43 of Act X of 1877 (1), for leave to omit to sue for the remedies under the mortgage, reserving such remedies for a future action if so advised, and to take now merely a money decree on the covenant contained in the mortgage.

[SARGENT, J.—Are not you too late? The application must be made "before the first hearing", and we are now at the first hearing. Should you not have applied in chambers before the case was called on?]

"Before the first hearing" means before the case is heard. It has not yet been heard. The section does not say "before the case is called on for hearing."

[465] SARGENT, J.—I think it will be convenient to lay down that such an application as this may be made directly the case is called on. I think if the application is made, as it is here, directly the case is called on, and before anything whatever has been done towards the hearing of the case, it is in time under this section; and I grant the leave asked for accordingly.

Plaintiff, having proved his case, asked for a decree accordingly.

[SARGENT, J.—The mortgage containing the covenant on which you sue is dated 16th February, 1870, and this suit was not brought until the 28th April, 1881. Is this suit not barred?]

Starling for plaintiff.—The suit can be brought any time within twelve years under art. 132, sch. II of the Limitation Act XV of 1877,

(1) The portion of the section referred to, runs thus:—

"A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

"For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."

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which refers to suits to "enforce payment of money charged on immoveable property." This money is money "charged on immoveable property," and, therefore, that article applies to the present suit: *Juneswar Dass* v. *Mahabeer Singh* (1).

[SARGENT, J.—But you are suing on the undertaking to pay.]

The section does not say that I must seek to enforce the charge. An Act like this must be construed strictly. If the words, on the face of them, bear the construction I contend for, it should be given to them. They must not be stretched in order to curtail a plaintiff's right of action (2).

[SARGENT, J.—Does this section apply to mortgages at all? There are other sections applying specifically to mortgages. Does not this section apply only to "charges" specifically so called, such as *haks* and charges for providing for younger children, &c. ?]

"Charge" is a generic word, and includes mortgages. The specific remedies of mortgagee are provided for elsewhere it is true, but this provides a general remedy which the mortgagee shares with all other beneficiaries of a charge.

Cur. adv. vult.

JUDGMENT.

28th June.—SARGENT, J., gave his decision on the point of limitation raised.

I have considered the point of limitation, and I have come to the conclusion that art. 132 of the Limitation Act XV of [466] 1877 does not apply to such a case as this. It applies, I think, only to suits to enforce "*against the land*" money charged upon it, and not to suits for a mere money decree. The fact that the money lent, which is the subject of the suit, happens to be secured by a charge on immoveable property is, in my opinion, immaterial, if the suit is not brought to enforce that charge. There is no doubt that before Act IX of 1871, such suits could only be brought within three years, or, under special circumstances, six years—unless, indeed, the debt was a specialty debt as contemplated by s. 11 of Act XIV of 1859; and if it was intended to alter that state of things, one would expect to find that intention clearly expressed. Again, whenever a suit for a mere money decree is meant, the language used in the Act is different to the language used in this section. It is also to be remarked that art. 132 does not contain the words "secured by mortgage", which are found in 3 and 4 William IV, c. 27, s. 40, and which words, it was argued in *Forsyth* v. *Bristowe* (3), would extend to the case of an action on the covenant to pay the mortgage money. Parke, B., however, in delivering judgment, said: "It was a question whether that section applied to any but remedies against the realty." Nor would there appear to be any reason why this plaintiff should be placed in a better position in respect of obtaining a money decree, capable of execution against the general property of the defendant, than any of the ordinary creditors. He has taken care to secure a better position, it is true, but that is against the land comprised in the mortgage; and he must, in my opinion, confine himself to that if he claims the benefit of the longer period within which to enforce payment.

(1) 3 I.A. 1. (2) *Ibid.* (3) 8 Exch. 716.