

**Ram Chander and ors. Vs. (Pandit) Ram Chander and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/473544](http://sooperkanoon.com/473544)

**Court :** Allahabad

**Decided On :** Aug-27-1936

**Reported in :** AIR1936All870; 166Ind.Cas.908

**Appellant :** Ram Chander and ors.

**Respondent :** (Pandit) Ram Chander and ors.

**Judgement :**

1. This is a defendants' appeal arising out of a suit for recovery of a principal sum, with interest and costs by enforcement of a charge against the properties mentioned in the plaint and also for the enforcement of the personal liability of the defendants. It appears that there was a previous mortgage debt on the properties belonging to the plaintiff's predecessor on 12th November 1919, on which date he executed a sale deed in favour of defendants' predecessor of part of his property leaving Rs. 621 in the hands of the vendee for the discharge of the previous mortgage. The earlier mortgage carried interest at the rate of 1 per cent. per mensem compoundable every year and was dated 7th November 1909. It is an admitted fact that the vendee did not discharge the debt. The result was that the mortgagee brought a suit for sale on the basis of his mortgage impleading both the mortgagor and the vendee. The case was fought out up to the High Court and was ultimately decreed, and the amount due under the mortgage together with interest and cost came to Rs. 1,524 on 17th October 1927. On that date the plaintiffs, in order to save their property from sale, raised that sum of money under another mortgage deed carrying interest at 1 1/4 per cent. per mensem compounded every

six months. They paid off the mortgage decree in that way. The present suit was then brought against the vendee for recovery of the amount mentioned above. The Courts below decreed the claim for Rs. 1,786-11-0 with proportionate costs and interest pendente lite and future, at 6 per cent., and ordered a preliminary decree under Order 34, Rule 4 to be prepared but held that the defendants would not be personally liable to pay the amount as the personal remedy, according to them, was barred by time. On appeal a learned single Judge of this Court has come to the conclusion that the claim to enforce the personal liability of the defendants was, on authorities, not barred by time. He has accordingly varied the decree, but in doing so he has allowed interest at 1 1/4 per cent. per mensem compounded every six months from 12th November 1919 under the impression that the earlier mortgage deed carried interest at that rate. So far as this part of his decree is concerned it is conceded by Dr. Asthana, who appears for the respondents, that there has been a mistake and that the earlier deed did not carry interest at 1-1/4 per cent but only at 1 per cent. The decree would have to be modified and only interest at 1 per cent per mensem compounded every year should be allowed up to 17th October 1927. On the authority of the case in *Kallu v. Ram Das* 1929 26 ALJ 53, the learned advocate for the appellants contends that, in the absence of any date having been fixed for payment to the prior mortgagee, the presumption was that the vendee was to pay it off immediately, or if not immediately at any rate, as soon as it was reasonably possible, and that accordingly he broke his contract on or about 12th November 1919, with the result that the claim for a personal remedy is barred under Article 116, Lim. Act. No doubt this view appears to have been expressed in that case, but there were slightly different opinions expressed in other cases referred to by the learned Single Judge: *Hakim Ali Khan v. Dalip Singh* (1913) 11 ALJ 478, *Kedar Nath v. Har Gobind* 1926 24 ALJ 550, *Ram Ratan Lal v. Abdul Wahid Khan* 1927 49 All 603, *K. Unkar Singh v. Kashi Prasad* 1933 ALJ 787, In *Kallu v. Ram Das* 1929 26 ALJ 53 the question of the applicability of Article 83, Lim. Act, which applies to suits upon a contract to indemnify in which time begins to run when the plaintiff is actually damnified, was not at all considered.

2. The true basis of the liability of the vendee in such a case has been recently considered by a Full Bench of this Court in *Naima Khatun v. Basant Singh* 1934

ALJ 318 at pp. 325 to 326, where it has been laid down that the transactions may be of three characters and different remedies would be available in each case. First where the amount left in the hand of the vendee is part of the purchase money remaining unpaid, a suit for the refund of the purchase money can be brought under Section 55, T.P. Act, and a statutory charge claimed under it. Secondly where there is a clear undertaking to release the vendor either from his personal liability or release his property from any previous encumbrance, the undertaking can be enforced in a suit on the covenant. Thirdly, where there is a contract to perform an act. As to this the Full Bench observed:

Where there is a mere contract to perform an act or to indemnify the promisee, a suit for damages can, of course, lie only when damage has been suffered. But it would be wrong to suppose that time for a suit for damages for such a breach of contract would have commenced to run from the original failure to perform the contract even before any damage was sustained. The damage caused would undoubtedly give a fresh cause of action for a suit for damages, which is of a different character from a suit for the enforcement of the covenant.

3. In the present case the first contention urged on behalf of the appellant is that there was no personal liability to pay the amount at all, and that in the absence of any such undertaking none should be implied. But Section 55, Sub-section

(5) (b), provides that, in the absence of a contract to the contrary, the buyer is bound to pay or tender at the time and place of completing the sale, the purchase money to the seller or such person as he directs. There is a statutory obligation cast upon him to pay the amount either to the vendor or to the person named by him or to the prior encumbrance where the property is sold free from encumbrances. There being nothing in the contract to the contrary, the personal liability to pay the amount must be implied. In addition to this liability the vendor of course has the statutory charge on the property transferred for the amount of the purchase money not paid. The question of limitation has to be answered in accordance with the special circumstances of each case:

(1) where property has been sold and part of the purchase money remains-unpaid, a suit would lie to recover it, even though no other special damage has been

proved, because the balance is payable. This would be so, even though the vendor had left the money in the hands of the vendee for payment to a creditor of his. But where the property transferred is subject to a charge, and money is left in the hands of the vendee to pay off that charge, the vendee would of course be entitled to pay the amount in discharge of the encumbrance and not pay it to the mortgagor direct:

(2) where there has been an undertaking to release the mortgagor from personal liability or to free his property from encumbrances and there is default made by the vendee, the vendor will be entitled to enforce the covenant and bring a suit for specific performance of the contract by the vendee;

(3) where there is an express contract to pay the amount and there is an express or implied contract of indemnity, then under Section 125, Contract Act, the promisee is entitled to recover all damages, costs etc., which he may have been compelled to pay in respect of any matter to which the promise to indemnify applied.

4. When a suit is brought for recovery of the amount, then the charge can be enforced for the payment of the amount due if the suit is within 12 years of the original sale deed, for the charge is a statutory charge created by the document and time would begin to run for enforcement of such a charge from the date of that document. If the suit is for specific performance of the contract, then it would be governed by Article 113, Lim. Act, and time would begin to run from the date when there was failure to perform it. Similarly in the case of compensation for breach of contract under Article 116, Lim. Act, time would begin to run from the time when the contract was broken or in case of successive breaches from the date when the last breach occurred or, in the case of a continuing breach, when it ceased. But where the claim is upon a contract to indemnify, then time would begin to run from the date when the plaintiff is actually damnified. It is therefore impossible to say that time would begin to run against the plaintiff even before any damage was suffered by him. Of course, if the suit is brought within three years of the date when the damage was suffered but more than 12 years after the date of the original transfer, then no charge can be enforced and only a money decree can be

obtained. But if the suit is brought both within three years from the date when the damage was suffered and 12 years from the date of the sale deed, the plaintiff would be entitled both to a charge and a personal decree, in case the amount is not satisfied out of the property on which the charge exists. On the other hand, if the suit is brought merely for compensation for breach of contract, then, as already remarked, time would begin to run from the date of the breach.

5. In the present case the contract was made on 12th November 1919 and the suit was brought within 12 years of that date, so the plaintiffs' right to enforce the charge subsists. Again, even though there was a breach of contract in not paying the amount soon after 12th November 1919 and a suit might have been maintained to enforce that contract in order to prevent the interest on the earlier mortgage from running, the present suit which has been brought within three years from the date when the plaintiffs were compelled to make the payment in order to save the property from sale must be regarded as a suit to be indemnified by the defendants on account of the damage suffered by the plaintiffs owing to the failure of the defendants to pay the amount as undertaken by them. The claim, in our opinion, is well within time as it is governed by Article 83, Lim. Act. The view taken by the learned Judge of this Court that the personal decree can be obtained is therefore correct.

6. The learned advocate for the defendants has argued before us that the sum of Rs. 1,524 paid by the plaintiff includes the costs of the litigation, which would not have been incurred if the plaintiffs had paid the amount to the mortgagees themselves. The liability of the defendants to pay the interest which accrued on the amount cannot be disputed. As regards costs, there might have been some force in this contention; but in reality it would make no difference whether we deduct the costs of the litigation and then allow interest at the rate of 1 per cent per mensem compounded every year from 17th October onwards on the consolidated amount, or allow interest at only Rs. 1-4-0 per cent per mensem on Rs. 1,524 because as a result of the litigation the interest on the mortgage debt was really reduced. The defendants can in no way benefit by an alteration in the method of calculation of interest. We, accordingly, allow this appeal in part and modifying the decree of the learned Judge of this Court direct that the interest allowed to the plaintiffs should

be at the rate of one per cent per mensem, compounded every year, on Rs. 621 from 12th November 1919 till 17th October 1927, and to that should be added interest at Rs. 1-4-0 compoundable every six months on the consolidated amount of Rs. 1,524 from the latter date. The parties will bear their own costs in this Court and the plaintiffs should have half their costs of the hearing before the learned single Judge. A fresh preliminary decree under Order 34, Rule 4 will be prepared. The amount will be calculated according to the directions given above. Six months for payment from today. Interest will run at six per cent per annum from the institution of suit till realization.

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