(1868) 01 CAL CK 0001

Calcutta High Court

Case No: Regular Appeal No. 35 of 1867

Shahzada Gholam Mahomed and Another		APPELLANT
	Vs	
Surwar Hossein Khan and Others		RESPONDENT

Date of Decision: Jan. 27, 1868

Judgement

Sir Barnes Peacock, Kt., C.J., Macpherson and Hobhouse, JJ.

The plaintiff is the assignee of Hazera Begum, who is the obligee of the bond given to secure to her the payment of Rs. 10,250. The bond was executed by Khaja Ali Hossein, and it stipulated for the payment of the balance specified in the bond by installments. It is found in the case which is submitted for our opinion that, by way of further security, and in order to ensure payment of the amount, the landed property, the subject of the present suit, was charged with the payment of the debt by way of simple mortgage. Several suits were brought to recover the installments; but in proceeding to enforce the decrees against the land in question, a waqf was set up as having been executed by Khaja Ali Hossein, by which the property was vested in a mutwalli free from the charge which had been created by the bond. In consequence, on the 21st December 1865, a new suit was brought for the purpose of declaring that the installments which fell due upon the bond in 1859, 1860, and 1861, were included in the decree of 8th April 1863, which was affirmed on appeal, and that they were a charge upon the land in question as against the mutwalli. The question is whether that suit is barred by limitation or not. The suit was brought, so far as it relates to the installment of 1859, after the expiration of six years, as the installment was payable on the 9th December 1859, and the suit was not brought until the 21st December 1865,--more than six years after the installment became due. But it was brought within six years from the date on which the installments for 1860 and 1861 became due; and we are now asked to decide whether the suit to have the lands charged with the payment of the debt, and for an order for the sale of the lands in satisfaction of the debt, falls, as regards limitation, within the provisions of cl. 10 or of cl. 12 of s. 1 of Act XIV of 1859; in other words, whether the

suit ought to be brought within three years from the accruing of the cause of action, or within twelve years.

2. It appears to me to be clear beyond doubt that this case cannot fall within cl. 10 of s. 1. The suit was brought against the mutwalli. The mutwalli never entered into any contract with the plaintiff, and was not liable for a breach of contract. The suit was brought against him to enforce payment of the installments which had been charged upon the land conveyed to him as waqf. Cl. 10 says:-- "To suits brought to recover money lent or interest, or for the breach of any contract in oases in which there is a written engagement." It appears to me clear that this is not a suit brought against the mutwalli for breach of contract, but that it is a suit to enforce a charge upon land. It does not fall within cl. 10.

3. The question then arises whether the suit falls within cl. 12; because if it does not, it is a suit not otherwise provided for, and falls within cl. 16. It appears to me that this is a suit to enforce a charge upon immoveable property, and is a suit for the recovery of an interest in immoveable property within the meaning of cl. 12. I have no doubt that it falls within cl. 12, and not within cl. 16. The only case which throws any doubt upon it, in my opinion, is the case, which has been referred to, of Seetul Singh v. Sooruj Buksh Singh 6 W.R., 318. But I cannot concur in the view which was expressed in that decision. Trevor, J., who delivered judgment, says:-- "The words of the law refer, it appears to us, to an interest residing of right in the party suing, for which he may sue." It appears to me that a charge upon the land is an interest in the party in whose favor that charge is made. It is also an interest for which he may sue. Then, is it an interest in laud, or is it an interest in something else? Trevor, J., says:-- "In a suit like that before us, he has simply a lien on the property for the amount of his debt, but he has no interest of right in the property; and in this view, the section of the law cited does not apply. But, again, the security is a mere incident to the bond. The debt acknowledged in the deed signed by the debtor, and to be payable at a certain time, is the principal, and the collateral security an incident, in the transaction. It follows on legal principle that the latter must follow the former, and not the reverse; in other words, the incident must be sued for within the same time with the principal, or the collateral security be declared enforceable against property pledged within the same time that the debt can be declared due by a Court of Justice." I do not know where the legal principles to which Trevor, J., refers are to be found. There is no such principle in the English law. If land is mortgaged as security for a loan in addition to a covenant for payment of the money, the mortgagee may sue the mortgagor for a breach of the covenant; and he may also bring an action of ejectment to recover the laud mortgaged as a collateral security. It appears to me that the charge upon the land created an equitable interest in the land, and that a suit brought to enforce that charge is in substance and in effect a suit for the recovery of that interest. There are decisions of the High Court at Madras in accordance with the view which I have now expressed, and I concur entirely in those cases.

4. The appeal will be dismissed with costs.

Seton-Karr, J.

5. In this case we have to decide whether the principle laid down by Trevor, J., in the judgment of the Court in Seetul Singh v. Sooruj Buksh Singh 6 W.R., 318, or that laid down by the Chief Justice of the Madras High Court in Kristna Roto v. Hachapa Sugapa 2 Mad. H.C. 307, is the correct principle. I concurred at the time in the judgment delivered by Trevor, J., and thought that the enforcement of a lien on the property by the sale of it in satisfaction of a debt for which it was pledged could not strictly be termed "an interest in immoveable property, to which no other provision of the Act applies." Trevor, J., laid it down that the suit was not one for an interest as of right in the property, but one to enforce a mere lieu on a property pledged, and to have a sale thereof carried out. I am further of opinion that nothing that I have heard to-day, in the course of argument or otherwise, satisfactorily explains the inconsistency so forcibly pointed out by Trevor, J., in that decision, if a suit for a debt due had to be instituted within one certain and defined period, and a suit for enforcing the security of that debt, arising out of the same circumstances, had to be instituted within another period. The anomaly and inconsistency still remains as pointed out.

6. On considering the sections of the law of limitation which are properly applicable to the case before us, I am clearly of opinion, as shown by the learned Chief Justice, that cl. 10, s. 1, is not applicable to the present case. It cannot, by any possibility, be termed a suit for the "breach of contract," as there was no contract between the plaintiff and the mutwalli into whose hands the property hypothecated had subsequently passed.

7. There remains, then, the only doubt in my mind as to whether it would be correct to say that the case fell under cl. 16, s. 1, and not under cl. 12 of the same section of the same Act. It seems clear that, if the present suit had been one not for the sale of the property as merely hypothecated, but for entering on the same property as held under a conditional mortgage, the words of cl. 12 would have been strictly applicable: and looking to the difficulty of drawing a very clear distinction between a suit for entering on a conditional mortgage, and a suit to enforce the mere sale of the property hypothecated, looking also to the opinion which I understand to be that of the majority of the Bench now sitting, I am not prepared to dissent from the principle laid down by the learned Chief Justice on the present occasion, which principle has been also expounded and adopted by the learned Chief Justice of the High Court of Madras, and has been enforced by another Bench of that same Court. I think that if it can be fairly said that the suit is one to enforce any kind of interest in immoveable property to which no other provision of the Act applies, if that can be fairly stated in interpreting the Act, we need not, and ought not, to have recourse to s. 16, as for a case for which no other limitation is expressly provided, and that we may say that the case is one to which the period of twelve years, from the time of

the cause of action, applies under cl. 12, s. 1.

8. For all these reasons, I am therefore prepared to record my opinion in accordance with that which I understand to be that of all my learned colleagues now sitting on this Bench.

Jackson, J.

I concur in the judgment of the Chief Justice. I am not clear that, if the lender of the money in this case had sued to recover the principal money and interest, and at the same time to enforce his lien upon property pledged after the expiration of three years or six years, and before the end of twelve years, he would have been barred.

See Act IX of 1871, Sch. ii, No. 132; and In re Leslie, 9 B.L.R., 171, at p. 177.