

doubtedly purchased by the father during his son's minority. It is in evidence that, after the purchase, the father and son lived together in the purchased house. As regards the land, it would seem that rent notes were taken in the son's name, and that rent was paid to the banker of the father and son, and credited in the son's name, and an account thereof was rendered by the banker to the son; but it appears from the banker's evidence that the account was originally a mere transfer of the father's balance to the name of the son; and it would, of course, be perfectly easy for the father and son to arrange the matter between themselves, so that the son should account for the rents to the father. It is possible that the transaction was a real one, and that the purchase was intended for the benefit of the son; but the burden of proof lies with more than ordinary weight on the person alleging the *bona fides* of such transaction, and the evidence in this case is too slender to enable us to say that the plaintiff has discharged himself of that burden.

The decree of the lower Court is reversed, and the claim rejected with costs.

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APPELLATE CIVIL.

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FULL BENCH.

*Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Melvill and Mr. Justice Kembal.*

LALLUBHAI, PLAINTIFF, v. NARAN, DEFENDANT.\*

*Limitation Act XV of 1877, Schedule II, Article 132—Mortgage—Suit by mortgagee to recover debt from the mortgagor personally—Money decree.*

Article 132 of Act XV of 1877, Schedule II, is applicable to a suit, by a mortgagee to obtain a mere money decree, to which suit, therefore, the limitation of twelve years from the time the money sued for becomes due applies.

*Pestonji Bezanji v. Abdool Rahiman* (1) overruled.

UNDER section 617 of the Code of Civil Procedure Rao Saheb Dolatrai Sampatrai, Subordinate Judge of Kheda, stated the following case for the orders of the High Court:—

“The plaintiff in the case presented a plaint on the 10th of January, 1882, in this Court to recover money due on a *sankhat*

\* Civil Reference, No. 6 of 1882.

(1) I. L. R. 5 Bom. 463.

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(mortgage without possession) from the person and general property of the defendant according to the contract in the said *sankhat*, but relinquishes his right over the *san* immoveable property. This *sankhat* is dated 6th November, 1876, and as there is no time fixed for repayment, there is no dispute that this suit is brought after the lapse of three years from the date of the *sankhat*. In this *sankhat* the covenant, mentioned in clear words at the foot, runs thus :—‘I bind myself jointly and severally to repay the amount of the *sankhat* with interest from the *san* property as well as my other properties, my person and heirs.’

“ The *sankhat* is proved by evidence. I am of opinion that, since the time the Limitation Act IX of 1871 came into operation, the limitation of twelve and not three years applies to suits against *san* property as well as the defendant’s person and other properties, if the debt be secured by such a *sankhat* of immoveable property as involves a two-fold contract; and such has been the practice of this Court.

“ Before Act IX of 1871, came into force, the statute of limitation was Act XIV of 1859, and section 1, clause 12 of that Act was applicable to suits to recover any interest in immoveable property; and I see no reason to write at length regarding the wording of Act IX, which in this respect is quite different, because on a reference from the First Class Subordinate Judge of Kheda, Westropp, C. J., and Melvill, J., decided in Regular Appeal No. 6 of 1877 on the 16th of July, 1877, as follows :—

“ The Court varies the decree of the Subordinate Judge by allowing interest at 9 per cent. per annum on the first instalment of Rs. 900 due upon the bond in the plaint mentioned from the 13th February, 1869, and by declaring that the defendant is personally liable for the said first instalment and the said interest thereon, inasmuch as the Court is of opinion that the period of twelve years allowed by article 132 of the second Schedule of Act IX of 1871 in the case of money charged upon immoveable estate is applicable as well to the personal liability of the debtor (when he has personally contracted) as to his liability of the immoveable property charged.’

“Lately Sir Charles Sargent has passed a decision in *Pestaji Bezanji v. Abdool Rahiman*(1), which is contrary to this. Hence I make this reference \* \* \*.”

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The case was heard by Kemball and Nanabhai Haridas, JJ., on the 14th of March, 1882, who referred it to the Full Bench.

The case was then reheard by Sir Charles Sargent, C.J., and Melvill and Kemball, JJ.

The parties did not appear.

*Manekshah Jehangirshah* as *amicus curiæ* for the plaintiff.—Article 132 of the Limitation Act XV of 1877, Schedule II, is conversant with the nature of the debt which is sought to be recovered, and not with the remedy by which it is sought to be recovered. For instance, a suit on a registered bond may be brought within six years, though a suit on a bond not registered must be brought within three years. To hold that article 132 does not apply to a claim to recover money only, would be to add words to it, and to read it as if it said “to enforce payment from the immoveable property”. As the article stands it is quite wide enough to include a claim to recover money only, which has been charged upon immoveable property. The explanation to the article shows that it would include *malikana* and *haks*.

*Ghanasham Nilkanth* as *amicus curiæ* for the defendant.—Article 132 is not applicable to a suit brought on a mortgage bond to obtain a money decree only. Where the mortgage security is abandoned, the suit must be regarded as brought as if were on a money bond, and the limitation applicable is three years. Under Act XIV of 1859 the limitation for such a suit was three years. It cannot be supposed that by passing Act IX of 1871 or XV of 1877 the Legislature intended to alter the law which was in force without an express provision to that effect. A ‘charge’ is money charged, and, therefore, to enforce payment of money charged upon immoveable property, is to enforce the charge upon immoveable property. How can a suit for a personal decree be called a suit to enforce a charge upon immoveable property under article 132? The word ‘charge’ is defined in the Transfer of Property Act IV of 1882, section 100, as follows:—

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“Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property.” This shows that the expressions used in article 132 do not cover a suit on a mortgage bond. The absence of the word ‘enforce’ in articles 57 to 64 and 65 to 80, which relate to suits for mere money, indicates that the article 132 in which that word occurs, is intended to apply to a suit for obtaining a decree against immoveable property only. A suit may be brought for a mere money decree, treating the mortgage bond as a simple money bond, and again another suit may be brought to enforce the mortgage lien. There is no reason, therefore, why a different period of limitation should apply to a suit on a mortgage bond treated by the plaintiff himself as a money bond from that applicable to a suit on a mere money bond. Again, there are distinct provisions of limitation, articles 147 and 148, for suits based upon mortgage. The Legislature could not, therefore, have intended article 132 to apply to a suit on a mortgage bond. The decision in *PestANJI Bezanji v. Abdool Rahiman* (1) is, therefore, correct.

In the course of the argument the following cases were also referred to :—*Juneshmar Dass v. Mahabeer Singh* ; *Surwan Hossein v. Shahazadah Golam Mahomed*(3) ; *Mannu Lal v. Pegue*(4) noted in the matter of the petitions of *S. J. Leslie*(5) ; and *Bappoo bin Ganoji v. Kalu bin Khandoba* at page 81 of the printed judgments for 1874.

MELVILL, J.—The question referred for our decision is, whether article 132, Schedule II, of Act XV of 1877 is applicable to a suit brought by a mortgagee to recover his debt, not from the mortgaged property, but personally from the mortgagor.

Under Act XIV of 1859 the Courts held that such a suit was a suit “for money lent”, and, therefore, subject to the three years’ or the six years’ rule, according as the bond was not, or was, registered. A suit for foreclosure or sale was held to be a suit “for the recovery of immoveable property or of an interest in

(1) I. L. R. 5 Bom. 463.

(3) 9 Calc. W. R. 170.

(2) I. L. R. 1 Calc. 163.

(4) 9 Beng. L. R. 175, note.

(5) 9 Beng. L. R. 171.

immoveable property", and, therefore, governed by the twelve years' rule.

Act IX of 1871 contained provisions similar to those of Act XIV of 1859 regarding suits "for money lent", and "for possession of immoveable property or any interest therein not otherwise specially provided for", and our Courts would, no doubt, have adhered to their decision passed under the previous Act, if it had not been for the introduction of a new rule in article 132, Schedule II, of Act IX of 1871. That article prescribed a period of twelve years for suits "for money charged upon immoveable property", and in the case referred to by the Subordinate Judge it was held by a Division Bench of this Court that article 132 was applicable as well to the personal liability of the debtor as to the liability of the immoveable property charged. Having regard to the wording of the article, and to its undoubted applicability to the case of money lent upon mortgage, we do not see how the decision could well have been otherwise.

The other decision to which the Subordinate Judge refers, *Pestanjji Bezanji v. Abdul Rahiman bin Shaik Budoo* (1), was passed with reference to the provisions of a later Act, and, consequently, the two decisions are not necessarily in conflict. For the words "for money charged upon immoveable property" article 132, Schedule II, of Act XV of 1877 has substituted the words "to enforce payment of money charged upon immoveable property", and it is difficult to suppose that the change was made without intention. In the case in question the use of the word "enforce" induced the Court to the conclusion that the article was intended to apply only to suits to enforce the claim of the mortgagee against the mortgaged property. It was indeed pointed out during the argument that it might well be doubted whether article 132 was intended to apply to mortgages at all, inasmuch as article 147 had introduced a special provision, not contained in previous Acts, for a suit by a mortgagee for foreclosure and sale.

It must be admitted that these changes in the law have introduced difficulties with which this Court had not to contend

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when considering this question with reference to the provisions of the Act of 1871. But upon a careful consideration of the whole subject, and bearing in mind that, in cases of doubt, an Act of Limitation ought to be construed in the manner most favourable to the person whose right is the subject of the limitation, we have come to the conclusion that article 132 of the last Act ought to be held applicable to a suit by a mortgagee to obtain a mere money decree. The explanation to the article provides that "the allowances and fees respectively called *malikana* and *haks* shall, for the purpose of this clause, be deemed to be money charged upon immoveable property." Now suits for *malikana* or *haks* are ordinarily suits for mere money decrees, and, therefore, the explanation is opposed to the supposition that the article was intended to apply exclusively to suits to enforce payment out of immoveable property. And although the introduction of a special provision for the enforcement of a mortgage by foreclosure or sale (article 147) may point to the conclusion that the Legislature intended the word "charge" in article 132 to bear the same meaning as in section 100 of the Transfer of Property Act (which says that "where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property"), yet it cannot be denied that money lent on mortgage is, in ordinary legal phraseology, money charged upon immoveable property, and that, therefore, a suit by a mortgagee for a money decree is strictly within the words, though possibly not within the intention of the article in question.