

that it ought not to convict however many of the co-accused have confessed. I agree with my brother Shah that the conviction and sentence should be set aside and the appellants acquitted.

Rs. 240 taken from accused 4 to be returned to him.

Appeal allowed.

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EMPEROR
v.
GANGAPPA
KARDEPPA.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

DINKAR HARI KULKARNI (ORIGINAL DEFENDANT), APPELLANT, v. CHHAGANLAL NARSIDAS AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1913.

September 16.

Limitation Act (IX of 1908), Articles 116 and 66, section 19—Registered bond—Suit to recover money due on the bond—Period of limitation—Acknowledgment contained in promissory notes.

On the 17th June 1897, the defendant passed a registered mortgage bond in favour of the plaintiff. It was attested by one witness and made the mortgage amount repayable in three instalments, the last one becoming due on the 24th June 1900. On the 24th August 1903, the defendant passed a promissory note in favour of the plaintiff, wherein he stated: "An account is taken to-day and the amount due under the mortgage deed is set apart." Again, on the 11th August 1903, he passed another promissory note which recited: "Besides this the mortgage debt is distinct." The plaintiff sued on the 6th August 1910 to recover the money due under the bond:

Held, that the words used in the two promissory notes amounted to acknowledgments within the meaning of section 19 of the Limitation Act.

Held, further, that the suit was governed by Article 116 and not by Article 66 of the Limitation Act, for though the suit was in form a suit for money due on a bond, it was in substance a suit for compensation for breach of a contract.

Ramdin v. Kalka Pershad⁽¹⁾ and *Bulakhi Ganu Shet v. Tukarambhat*⁽²⁾, commented on.

* First Appeal No. 206 of 1912.

(1) (1884) L. R. 12 I. A. 12.

(2) (1889) 14 Bom. 377.

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APPEAL from the decision of N. B. Mujumdar, Additional First Class Subordinate Judge at Dhulia.

Suit to recover money.

The defendant executed a registered mortgage bond in favour of the plaintiff on the 17th June 1897. It contained a personal covenant. It was attested by one witness. The sum advanced was repayable in three instalments which became due respectively on the 5th June 1898, the 24th June 1899 and the 14th June 1900. The instalments were not paid. On the 24th August 1903, the defendant passed a promissory note to the plaintiff, wherein he stated: "An account is taken to-day and the amount due under the mortgage deed is set apart." On the 11th August 1906, he passed another promissory note which recited: "Besides this, the mortgage debt is distinct."

On the 6th August 1910, the plaintiff filed the present suit to recover the money due under the registered bond.

The Subordinate Judge held that the registered bond not having been attested by two witnesses could operate only as a simple bond, that the two promissory notes were acknowledgments within the meaning of section 19 of the Limitation Act, and that the suit was governed by Article 116 of the Limitation Act. He, therefore, decreed the plaintiff's suit.

The defendant appealed to the High Court.

Gadgil, with *A. V. Lele*, for the appellant:—The case is governed not by Article 116 but by Article 66 of the Limitation Act. See *Ramdin v. Kalka Pershad*⁽¹⁾ and *Bulakhi Ganu Shet v. Tukarambhat*⁽²⁾. Article 116 applies only when the suit for compensation for breach of contract in writing registered, that is, to suits contem-

(1) (1884) L. R. 12 I. A. 12.

(2) (1889) 14 Bom. 377.

plated by section 73 of the Indian Contract Act. See *P. R. & Co. v. Bhagwandas*⁽¹⁾.

The promissory notes are not acknowledgments within the meaning of section 19 of the Limitation Act.

W. B. Pradhan, for the respondents :—Article 116 governs all suits brought on registered writings. The article applies to suits to recover money on registered bonds. See *Ganesh Krishn v. Madhavrav Ravji*⁽²⁾; *Husain Ali Khan v. Hafiz Ali Khan*⁽³⁾; *Srinivasa v. Rengasami Aiyangar*⁽⁴⁾; *Sawaba Khandapa v. Abaji Jotirav*⁽⁵⁾; *Gomaji v. Subbarayappa*⁽⁶⁾; *Din Doyal Singh v. Gopal Sarin Narain Singh*⁽⁷⁾.

[SHAH, J. : referred to *Kameswar Pershad v. Rajkumari Ruttun Koer*⁽⁸⁾.]

Gadgil, in reply.

SHAH, J. :—The present appeal arises out of a suit brought by the plaintiffs to recover money by sale of the mortgaged property described in the plaint and in the alternative, in case a decree for sale of the property cannot be passed, for a decree personally against the defendant. The bond is dated the 17th of June 1897 under which the defendant agreed to pay the amount of the mortgage debt in three instalments, the first instalment being payable on the 5th June 1898, the 2nd on the 24th June 1899, and the 3rd on the 14th June 1900. The plaintiff relied also upon two acknowledgments contained in two promissory notes, dated the 24th August 1903 and 11th August 1906 respectively. The suit was filed on the 6th August 1910. The bond being attested only by one witness is inoperative as a mortgage bond. The lower Court has, however, passed a decree against

(1) (1909) 34 Bom. 192.

(2) (1881) 6 Bom. 75.

(3) (1881) 3 All. 600.

(4) (1908) 31 Mad. 452.

(5) (1887) 11 Bom. 475.

(6) (1891) 15 Mad 253.

(7) (1891) 18 Cal. 506.

(8) (1892) L. R. 19 I. A. 234.

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the defendant personally, holding that the plaintiffs' claim is within time.

In appeal it has been contended on behalf of the appellant before us that though the bond sued on is registered, the claim is beyond time inasmuch as Article 66 and not Article 116 of the Limitation Act, Schedule I, is applicable, and that the acknowledgments which have been held by the lower Court to be good acknowledgments are really not acknowledgments within the meaning of section 19 of the Limitation Act. It is also urged that the personal decree cannot be legally passed.

With regard to the first point, reliance has been placed upon two cases, *viz.*, *Ramdin v. Kalka Pershad*⁽¹⁾ and *Bulakhi Ganu Shet v. Tukarambhat*⁽²⁾. On the strength of certain observations in these two cases, it has been urged that where the suit is in form a suit on a bond, Article 66 should be applied, and not Article 116, even though the bond may be registered. Several other cases have been cited at the bar having reference to this particular point, and on a consideration of all the cases and the observations in the above two cases, I have come to the conclusion that the current of decisions, which is against the appellant's contention, is in no way disturbed by the observations relied upon by him. It has been held by all the High Courts in India that though the suit may be in form a suit for money due on a bond, still it is in substance a suit for compensation for breach of a contract within the meaning of Article 116 of the Limitation Act, and the period of six years provided in that article would apply if the bond is registered. I need refer only to the cases of *Ganesh Krishn v. Madhavrav Ravji*⁽³⁾, *Amritrav Vinayak v. Vasudev*⁽⁴⁾, *Husain Ali Khan v. Hafiz Ali Khan*⁽⁵⁾,

(1) (1884) L. R. 12 I. A. 12.

(3) (1881) 6 Bom. 75.

(2) (1889) 14 Bom. 377.

(4) (1882) P. J. p. 291.

(5) (1881) 3 All. 600.

Naubat Singh v. Indar Singh⁽¹⁾, *Umesh Chunder v. Adarmoni Dasi*⁽²⁾, *Din Doyal Singh v. Gopal Sarun Narain Singh*⁽³⁾ and *Srinivasa Raghava Dikshadar v. Rengasami Aiyangar*⁽⁴⁾. It will thus appear that the Courts have consistently taken the same view both before and after the ruling in *Ramdin v. Kalka Pershad*⁽⁵⁾. This view derives further support from the observations of the Judicial Committee in the case of *Kameswar Pershad v. Rajkumari Ruttun Koer*⁽⁶⁾, where, in a suit based upon a registered instrument, it was observed that the period of six years, and not a period of twelve years, would apply to the case. With regard to the observations in the case of *Ramdin v. Kalka Pershad*⁽⁵⁾, I may say that, having regard to the facts of that case, the only point which arose for decision was whether for the purposes of personal liability the period of twelve years under Article 132 of the Limitation Act applied to the case. There was no point in that case as to whether the period of limitation applicable would be three years or six years. Therefore, the observations in the case of *Ramdin v. Kalka Pershad*⁽⁵⁾ about the shorter period of three years being applicable were not necessary for deciding the appeal. As the observations in the case of *Kameswar Pershad v. Rajkumari Ruttun Koer*⁽⁶⁾ are in consonance with the current of decisions of the Indian Courts and in conflict with the *dictum* in the case of *Ramdin v. Kalka Pershad*⁽⁵⁾, I think that it would be proper to accept the view which has found favour with the Indian Courts. As regards the case of *Bulakhi Ganu Shet v. Tukarambhat*⁽⁷⁾, having regard to the facts of the case, it is clear that it was not necessary to decide whether the period of limitation

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(1) (1890) 13 All. 200.

(4) (1908) 31 Mad. 452.

(2) (1887) 15 Cal. 221.

(5) (1884) L. R. 12 I. A. 12.

(3) (1891) 18 Cal. 506.

(6) (1892) L. R. 19 I. A. 234.

(7) (1889) 14 Bom. 377.

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applicable was three years or six years. The observations of the learned Judges are based upon the *dictum* in the case of *Ramdin v. Kalka Pershad*⁽¹⁾ and upon two cases which on reference I find to have no bearing on the question as to whether to a suit on a registered bond Article 66 or Article 116 would apply. I think, therefore, that the lower Court has rightly applied Article 116 to the present case.

As regards the argument as to acknowledgments, I am of opinion that the words used in the two promissory notes do amount to acknowledgments within the meaning of section 19 of the Limitation Act. I am unable to see why a personal decree cannot be passed. The only consideration urged by the learned counsel for the appellant is that as the bond provides that the executant is to pay the balance personally after the proceeds of the sale should be credited to accounts, and that as no sale can be effected under the bond there is no liability whatever. The words in the bond, however, "as stated above I shall repay the amount with interest" contain a distinct undertaking to pay, and the effect of these words is in no way limited by the subsequent undertaking to pay the balance in case of deficiency.

I, therefore, affirm the decree of the lower Court with costs.

HEATON, J. :—I concur.

Decree confirmed.

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⁽¹⁾ (1884) L. R. 12 I. A. 12.