APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1886. *July* 8,19,20.

BOO JINATBOO AND ANOTHER, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* SHA' NAGAR VALAB KA'NJI AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act IX of 1871, *Sec.* 92—*Suit to set aside an instrument creating a charge on immoveable property, and to recover possession of the same—Agent not standing in a fiduciary relation—Onus of proving fraud against—Tálukdári Act (Bom. VI of* 1862*), Secs.* 9, 12, 20—*Tálukdár's power of disposal over his landed estates after the expiration of the management by the Tálukdári Settlement Officer.*

Article 92, Schedule II of Act IX of 1871 has no application to a suit to set aside a mortgage bond, on the ground of fraud, and to recover possession of the immoveable property therein referred to. The article in question applies only where a bare declaration is sought regarding the cancellation of a bond, or other instrument.

Sikher Chund v. *Dulputty Singh* (1) followed.

It is only in cases where one person stands in a fiduciary relation to another that the law requires the former to exercise extreme good faith in all his dealings with the latter, and scrutinises those dealings with more than ordinary care and caution.

In the absence of any special confidence reposed by one person in another, it lies on him, who alleges fraud, to prove it.

Where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the notice of the Court before it can be called upon to order the accounts to be re-opened from the first.

Williamson v. *Barbour* (2) followed.

Under section 12 of the Ahmedabad Tálukdárs' Act (VI of 1862), debts or liabilities incurred by a tálukdár during the management of the Tálukdári Settlement Officer are not enforceable against his *landed* estates. His personal liability for the same remains unaffected by the Act. This personal liability furnishes a sufficient consideration for a subsequent obligation so as to bind the landed estates by a contract made *after* the period of the management by the Tálukdári Officer has expired. From and after the expiration of that period, the tálukdár becomes, under section 20, the absolute proprietor of his estate, and he is *then* at liberty to create a valid charge upon his estate for debts contracted *during* the period of the management.

Accordingly, where a tálukdár had, after the withdrawal of the management by the Tálukdári Settlement Officer, encumbered his landed estate under several

* Appeal, No. 22 of 1883.

(1) I. L. R., 5 Calc., 363. (2) L. R., 9 Ch. D., 529.

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mortgage bonds, passed partly in renewal of old bonds and partly in consideration of old debts contracted during the period of the management,

Held, that the mortgage bonds created valid and binding encumbrances upon the estate.

APPEAL from the decree of Ráv Bahádur Makundráv Mánirái, First Class Subordinate Judge of Ahmedabad, in Suit No. 713 of 1878.

The plaint in this case stated that the plaintiffs, Jinatboo and Nathiboo, were the owners of a separated three-annas' share in the tálukdári village of Kotra, in the Ahmedabad District; that the plaintiffs and their mother, Ráje Sáheb, had had pecuniary transactions with the defendants, commencing from about the year 1863; that their estate was under the management of the Tálukdári Settlement Officer, under Bombay Act VI of 1862, from 1863 to 1866; that the plaintiffs and their mother, having implicit confidence in the defendants, acted entirely according to their advice, and entrusted to their sole care and management their three-annas' share of the village; that the defendants, taking advantage of the ignorance of Ráje Sáheb and her daughters, and of the confidence reposed in them, fraudulently caused from time to time certain bonds to be passed to them; that these documents were without any consideration; and that the defendants, when called upon to render an account of their management and restore the land to the plaintiffs, refused to give up possession, alleging that it had been mortgaged to them.

The plaintiffs, therefore, prayed that four bonds, one dated 11th August, 1870, another dated 15th May, 1872, and two dated 13th June, 1874, which the defendants had fraudulently caused to be executed, should be cancelled, and the land delivered over to them.

All the four bonds purported to have been passed by the plaintiffs in renewal of old bonds and partly in consideration of old debts contracted during the period when the village was under the management of the Tálukdári Settlement Officer.

The defendants contended *(inter alia)* that the suit was barred by the law of limitation; that the bonds in question were all obtained *bonâ fide* for valuable consideration; that the amount due under those bonds was about Rs. 28,373; and that, until this amount was

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paid off, they had a right to retain possession of the mortgaged land.

The Subordinate Judge dismissed the suit, on the grounds, first, that the claim to set aside the bonds was barred under article 92, Schedule II of Act IX of 1871; second, that the plaintiffs had failed to prove that the defendants had obtained the bonds in question by fraud and misrepresentation; and, thirdly, that the land could not be restored to the plaintiffs until the amount of the mortgage debt, as claimed by the defendants, had been paid off.

Against this decision the plaintiffs appealed to the High Court.

Ráv Sáheb *Vásudev Jagannáth Kirtikar* for the appellants:—The plaintiffs do not seek for a mere cancellation of the mortgage bonds on the ground of fraud. The main object of this suit is to recover possession of lands which have been wrongfully withheld from the plaintiffs. This suit is substantially one for possession of immoveable property. As such, the period of limitation for it is twelve years—*Sikher Chund* v. *Dulputty Singh* (1); *Ramasar Pánday* v. *Raghubár Játi* (2), and *Nathu* v. *Badridás* (3).

The defendants have had possession, as the plaintiffs' agents, since 1864. They collected the rents from our tenants, sold the crops on our account, and paid the Government assessment. As agents they were bound to show good faith, especially as the plaintiffs were illiterate *pardá* ladies, who had implicit confidence in them, and acted entirely under their advice. The defendants' accounts ought, therefore, to be examined with special care. The accounts are full of false and fictitious entries, showing a clear intention to misrepresent and mislead. They are kept in a manner which lay them open to the gravest suspicion. They ought, therefore, to be re-opened from the commencement of the transactions.

[WEST, J.:—You are not entitled to re-open the accounts until you prove two or three specific instances of fraud.]

I can show many. Exhibits 135, 136, 137 are bonds executed during the period of the management by the Tálukdári Officer. These bonds are invalid under section 12 of Bombay Act VI of

(1) I. L. R., 5 Calc., 363. (2) I. L. R., 5 All., 491.
(3) I. L. R., 5 All., 614.

1862. The bonds sued upon, are also invalid, as they are based upon the three earlier ones.

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Shántárám Náráyan for the respondents:—Section 12 of Bombay Act VI of 1862 protects only the landed estates of the tálukdár. But it leaves his personal liability intact. That personal liability furnishes a good consideration for subsequent charges on the estate. Refers to *Shaik Gulám Mohidin* v. *Wághelá Rájsangji*[1] and *Subá Miyá Bápu Sáheb* v. *Shá Lálchand Tejá*[2]. The earlier bonds are, therefore, a good consideration for those sued upon; the latter are, therefore, valid and binding on the estate. There is no evidence of a fiduciary relation between the parties. The ladies are not *pardá* ladies, and if they are illiterate, that does not free them from responsibility.

Ráv Sáheb *Vásudev Jagannáth Kirtikar* in reply:—As to the application of section 12 of Bombay Act VI of 1862, that section provides against charging the lands during the management by the Tálukdári Officer. If so, effect must be given to the law by preventing the personal obligation from being replaced by one binding the lands. Here, if the personal obligation formed a consideration for subsequent charges on the estate, it would defeat the provisions of the law, and, therefore, under section 23 of the Contract Act, it would be an illegal consideration. Refers to *Pándurang Rámchandra* v. *Náráyan*[3].

WEST, J.:—This is an appeal against the decree of the First Class Subordinate Judge of Ahmedabad in Suit No. 713 of 1878 brought by the appellants to have certain bonds, alleged to have been fraudulently and without consideration obtained from them by the defendants, cancelled, and to recover possession of the land therein referred to.

The Subordinate Judge dismissed the claim, holding that it was time-barred under article 92, Schedule II, Act IX of 1871, and that no fraud or want of consideration was shown.

The first point pressed upon us was that the lower Court was wrong in applying the three-years' rule to the case.

(1) Printed Judgments for 1883, p. 68. (2) Printed Judgments for 1884, p. 34.
(3) I. L. R., 8 Bom., 300.

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Ráv Sáheb Vásudev Jagannáth Kirtikar has relied on *Sikher Chund* v. *Dulputty Singh*[1] in support of his argument that the claim is not time-barred. The counsel for the defendants contends that as proper steps were not taken by the plaintiffs, within the three years allowed by law, to get the bonds cancelled, they cannot claim possession of the land, on which there is a valid charge created by the bonds.

We do not think that article 92, Schedule II of Act IX of 1871 applies to a case like the present, in which the remedy sought is the recovery of land alleged to be wrongly withheld from the plaintiffs. Effect can be given to the article in question by applying it to the well-known class of cases of outstanding instruments by which, should they pass into the hands of an innocent holder for value, such holder would have a right to recover on them. Should the person who has given any such instrument leave it outstanding for any length of time, he would enable the holder to raise money, perhaps, on a false show of wealth. Here the defendants hold possession and use the bonds taken by them to guard it. The object of the suit is to deprive them of that possession, and recover it for the plaintiffs. If it were possible for the Court to award to the plaintiffs possession of the land, and hold that the defendants had no right to keep the same without declaring the bonds to be void, the plaintiffs would hardly care much whether the bonds were cancelled or not; whilst, in order to bring the case under article 92, Schedule II of the Limitation Act, there must be a bare declaration asked regarding the cancellation of the bonds.

Notwithstanding the possible analogy of a recent case in the Privy Council we must follow the principle laid down in the Calcutta case cited, and rule that the period of limitation is twelve years.

The next question for consideration is, whether the respondents were agents of the plaintiffs in the management of their affairs generally, and of the village of Kotra in particular, and whether the defendants stood in such a position of active confidence that

(1) I. L. R., 5 Calc., 363.

they were called on to exercise an extreme good faith in relation to these ladies, in order to guard their interests. It was argued for the plaintiffs that the ladies were entitled to great consideration as *quasi*-infants, as they were illiterate, helpless *pardá* ladies; and that since the defendants, at least some of them, collected the three-sixteenth share of the plaintiffs in the produce of the village direct, and made advances of cash, grain, &c., and paid the Government assessment, they were bound to explain to the ladies the responsibilities they incurred by passing the bonds, and the reasons for the same.

For the defendants, on the other hand, it was contended that there was no evidence, at all, of the defendants having been agents in active confidence, so that the *pardanashin* condition and the illiterateness were circumstances of no consequence.

We cannot find in the evidence that there was confidence of that kind; that the defendants took up the management of the village, and the plaintiffs resigned it in their favour. It appears that they were used as agents for particular transaction, *viz.*, agents for payment of Government assessment, for selling grain, for carrying on legal proceedings, &c. But this is not the kind of agency which the law requires to impose on them special self-denying duties. A merchant is in some sort an agent, and so are a house agent and many others; but, unless there is a special confidence created, the law does not give their employers special protection.

If there was any special confidence, the ladies should have come forward to say in what way the confidence was created and violated. Far from doing that, there was negligence on their part, and delay to such an extent as to give rise to an inference, that, if there were any truth in these statements, they would not have allowed so long a time to elapse, and more especially when they had the assistance of their new *sávkár*, who instructs their pleader in this Court on their behalf.

After we have decided this second point against the appellants, it is clear that it lay upon them to show that there was fraud practised by the defendants in obtaining these and other bonds, and that there was no consideration for them. We find that

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there is no direct evidence in the case to show that the amounts, for which these bonds were passed, were not received by the plaintiffs, or paid on their account. The defendants, who were examined in the case as witnesses, said on oath that the amounts, for which the different bonds were passed, were paid to or for the plaintiffs. There is no oath against this oath: the ladies have not cared to come forward and say which of the items were not received by them, and in what way they were deceived. The pleader for the plaintiffs relies on the alleged irregularities in the defendants' books of account, and wants us to presume that, inasmuch as there were erasures, &c., in them, the conduct of the defendants in their dealings with the plaintiffs and in the transactions relating to the bonds was fraudulent. He has drawn our attention to a smear of ink over certain words and to a hole in the middle of an entry in the accounts, for the purpose of showing that the accounts were tampered with fraudulently. In the next place, he argues that some fictitious entries have been made in the accounts to the credit of some of the partners of the firm of the defendants, in order to create a balance, such as to cover the amounts shown as advanced to the ladies. But generally for a long time before or after each of those entries alleged as fictitious to the credit of the separate partners there were no advances made to the ladies, nor can we find a connexion through entries of advances equal or nearly equal in amount to those on the credit side alleged to be fictitious.

The accounts do not show any indications of fraud, though they might be loosely or irregularly kept, or may be such as themselves do not command confidence. They do not appear to us to make out such a case as to enable us to throw the burden on the defendants, of proving to the satisfaction of the Court that the consideration moneys stated in the bonds were actually paid. The utmost that can be said as regards these accounts is that, if the bonds wanted any corroboration, they do not supply the whole of it, but we cannot say that they afford no corroboration at all, in the face of the *primâ-facie* obligations created by the bonds, unless the accounts are palpably false. Though these accounts present evidence of irregularity, they do not appear to be false. Before they can call upon the Court to

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re-open the accounts from the first, on the ground of fraud, it is necessary for the plaintiffs to bring to its notice at least two or three instances of particular items which the Court can take as false and fraudulent. The principle enunciated in the well-known case of *Willamson* v. *Barbour*[1], and which has been assented to in some cases since, requires that two or three instances of fraud ought to be established before the Court can re-open the accounts. If there were reasons for imputing any fraudulent conduct to the defendants in the transactions which resulted in the passing of the bonds by the plaintiffs, and if there were no consideration for the same, the ladies, when they appeared before the Registrar to admit the execution of the bonds and the receipt of consideration money, had ample opportunities of stating what they now aver as the true state of things. But, instead of doing so, they admitted their obligations, and they then allowed the time, within which their rights to impugn the genuineness of the bonds might be asserted, to pass away. Merely because three years had elapsed from the dates of the bonds, the ladies were not debarred from suing for possession of the land, as already remarked by us; but the lapse of so many years casts a shadow of suspicion over their case, and to raise any presumptions in their favour now, would be fatal to the administration of justice. The bonds were not disputed for a number of years. It is next to impossible, therefore, to believe that had there been a good case of fraud, or want of consideration, the ladies should have taken no steps earlier, and allowed the defendants to be all along in possession of the land. The delay in bringing this suit was approaching to the point where Courts cannot interfere. To allow the plaintiffs to disturb such transactions after so many years, and after the means of evidence perish, would be setting a premium on indolence. It behoves us under such circumstances to exact very satisfactory evidence of failure of duty on the part of the defendants, and we are not prepared to say that there is such evidence in the case. For these reasons we cannot set aside the bonds as having been fraudulently obtained, but must hold them to be genuine and *primâ facie* binding.

(1) 9 Ch. Div., 529.

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The next point argued before us was whether, under the Tálukdári Act (Bombay) VI of 1862, any of the bonds under question could be held void wholly or as far as the debts incurred during the continuance of the management, the estate of the plaintiffs having admittedly been placed under the management of the Tálukdári Settlement Officer for some time. That a portion of the consideration money for some of these bonds at least was advanced during the continuance of the management by the Tálukdári Officer, is not denied even by Mr. Shántárám, pleader for the defendants; and Ráv Sáheb Vásudev, for the plaintiffs, contends that, under section 12 of that Act, that debt or liability cannot be enforceable in any manner whatever, either during or subsequently to such period of management, against the landed estates of the tálukdár. He further argued that the debts due or incurred during the management should have been notified to the Tálukdári Officer, or else were barred and extinguished by operation of section 9; that the bonds exhibits 135, 136 and 137 being consequently null and void, the other bonds, which were the offspring of these, were tainted with their defects, and also void.

There is no doubt that any debt or liability of the plaintiffs, to which they were subject, either personally or in respect of their landed estate, at the time of the declaration, but which was not notified to the Tálukdári Officer, became for ever barred under section 9. But the only section affecting debts or liabilities *incurred* during the continuance of the management under the Act is 12, which simply says that the same shall not be enforceable in any manner whatever, either during or subsequently to such period of management, *against the landed estates* or *any part thereof*. Such liabilities incurred during the continuance of the management would not then be enforceable against the landed estates. Comparing sections 9 and 12, however, we find that debts or liabilities existing at the time of the declaration by the Governor in Council vesting the management in the Tálukdári Officer became barred for ever both as regards the personal liability of the tálukdár and as regards his landed estates, if not duly notified, whilst those incurred during the management are only not enforceable against the *landed estates*, the

personal liability of the tálukdár for the same remaining unaffected by the Act. Applying the maxim, *expressio unius est exclusio alterius*, we can say that the Legislature did not intend to go further than exempting the landed estates of the tálukdár from being liable for debts or liabilities incurred during the continuance of the management. The personal obligation created in this case by the bonds passed during the tálukdári management was a primary one, the charge on the land being merely secondary. We, therefore, think that though the charges on the land created by those bonds could not be enforced, the personal obligation was still subsisting.

The question then arises, whether this personal obligation can furnish a consideration for a subsequent obligation so as to bind the estate by a contract made subsequently to the close of the management of the Tálukdári Officer. Unless the law intervenes, every obligation, every debt subsisting between individuals may be made a consideration for charging lands, and where the exception ceases to operate as in the case of a minor after he attains majority, a personal or moral obligation may be converted into legal obligations. Section 20 sets forth, in the broadest and clearest terms, that, after the withdrawal of the management of the estate by the Tálukdári Officer, the tálukdár has full, unlimited power of disposal over his estates as to which his rights were till then limited. The moment the interdict is removed, the Tálukdár can bind his estate by a charge securing a personal obligation upon which the creditor might otherwise sue and get his debtor imprisoned. If the estate can thus be subjected to obligations generally, why not to an obligation in itself binding the person, though created during the interdiction. That a personal obligation of the plaintiffs, created by the bonds passed during the tálukdári management was subsisting, is beyond doubt. How, then, can it be possible that the ladies should be liable to be sued and imprisoned for that obligation, and yet not in a position to relieve themselves by charging the landed estate after the withdrawal of the management. We cannot impute such an intention to the Legislature. The cases cited by Ráv Sáheb Vásudev are not on all fours

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with the present case. In those cases there was nothing more than a mere moral obligation, whilst here there was a legal one, a personal liability at least of the ladies. We, therefore, come to the conclusion, that there was no violation of the law in the transactions in question.

The last question that remains to be noticed, relates to the legality, or otherwise, of the appropriation of a sum of Rs. 875, being the sale-proceeds of the grain that came to the share of the plaintiffs out of the income of the village of Kotra in a certain year made by the defendants towards the payment of a debt due by the plaintiffs. It is contended by the defendants' pleader that the amount was appropriated by them with the consent of the plaintiffs. It is admitted, on all sides, that, during the time this amount was put down in the account as appropriated, the tálukdári management was still continuing, though the land was managed by the ladies themselves. The debt of Rs. 857, not notified to the Tálukdári Officer, was not recoverable. It does not follow that the payment was made in fraud of the ladies. They were carrying on transactions behind the back of the Tálukdári Officer, and that they should not be able of their own good-will to make payments towards the satisfaction of debts not notified to that officer out of the profits of the land, would be rather anomalous. The ladies ought not to have entered into these transactions; but we cannot say, there being a real debt, that they and all others were entirely prohibited from entering into them. After the appropriation of the sum they passed many bonds to the defendants, and on passing any one of them they could have raised the objection. The settlement was not an idiotic one. They had then, perhaps, a finer sense of their obligation than now under the instruction of the new *sávkár*. We do not see sufficient reason for interfering with the appropriation of this sum.

We, therefore, confirm the decree of the First Class Subordinate Judge, with costs.

Decree confirmed.