

1909.

IN THE
MATTER OF
INDIAN COM-
PANIES ACT,
IN THE
MATTER OF
THE BOMBAY
MANUFAC-
TURING COM-
PANY AND IN
THE MATTER
OF RATILAL
KARSONDAS.

Costs of the petitioner Ratilal Karsondas and the costs of the Company out of the assets: and one set of costs between the other petitioners and creditors appearing. As the other petitioners had notice of the first petition their costs must be included in the one set of costs allowed to the creditors.

Attorneys for 1st petitioner: Messrs. *Daphtary, Ferreira and Divan.*

Attorneys for the other petitioners: Messrs. *Bhaishankar, Kanga and Girdharlal.*

Attorneys for the Company: Messrs. *Payne and Co.*

Attorneys for other creditors: Messrs. *Dikshit, Dhunjisha and Sunderdas.*

K. McI. K

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910.
February 10.

GULAM HUSSEIN ALIAS KIKABHAI TYABALLI (ORIGINAL PLAINTIFF), APPELLANT, v. MAHAMADALLI IBRAHIMJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 43 and 50—Transfer of Property Act (IV of 1882), section 90—Suit to recover mortgage-debt by sale of mortgaged and unhypothecated property—Decree against mortgaged property alone—Sale—Amount realized not sufficient—Application for supplemental decree to recover balance by sale of other property—Limitation—Putting forward allegations at a late stage.

In a suit upon a mortgage dated the 18th April 1887 the plaintiff claimed, on the 18th April 1899, to recover the mortgage-debt by sale of the mortgaged property and the balance, if any, from the non-hypotheated property of the mortgagor. The decree was passed in plaintiff's favour against the mortgaged property alone. The amount realized by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under section 90 of the Transfer of Property Act (IV of 1882) for a supplemental decree against the other property of the mortgagor.

* Second Appeal No. 493 of 1 06.

The first Court found that the claim for a personal decree against the mortgagor was time-barred.

On appeal by the plaintiff he attempted to prove that the claim was within time owing to an intermediate payment by the defendant but the appellate Court found that the plaintiff failed in his attempt and confirmed the decree.

On second appeal by the plaintiff *held*, confirming the decree, that the mortgage in suit being of the year 1887 and the suit of the year 1899, the plaintiff's right to a personal decree against the mortgagor was time-barred, the plaintiff having failed to show the ground on which exemption from the law of limitation was claimed.

Held, further that the plaintiff could not be allowed at a late stage of the suit to bring forward for the first time allegations which it was necessary to prove in order to show that he was entitled to a further decree against the defendant personally.

SECOND appeal from the decision of W. Baker, District Judge of Surat, confirming the decree of Chimanlal Lallubhai, First Class Subordinate Judge.

On the 18th April 1887 one Ibrahim Jiva passed a mortgage-bond to the plaintiff. Subsequently the mortgagor having died the plaintiff, on the 18th April 1899, brought a suit against the mortgagor's widow as defendant 1 and his children as defendants 2—4 to recover Rs. 1,999 due under the mortgage. The plaintiff claimed to recover the said amount by sale of the mortgaged property and the balance, if any, from the remaining non-hypothecated property of defendant 1 and of the deceased mortgagor. The decree was, however, passed against the mortgaged property alone. The amount realized by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under section 90 of the Transfer of Property Act (IV of 1882) for a further decree against the other property of the mortgagor. The Subordinate Judge found that the claim was time-barred and that the plaintiff was not entitled to the further decree prayed for.

The plaintiff appealed to the District Court urging *inter alia* that the sum of Rs. 200 was paid by the mortgagor to the plaintiff subsequent to the mortgage, therefore, the claim was not barred by limitation and that the plaintiff should have been allowed an opportunity of proving the payment of interest as

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alleged by him. The District Judge found that the plaintiff was not entitled to adduce evidence to prove the payment of interest and that he was not entitled to a further decree under section 90 of the Transfer of Property Act. The appeal was therefore dismissed with costs. In his judgment the District Judge observed as follows :—

Section 50 of the Civil Procedure Code provides that if the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaint must show the ground upon which exemption from such law is claimed.

It is argued that the plaint in the original suit satisfies the requirements of section 50.

The plaint, para 5, says that Rs. 7-8-0 were paid as rent. No date is given. It also says 200 were received but as it is not stated on what account it was received, the learned Sub-Judge holds that it was not a payment under the mortgage at all, but on some other account.

What the plaintiff seeks now to prove is that the payment of 200 as interest was made within 6 years of the suit. This fact is stated to be mentioned in the original plaint. But the plaint merely states that 200 were received and does not give any date or the account on which they were paid. Hence it will appear that the present application contains 2 distinct allegations which are not found in the original plaint, first that 200 was paid within six years of the suit and secondly that it was paid as interest. Plaintiff seeks to adduce evidence to prove these allegations. I do not think he can be allowed to do so; it is stated that no fresh allegations are made and that he is not going beyond his original plaint. It is argued that the fact of his mentioning this sum of 200 in the plaint taken with his request for a remedy against the mortgagor personally should lead the Court to presume that this amount was paid within the period of limitation. I do not see how the Court can make such a presumption when the plaintiff himself does not trouble to explain in his plaint how the payment of this sum saves limitation. Even now no date is given of the payment and beyond saying that it was within 6 years plaintiff does not give any information as to when it was paid. Nor is there anything in the application regarding the payment being shown in the debtor's handwriting.

In these circumstances it seems to me that the present allegations are entirely different from those in the original plaint, when the personal relief sought was not based on the facts now alleged. In his deposition in the original suit plaintiff did not give the details. It does not appear to me that the rulings cited contemplate the proceedings under section 90 of the Transfer of Property Act being based on an entirely new case and I would therefore hold that plaintiff has no right to set up these new allegations and cannot be allowed to adduce evidence to prove them.

The plaintiff preferred a second appeal.

N. K. Mehta for the appellant (plaintiff):—Our point is that both the lower Courts erred in not allowing us to adduce evidence to show that our personal remedy against the defendant under section 90 of the Transfer of Property Act was not time-barred. If section 88 of the Act be read in conjunction with section 90 it becomes clear that there are two distinct decrees to be passed—one a substantial decree under section 88 and another under section 90—on the application of the decree-holder in case the net proceeds of any sale under section 89 are insufficient to pay the amount due on the mortgage. The question is whether the personal remedy was within time. We contend that it was not necessary for us to ask for a personal remedy in the plaint or to show that the remedy, if asked for, was still subsisting, as the time for showing that it was not time-barred arose when it was found that the net proceeds of the sale under section 89 were insufficient. If the net proceeds of the sale had been sufficient to pay off the mortgage-debt, an application under section 90 would not have been at all necessary: *Musakeb Zaman Khan v. Inayat-ul-lah*⁽¹⁾ and *Rama Dattu v. Sakharam Lingu*⁽²⁾ support our contention.

L. A. Shah for respondents 1, 2 and 4 (defendants 1, 2 and 4):—The plaintiff asked for a personal remedy in respect of the balance and mentioned the fact of having received Rs. 200 without giving the date of the receipt or the purpose for which that amount was received.

We rely on section 50 of the Civil Procedure Code. The plaint merely stated that Rs. 200 were received but it did not show that receipt kept the personal remedy subsisting. The lower Courts were therefore justified in not allowing the plaintiff to adduce fresh evidence to show that the personal remedy was not time-barred: *Damodar Sakarchand v. Vyanku Gangaram*⁽³⁾.

See, Form of Plaint in a suit on mortgage, No. 109, Sch. IV, Civil Procedure Code of 1882.

N. K. Mehta in reply.

(1) (1892) 14 All. 513.

(2) (1909) 11 Bom. L. R. 1127.

(3) (1906) 31 Bom. 244.

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SCOTT, C. J.:—The plaintiff originally sued on the 18th April 1899 to recover Rs. 999 due under a mortgage-deed dated the 18th April 1887. He claimed to recover the amount in question by sale of the mortgaged property and any balance from the remaining non-hypothecated property of the first defendant and of the deceased mortgagor.

A decree was passed in his favour against the mortgaged property alone. The amount realized by the sale of the mortgaged property was insufficient to satisfy the decree by Rs. 837 and the plaintiff applied under section 90 of the Transfer of Property Act for a further decree against the other property of the mortgagor.

The Sub-Judge found that the claim was time-barred.

An appeal was then preferred to the District Court on the ground that a sum of Rs. 200 was paid by the mortgagors on account of interest on the mortgage-debt and that therefore the plaintiff's present claim was not barred by limitation and that the plaintiff should have been allowed an opportunity of proving the payment of interest as alleged by him.

The Acting District Judge framed the following issues:—

- (1) Whether the plaintiff is entitled to adduce evidence to prove the payment of interest?
- (2) Whether he is entitled to a further decree under section 90 of the Transfer of Property Act?

He decided both the issues against the plaintiff. He says, "what the plaintiff seeks now to prove is that the payment of Rs. 200 as interest was made within six years of the suit. This fact is stated to be mentioned in the original plaint. But the plaint merely states that Rs. 200 were received and does not give any date or the account on which they were paid. Hence it will appear that the present application contains two distinct allegations which are not found in the original plaint, first that Rs. 200 was paid within six years of the suit and secondly that it was paid as interest."

We are of opinion that the District Judge came to the right conclusion upon the facts stated by him.

Section 43 of the Code of Civil Procedure of 1882 provides that "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) to sue for any of such remedies he shall not afterwards sue for the remedy so omitted." If therefore he wished to make out a case that he was entitled to a decree against the mortgagor personally or against his unhypothecated property in the event of the sale-proceeds of the mortgaged property being insufficient to pay the mortgage-debt, he was bound to put forward in his plaint the allegations which if established would entitle him to that relief. The mortgage being a mortgage of 18th April 1887 and the suit being a suit of 1899, it is clear that the plaintiff's right to a personal decree would be barred unless he could allege some ground for exemption from the law of limitation.

Section 50 of the Code of 1882 provides that "If the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaintiff must show the ground upon which exemption from such law is claimed." The plaintiff did not show any ground for exemption from the law of limitation and therefore if the plaintiff is bound by what is stated in his plaint he cannot obtain the relief which he now seeks. In the case of *Damodar v. Vyanku*⁽¹⁾ the Court said, "It is clear from the words of section 90 of the Transfer of Property Act that a direction of personal payment by the mortgagor should be in a supplemental decree to be passed when the net proceeds should be found to be insufficient. The original decree should merely have reserved to the plaintiff liberty to apply for decree under section 90." This assumes that the plaint indicated that debt sued on was legally recoverable at the date of suit.

This view is supported by the form of plaint for a mortgage suit, No. 109, in the Schedule to the Code of 1882, which shows that there should be a prayer in the original plaint for payment to the plaintiff of the amount of the deficiency if the sale-proceeds should not be sufficient for payment of the full amount.

(1) (1906) 31 Bom. 244.

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The conclusion, therefore, to which we have come is that the plaintiff cannot be allowed at this stage of the suit to bring forward for the first time allegations which it is necessary to prove in order to show that he is entitled to a further decree against the defendant personally.

Our attention has been called to the decision in *Ram Dattu v. Sakharam Lingu*⁽¹⁾. That was a case in which the plaintiff in his plaint had claimed a personal decree although he had not at the original hearing led evidence to prove a subsisting personal obligation. It does not appear that any question of limitation arose which should have been confessed and avoided in the plaint.

We affirm the decision of the lower Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

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February 28.

GOKULSING BHIKARAM PARDESHI (ORIGINAL PLAINTIFF), APPELLANT, v. KISANSINGH GURU LAXMANGIRI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 244, 252, 647—Decree—Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under section 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger.

C sued M on a money-bond. M having died during the pendency of the suit, his widow R and his brother N were brought by C on the record as his representatives. A decree was passed awarding the claim out of the property of the deceased. After the passing of the decree but before it could be

* Second Appeal No. 245 of 1909.

(1) (1909) 11 Bom. L. R. 1127.