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make any distinction between different forms of succession. You may have a succession by the ordinary rules of inheritance, or you may have a succession by some very special rules as you have in the case of Saranjams. That, I think, is not intended to affect the operation of the section of *res judicata*. I agree with the decree which was made.

Decree confirmed.

J. G. R.

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June 16.

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

BAI DIWALI WIDOW OF JIWABHAI KALIDAS AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 2, 3), APPELLANTS *v.* UMEDBHAI BHULABHAI PATEL AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 4), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 11—Prior suit to claim possession by virtue of the purchase of mortgagee's rights—Subsequent suit for repayment of the money advanced on mortgage—No bar of res judicata*—Bhagdari Act (Bom. Act V of 1862)—Mortgage of unrecognised share of a* bhag*—Mortgage void—Unlawful consideration—Indian Contract Act (IX of 1872), section 24—Indian Limitation Act (IX of 1908), Art. 62.*

One K mortgaged with possession an unrecognised share of a *bhag* with R on May 19, 1896, contrary to the provisions of the Bhagdari Act, 1862. The mortgage deed provided that after possession by the mortgagee for eleven years the mortgage amount was to be paid to him whenever he should demand it either out of the property or by the mortgagor or his heirs personally. In 1908 B obtained a money decree against the estate of R whose mortgage right was put up to sale and purchased by the plaintiff at a Court-sale for Rs. 577. In 1910 the plaintiff filed a suit No. 176 of 1910 against the representatives of R and K to obtain possession. No claim was made in that suit for payment of the amount of the mortgage-debt. The suit failed on the ground that the mortgage was invalid and therefore unenforceable. In 1911, another suit was filed by the plaintiff against the same parties to recover Rs. 788 from the estate of K and in the alternative to recover Rs. 577 from the estate of B. The defendants Nos. 1 to 3 contended that the suit was barred by *res judicata* and also pleaded limitation.

* Appeal from Order No. 27 of 1915.

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Held, that the subsequent suit for the mortgage-debt was not barred by *res judicata*, as the prior claim of 1910 for possession was not really a claim on the mortgage but a claim by virtue of the purchase by the plaintiff of the mortgagee's rights.

Held, further, that the consideration for the mortgage being unlawful under section 24 of the Contract Act, 1872, it failed *ab initio* and the claim for repayment of the money advanced to the mortgagor as money had and received being brought more than three years after the date of the mortgage deed was barred by reason of article 62 of Limitation Act, 1908.

Javerbhai Jorabhai v. *Gordhan Narsi*(1), followed.

APPEAL against the order passed by C. N. Mehta, Joint Judge of Ahmedabad, reversing the decree passed by Parvatishankar M. Bhat.

The facts were as follows :—

One Kalidas Haribhai (father of defendants Nos. 1 and 2) mortgaged his unrecognised sub-division of a *bhag* with Ranchod Madhdas on May 19, 1896, for Rs. 788. The mortgage deed provided that after possession by the mortgagee for 11 years the mortgage amount was to be paid to him whenever he should demand it either out of property or by the mortgagor or his heirs personally.

In 1908, one Bhalabhai Avchalbhai had obtained a money decree against the estate of Ranchod Madhdas and in execution proceedings Ranchod's mortgage right was put up to sale and purchased by the plaintiff at the Court's sale on January 8, 1909, for Rs. 577.

In 1910, plaintiff brought a suit No. 176 of 1910 against defendants Nos. 1 and 2, representatives of Kalidas, and defendant No. 3, representative of Ranchod, for the recovery of possession of the mortgaged property. No claim was made in that suit for payment of the amount of the mortgage debt. The suit failed on the ground that the mortgage was invalid and therefore unenforceable.

(1) (1914) 39 Bom. 358 at p. 366.

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In 1911, the plaintiff filed the present suit against the same defendants Nos. 1 to 3 to recover the amount of Rs. 788-7-0 from the estate of the deceased Kalidas, and in the alternative, if that should not be allowed, to recover Rs. 577 from the estate of deceased Bhalabhai Avchalbhai, represented by defendant No. 4.

Defendants Nos. 1 and 2 contended that unless the mortgage property was given back, the suit could not lie; that the suit was barred by *res judicata* in consequence of the previous decision in suit No. 176 of 1910.

Defendant No. 3 contended that the plaintiff's sale was opposed to the provisions of Bhagdari Act, 1862; that plaintiff had no cause of action against him; that the suit was barred by *res judicata* and limitation.

Defendant No. 4 did not appear.

The Subordinate Judge rejected the plaintiff's claim to recover Rs. 788-7-0 from the estate of deceased Kalidas but allowed the alternative claim to recover Rs. 577 from the estate of deceased Bhalabhai.

On appeal, the Joint Judge held that the suit was not barred by *res judicata*; that the money claim for Rs. 788-7-0 was enforceable under the registered mortgage deed and the suit being brought within 6 years from the date money became due under the deed, it was within time under article 116 of Limitation Act. He, therefore, remanded the case for trial to the lower Court.

The defendants Nos. 1 to 3 appealed to the High Court.

G. N. Thakor, for the appellants :—I submit that the promise to pay—the personal covenant—is mixed up with the mortgage security and since the mortgage is void under section 3 of the Bhagdari Act, 1862, being of an unrecognised *portion of a bhag*, the covenant is

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also void under section 24 of the Contract Act, 1872: see *Laxmanlal* v. *Mulshankar*.[1] The covenant to pay was wholly dependent on the mortgage and it fell with the mortgage. There can, therefore, be no decree on the covenant.

Secondly, the suit is barred by limitation. On this point I submit that the consideration for the mortgage having failed, the suit is only for money had or received, or for failure of consideration under Articles 62 or 97 of the Limitation Act, 1908, the period for which is three years from the date of the mortgage: *Hanuman Kamat* v. *Hanuman Mandur*;[2] *Ardesir* v. *Vajesing*.[3]

Thirdly, even if the suit is in time, I submit it is barred by *res judicata* or by Order II, Rule 2 of the Civil Procedure Code, 1908. The plaintiff should have sued on the covenant in the previous suit of 1910. That was a suit between the same parties and the same cause of action. The plaintiff having failed to sue for the relief on the covenant in that suit, his present suit is barred by explanation 4 to section 11 of the Civil Procedure Code, 1908. *Tarachand* v. *Bai Hansli*;[4] *Kameswar Pershad* v. *Rajkumari Ruttan Koer*;[5] *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff*;[6] *Rangayya Goundan* v. *Nanjappa Rao*;[7] *Kashinath Ramchandra* v. *Nathoo Keshav*;[8] *Guddappa* v. *Tirkappa*.[9]

T. R. Desai, for respondent No. 1:—I submit the present suit is not barred by *res judicata* nor by Order II, Rule 2 of the Civil Procedure Code, 1908. It was not necessary to raise the question of covenant in the suit of 1910. That was a suit as assignee of the

(1) (1908) 32 Bom. 449.
(2) (1891) 19 Cal. 123.
(3) (1901) 25 Bom 593.
(4) (1904) 6 Bom. L. R. 594.
(5) (1892) 20 Cal. 79.
(6) (1912) 40 Cal. 1.
(7) (1901) 24 Mad. 491.
(8) (1914) 38 Bom. 444.
(9) (1900) 25 Bom. 189.

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mortgagee to stand in the shoes of the mortgagee and be restored to possession, the mortgage being possessory. The second suit is on the mortgage to enforce the rights under the document and the cause of action is different from that for the first suit. I rely on *Pittapur Raja* v. *Suriya Rau*;[1] *Mahomed Riasat Ali* v. *Hasin Banu*;[2] *Amanat Bibi* v. *Imdad Husain*;[3] *Hansraj Lakhmidas* v. *Lalji Anandji*;[4] *Nathu valad Pandu* v. *Budhu valad Bhika*;[5] *Naro Balvant* v. *Ramchandra Tukdev*.[6]

Secondly, I submit, the claim is in time. The mortgage is registered and, therefore, under article 116 of the Limitation Act, 1908, the period is six years from the time money became payable: see *Dinkar Hari* v. *Chhaganlal Narsidas*.[7] The money was payable in 1907 for the mortgage deed contains a clause giving 11 years time to the mortgagors for redemption. The mere fact that the mortgage is void under the Bhagdari Act, 1862, does not affect the plaintiff's claim under the covenant. There are two distinct and independent obligations under the deed (*a*) a personal loan and liability to repay it after 11 years, (*b*) a collateral security of mortgage of immoveable property. If the mortgage fails the collateral security is not affected.

Section 24 of the Contract Act cannot apply to such a case. Here there are two transactions and not one. The consideration or object of the mortgage may be void, therefore, it does not follow that the consideration or object of the *loan* is bad in law.

Thakor, in reply.

(1) (1885) 8 Mad. 520.
(2) (1893) 21 Cal. 157.
(3) (1888) 15 Cal. 800.
(4) (1904) 28 Bom. 447.
(5) (1893) 18 Bom. 537.
(6) (1888) 13 Bom. 326.
(7) (1913) 38 Bom. 177.

SCOTT, C. J. :—In 1896, Kalidas Haribhai, father of the first two defendants, purported to mortgage to Ranchhod Madhdas, whose representative the 3rd defendant now is, an unrecognised share of a Bhag or the Narva, contrary to the provisions of the Bhagdari Act. Such mortgage by reason of those provisions was void *ab initio*. The mortgage deed provided that after possession by the mortgagee for 11 years the mortgage amount was to be paid to him whenever he should demand it either out of property or by the mortgagor or his heirs personally. Ranchhod under the professed mortgage obtained possession of the land, and subsequently his rights under the mortgage claim were sold and purchased by the plaintiff at a Court-sale.

In 1910, the plaintiff filed a suit against the representative of Ranchhod and also against the representatives of the professed mortgagor to obtain possession from the representative of Ranchhod of the property then in his possession. No claim was made in that suit for payment of the amount of the so-called mortgage debt, nor was it alleged that any demand had been previously made. The suit failed on the ground that the mortgage was invalid, and therefore unenforceable, and the plaintiff as the purchaser of the mortgagee's claim could get no relief from the Court.

The present suit was filed in the following year to recover the amount of Rs. 788-7-0 from the estate of the deceased mortgagor, and, in the alternative, if that should not be allowed, to recover a smaller sum from the holder of a decree against the representative of the deceased mortgagee. The learned Subordinate Judge rejected the plaintiff's claim except in so far as he claimed in the alternative to recover Rs. 577 from the estate of the holder of the decree against the deceased mortgagee.

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An appeal was preferred to the Joint Judge who has held that the money claim is enforceable under the mortgage-deed, and has therefore remanded the case for trial to the lower Court. The question is whether that decision is correct or not.

It is first contended that the plaintiff's claim is inadmissible by reason of the law of *res judicata*, and it is urged that in the suit of 1910 the plaintiff should have claimed the amount of the mortgage debt which he claims in the present suit, and having failed to do so he is barred on the footing that he might and ought to have claimed in that suit. We are of opinion that this argument should not prevail. The claim for possession was not really a claim on the mortgage, but a claim by virtue of the purchase by the plaintiff of the mortgagee's rights. The mortgagee was then in possession, and the plaintiff merely sought to stand in his shoes, but not to exercise against the mortgagee any new rights under the mortgage deed. Moreover, at the time of the suit of 1910 his right according to the terms of the mortgage deed had not matured, because no demand had been made since the expiry of the 11 years mentioned in the deed. Therefore no cause of action for the debt had arisen, and upon the evidence which was available in the suit of 1910 and which was relevant to the suit of 1910, he had no occasion to sue for the payment of the mortgage money. Therefore it cannot be said that he might and ought to have put forward the present claim in that suit.

The second objection is an objection based upon the Limitation Act and is of a more serious character. The learned Judge in discussing the question of limitation observes that the mortgage deed is dated 19th May 1896. Eleven years expired on 19th May 1907 and the suit was brought on 20th September 1911 within the 6 years

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from the date of the cause of action accruing under the registered mortgage deed, and therefore he held that the suit was not time-barred. We are of opinion that the learned Judge was in error. According to section 24 of the Contract Act the consideration or part of the consideration being unlawful the mortgage deed was void, and the agreement contained in the mortgage to pay the mortgage debt was void. That being so, the consideration failed *ab initio*, and the mortgagee's right was, as held in *Javerbhai Jorabhai* v. *Gordhan Narsi*,[1] to claim repayment of the money advanced to the mortgagor within 3 years of the date of the mortgage deed as money had and received, but after 3 years by reason of Article 62 of the Limitation Act, his remedy was barred. For these reasons we set aside the order of the Joint Judge and restore that of the Subordinate Judge with costs throughout on the plaintiff.

Order set aside.

J. G. R.

[1] (1914) 39 Bom. 358 at p. 366.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

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NARHAR DAMODAR VAIDYA (ORIGINAL PLAINTIFF), APPELLANT *v.* BHAU MORESHWAR JOSHI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Mitakshara—Vyavahara Mayukha—Hindus in Mahad governed by Mitakshara.

In the town of Mahad in the Kolaba District Hindus are governed by the Mitakshara and not by the Vyavahara Mayukha.

SECOND appeal from the decision of V. G. Kaduskar, First Class Subordinate Judge, A. P., at Thana, confirming the decree passed by B. G. Sabnis, Second Class Subordinate Judge at Mahad.

* Second Appeal No. 258 of 1915.