APPELLATE CIVIL

Before A. N. Grover and Inder Dev Dua, JJ.

MRS. I. K. SOHAN SINGH,—*Appellant.*

v.

STATE BANK OF INDIA,—*Respondent.*

Regular First Apeal No. 61 of 1963.

1968

August, 2nd

Contract Act (IX of 1872)—Ss. 31, 32 and 46—Contract of sale stipulating that the payment of balance of sale money will be made "as soon as possible but at a time when the vendee is in a position to make the payment"—Whether prescribes mode of payment or makes the contract contingent—Whether sale-money recoverable after a reasonable time—Limitation Act (IX of 1908)—Article 132—Transfer of Property Act (IV of 1882)—Ss. 55 (4) (b) and 100—Unpaid price—Whether a charge on the property sold—Courts, whether entitled to enforce the charge in places where Transfer of Property Act is not in force—Article 132—Whether governs suits to enforce the unpaid vendor's charge not covered by S. 100, Transfer of Property Act—Interest on unpaid purchase money—Whether payable and from what date—Whether constitutes charge on the sold property.

Held, that when the parties provided in the sale-deed that the balance sale money would be paid "as soon as possible but at a time when the vondee is in a position to make the payment", they were dealing with the mode of performance or the obligation to perform the contract. The obligation was absolute and unconditional and it was only as to how the contract was to be performed that was being dealt with. The contract, cannot therefore, be regarded as contingent contract. The true import of the stipulation was that the same would be paid within a reasonable time by virtue of the application of section 46 of the Indian Contract Act as it must be deemed that no time for performance had been specified.

Held, that the language employed in article 132 of the Indian Limitation Act, 1908, is of wide import. The unpaid

vendor's lien is well recognised both in English and Indian law and even in a case where section 55(4) (b) of the Transfer of Property Act does not in terms apply, the charge to the extent of the unpaid money subsists on the property on the principle of that section. It may be that in certain events where justice and equity so require, the Court may decline to enforce that charge but it cannot be said that before the Courts made a decree, no charge exists on the property in respect of the unpaid purchase price. The mere fact that the charge did not come within the meaning of section 100 of the Transfer of Property Act did not necessarily imply that it was not a charge within the meaning of article 132. It is to be noted that there is nothing in the language of the substantive part of article 132 to indicate that the word "charged" has to be interpreted with reference to the charges defined by section 100 of the Transfer of Property Act. Article 132 of the Indian Limitation Act, therefore, governs suits for the enforcement of the charge of the unpaid vendor of immovable property.

Held, that where on passing of ownership, delivery of possession has been given to the buyer who has not paid the full purchase money, the act of taking possession will be regarded as an implied agreement on the part of the buyer to pay interest on the purchase money from the date on which he took possession till the actual realization of the entire purchase money and the vendor shall be entitled to recover such interest which shall also be a charge on the property sold alongwith the principle amount.

First Appeal from the decree of the Court of Shri N. S. Gilani, Senior Sub-Judge, Simla, dated the 30th day of November, 1962.

B. R. TULI AND SUSHIL MALHOTRA, ADVOCATES for the Appellants.

S. K. KAPUR, N. N. GOSWAMI AND T. BARREL, ADVOCATES for the Respondent.

JUDGMENT.

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GROVER, J.—This appeal arises out of a suit for recovery of Rs. 34,000 with interest on the basis of a charge claimed over the property known as "Villette"

Simla East, which belonged to one Mr. W. G. Deeks who executed a deed of sale in respect of it in favour of the defendant on 29th September, 1947, for a total consideration of Rs. 75,000. The plaintiff Bank is the Administrator of the estate of Mr. Deeks who apparently had died, the Letters of Administration having been granted by the Senior Subordinate Judge, Simla, on 18th February, 1959.

The suit was instituted *inter alia* on the ground that out of the consideration of Rs. 75,000 for which the sale had been effected in favour of the defendant, Rs. 25,000 had been paid by means of a cheque, dated 22nd September, 1947, on the Lloyds Bank, Ltd., Simla, and another sum of Rs. 25,000 was paid by means of a cheque, dated 29th September, 1947 in the presence of the Sub-Registrar, Simla, at the time of the registration of the sale deed, leaving a balance of Rs. 25,000 about which the stipulation in the deed was in the following words:—

> "* * * and the balance of Rs. 25,000 (twenty-five thousand) is to be paid by the vendee to the vendor as soon as possible but at a time when the former is in a position to make the payment."

The sale deed had actually been executed and got registered and possession had been delivered of the property to the defendant before the receipt of the aforesaid amount of Rs. 25,000 which remained payable. It was claimed in the plaint that under the law the seller was entitled to a charge upon the property sold to the defendant for the unpaid purchase price of Rs. 25,000 together with interest at six per cent per annum on that amount from the date of sale, i.e., 29th September, 1947, until payment. The total amount of interest which became due was Rs. 17,250 till the date of the suit but out of that an amount of Rs. 8,250 was

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given up being the interest for the first five years after the date of sale. The claim in the suit was confined to the amount of Rs. 25,000 as principal and Rs. 9,000 as interest aggregating Rs. 34,000. The cause of action was stated to have arisen on 29th September, 1947, from the date of execution and registration of the sale deed and delivery of possession of the property to the defendant.

In the written statement the defendant raised the plea of the bar of limitation and asserted that the contract sued upon was known to the vendor to be void for uncertainty and, therefore, the suit was not sustainable. It was further pleaded that the suit contract was one contingent on the defendant attaining the position to pay. That was an uncertain event which had yet not happened, and thus the suit was premature. It was also maintained that by an implied agreement the alleged charge sought to be enforced had been excluded. The defendant asserted that she was a *benami* purchaser and that the sum of Rs. 50,000 which had admittedly been paid to the vendor had been paid by Shri Sohan Singh, the husband of the defendant. The only other plea which deserves notice relates to the attack on the probate proceedings which were described as not being *bona fide* and without jurisdiction, with the result that the plaintiff Bank had no *locus standi* to sue. In the replication which was filed on behalf of the plaintiff Bank, it was stated that the defendant was in a position to pay and was in possession of considerable movable and immovable property and the pleas taken up by the defendant were denied.

The trial Court framed the following issues:—

(1) Is the suit premature ?

(2) Is the suit time-barred ?

(3) Whether the suit is not properly valued for purposes of court fee and jurisdiction ?

(4) Whether the defendant is a *benami* purchaser and can take up this plea, if so what effect ?

(5) Whether the suit contract was known to the vendor to be void for uncertainty, if so what is the effect ?

(6) Whether the alleged charge was excluded by an implied agreement as alleged in preliminary objection No. 4 in the written statement ?

(7) Has the plaintiff Bank no *locus standi* to sue ?

(8) Whether the alleged probate proceedings were not *bona fide* and were without jurisdiction and, therefore, did not bind the defendant ?

(9) Whether or not a valid charge exists on the suit property ?

(10) Is the plaintiff entitled to the interest claimed ?

(11) Relief.

Issues 3, 4 and 8 were not pressed on behalf of the defendant before the trial Court. The other issues were decided against her and a preliminary decree was passed against the defendant for Rs. 34,000 with costs and further interest calculated from the date of the filing of the suit till the date of realisation at the rate of 6 per cent per annum. The defendant was granted three months' time to pay the amount otherwise the property on which the charge was claimed was to be put to sale.

Mr. Bal Raj Tuli, who appears for the defendant appellant, has assailed the decision of the Court below on all the issues except issues Nos. 3 and 4. Although issue No. 8 was not pressed before the trial Court, the counsel has sought to establish that the proceedings by

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which the Letters of Administration were granted to the plaintiff Bank were *corum non judice* as the Simla Court granting the same suffered from lack of inherent jurisdiction to entertain those proceedings and grant the Letters of Administration. This matter will be discussed at the proper stage.

The first question that has been agitated is whether the suit had been instituted prematurely. A good deal of stress has been laid on the stipulation in the sale deed to which reference has already been made that the amount of Rs. 25,000 which remained payable would be paid by the vendee to the vendor as soon as possible when the former would be in a position to make the payment. According to Mr. Tuli, the agreement to pay the aforesaid amount was a contingent contract which has been defined by section 31 of the Indian Contract Act, 1872, as a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. Section 32 is to the effect that contingent contracts cannot be enforced by law unless and until that event has happened and if the event becomes impossible, such contracts become void. It is argued that the sole contingency provided for by the contract had not yet arisen inasmuch as it had been clearly stated by the defendant in her evidence that she was not in a position to pay the suit amount. It is pointed out that the plea of the plaintiff Bank was that the defendant had the means to make payment of the sum of Rs. 25,000 but that no evidence had been led to establish that plea. Mr. S. K. Kapur, counsel for the plaintiff Bank, has taken up the position that the contract in question could not be regarded as contingent within the meaning of section 31 as the event on the happening of which the payment of the amount of Rs. 25,000 was to be made by the vendee to the vendor was not collateral to the contract. It is submitted by him that the real test in such matters is whether when the parties provided that

the amount of Rs. 25,000 would be paid as soon as possible but at a time when the vendee "is in a position to make the payment", they were dealing with the mode of performance or with the question of the very obligation to perform the contract. If the obligation to perform the contract was absolute and unconditional and it was only as to how the contract was to be performed that was being dealt with, then it could not possibly be regarded as a contingent contract. Reliance has been placed on *F. Ranchoddas* v. *Nathmal Hirachand and Co.* (1), in which Chagla, C.J., while delivering the judgment observed that where the parties provided that the goods were to be taken delivery of when they arrived they were dealing with the mode of performance and not with the question of the very obligation to perform the contract. The learned Chief Justice referred to a decision of the Privy Council in *Hurnandari* v. *Pragdas* (2), where the goods were to be manufactured by a certain mill and the contract was that the delivery was to be taken as and when the goods were received from the mill. Lord Summer pointed out that to construe the words "as and when received" to mean "if and when received" would be to convert the words which fixed quantities and times for deliveries by instalments into a condition precedent to the obligation to deliver at all and virtually make a new contract. The words certainly regulated the manner of performance. In *Ganga Saran* v. *Firm Ram Charan-Ram Gopal* (3), the defendant had entered into a contract with the plaintiff under which he was to supply certain bales of cloth manufactured by the New Victoria Mills, Kanpur. According to the agreement, the goods were to be sent as soon as they were supplied by the said mills. Their Lordships also referred to the above decision of the Privy Council and expressed agreement with the

(1) A.I.R. 1949 Bom. 356.
(2) A.I.R. 1923 P.C, 54.
(3) A.I.R, 1952 S.C, 9.

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reasoning given therein. It was held that the agreement did not convey the meaning that the delivery of the goods was made contingent on their being supplied to the respondent firm by the Victoria Mills. Mr. Kapur says that if the argument of Mr. Tuli, were to be accepted, then the word "if" will have to be read in place of the word "when" in the material clause in the sale deed. In other words, that portion would read thus:

> "* * and the balance of Rs. 25,000 (twenty-five thousand) is to be paid by the vendee to the vendor as soon as possible 'if' the former is in a position to make the payment, * *."

Actually the word employed in the sale deed, as stated before, is "when". A careful perusal of the sale deed leaves little room for doubt that the obligation of the vendee to make payment of Rs. 25,000, which was the balance of the sale consideration, was absolute and it was only by way of concession in point of time that the vendee was allowed the facility of making payment at a time when she was in a position to make payment. It must be remembered that the total amount of sale consideration was Rs. 75,000 out of which only a sum of Rs. 50,000 was paid and admittedly an amount of Rs. 25,000 remained outstanding which was agreed to be paid in the manner set out before. In the sale deed itself, the words used were:—

> "And whereas the vendor aforesaid has, by virtue of his agreement to sell, a memorandum whereof is contained in his letter dated 13th September, 1947, has agreed with the vendee aforesaid through her husband S. Sohan Singh, for the absolute

sale of the property above referred in consideration of a sum of Rs. 75,000 (seventy-five thousand) to be paid by the vendee to the vendor in the manner therein stated."

The words "as soon as possible" which preceded the words "but at a time when the former is in a position to make the payment" also relate to the time of payment. It was neither pleaded nor was it the case of the defendant that if she never had the financial resources or the means to make the payment of the amount of Rs. 25,000, she was to be altogether absolved from all liability to make payment of the balance amount of sale consideration. While construing the disputed contract embodied in the sale deed, the real covenant cannot be so construed that an absolute obligation arising under it can be allowed to be destroyed by a subsequent clause contained in the same deed. In *In re Tewkesbury Gas Company Tysoe* v. *The Company* (4), a company had issued a series of debentures each of which contained a covenant by the company that it would 'on or after' January 1, 1898, pay to the registered holder of the debenture the principal sum thereby secured. The debenture then stated as follows: "The debentures to be paid off will be determined by ballot, and six calendar months' notice will be given by the company of the debentures drawn for payment." The company never paid off any of the debentures or held any ballot. In an action by one of the debenture-holders, it was held that on the construction of the covenant and in the events that had happened the principal money secured by the debenture was presently due and payable, and that, if the provision as to balloting and notice meant that the company was never to be bound to pay off any debenture unless it elected to do so and balloted and gave notice accordingly, the provision was void for repugnancy on the

(4) (1911) 2 Ch. 279.

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principle stated in *Sheppard's Touchstone*, p. 273, and illustrated in *Watling* v. *Lewis* (5). In the latter case Warrington, J., came to the following conclusion:—

> "The result is, I think, that first there is a covenant to pay the money and to idemnify, and then the parties have attempted to qualify that covenant by using words the effect of which, if effect is to be given to them, would be to destroy the personal liability. That being so, the words they have used can have no effect at law and the liability remains."

Consequently there is a good deal of force in the submission of Mr. Kapur that the true import of the stipulation in the sale deed with regard to payment of the amount of balance consideration of Rs. 25,000 was that the same would be payable within a reasonable time by virtue of the application of section 46 of the Contract Act as it must be deemed that no time for performance had been specified. It may be mentioned that this view justifiably commended itself to the Court below.

Even in point of fact the evidence leaves no room for doubt that the defendant was in a position to pay the amount of Rs. 25,000 before the suit was instituted. It is true that there is nothing to show that the defendant personally came into possession of any assets that were sufficient for discharging the aforesaid liability but it is significant that according to the evidence of her husband S. Sohan Singh, he had received in lieu of the properties left by him in Pakistan, the value of which was estimated by him at a figure of Rs. 74,00,000, compensation in the form of landed property and bonds worth Rs. 2,00,000. It was he who had paid

(5) (1911) 1 Ch. 414.

the amount of Rs. 50,000 by means of cheques to the vendor and actually both the wife and the husband maintained that he was the real purchaser. The issue relating to the *benami* nature of the transaction has not been pressed by Mr. Tuli, on behalf of the defendant. It is, however, apparent that it was the husband who was financing the wife for acquiring the property in question. In the sale deed also, it is stated that the agreement for sale of the property had been entered into between the husband and the vendor and it was further mentioned that a cheque for Rs. 25,000 had been paid by the vendee and another sum of Rs. 25,000 would be paid by a cheque by the vendee before the Sub-Registrar. These cheques were not drawn by the vendee herself, but by her husband. Even the sale deed had been signed by him although the following words appear under the signatures:—

"for Sirdarni J. K. Sohan Singh."

The truth of the matter seems to be that the sale consideration was being paid by the husband although the sale deed was executed in favour of the wife, namely, the defendant. In his evidence also the husband S. Sohan Singh, stated that he intended to pay up the balance of Rs. 25,000 when he got his full claim for properties left in Pakistan. It is difficult to accept as has been suggested by Mr. Tuli that he would not have paid the balance of Rs. 25,000 in the same way as he had paid the amount of Rs. 50,000 previously because he was under no legal obligation to his wife to make any such payment. It is not so stated by the husband and the wife never took up the position that her husband would not have paid the balance of the sale consideration also when he had paid the bulk of the same amounting to Rs. 50,000. The properties, moveable and immovable, which the husband had received by way of compensation were more than enough to pay up the amount of Rs. 25,000. In this view of the

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matter, the Court below rightly held that the defendant was in a position to pay the amount of Rs. 25,000. Consequently the suit could by no means be regarded to be premature.

The next submission of Mr. Tuli is that the suit was barred by time. The Court below found that it was governed by article 132 of the Indian Limitation Act, 1908. The relevant portion of that article is as follows:—

"To enforce payment of money charged upon immovable property.	Twelve years	When the money sued for becomes due."

It is not disputed that if article 132 governs the case, the suit would be within time. It is, however, contended that the amount of Rs. 25,000 could not be said to have been "charged upon immovable property". It is said that section 55(4)(b) of the Transfer of Property Act, 1882, has not been applied to the Punjab State and, therefore, no charge had been created under that provision upon the property in the hands of the buyer. Mr. Tuli has argued that in order to constitute a charge the requirements of section 100 of the Transfer of Property Act must be satisfied. That section lays down two modes by which charge can be created: (1) by act of parties and (2) by operation of law.

Now, although section 55(4)(b) of the Transfer of Property Act would not in terms apply to the present case, its principle has been applied by the Courts in this country since the year 1892. In *Virchand Lalchand* v. *Kuma'Ji* (6), Sargent, C.J., while delivering the judgment of the Bench observed:—

> "It is a well-established rule of an English Court of Equity, and which is equally

(6) I.L.R. 18 Bom. 49.

applicable to the circumstances of this country, that the unpaid purchase-money is a charge on the property in the hands of the vendee, and the claim to enforce it would, therefore, fall under article 132 of the Limitation Act (XV of 1877)."

In *Mela Ram and Sons* v. *Ram Das Joshi and Sons* (7), a Full Bench consisting of Tek Chand, Bhide and Sale, JJ., accepted the rule even though it was based on admission of counsel that on the completion of the sale transaction the vendor automatically acquires a charge for the unpaid purchase price on the property sold which is analogous to the unpaid vendor's lien in English law and which has received statutory recognition in section 55(4) of the Transfer of Property Act, the principle of which has been held applicable to the Punjab. Mr. Tuli has not been able to show how the principle of section 55(4)(b) will not be applicable to the present case. He has, however, contended that even if such a lien or the charge can be enforced by the Courts that is done on grounds of equity, justice and good conscience. It is pointed out that in *Dyal Das-Chanan Das* v. *Harkishan Singh* (8), Tek Chand and Agha Haidar, JJ., declined to enforce the rule embodied in section 55(4)(b) on the ground that it was not in the interest of justice in that case to do so. Reliance has been placed on the following observations:—

"This rule is embodied in section 55(4)(b), and (6)(b) of the Transfer of Property Act and is followed in this province in ordinary cases. But the rule is not one of universal application, and cases may arise in which its application may result in great injustice to one or other of the parties. In such

(7) A.I.R. 1942 Lah. 275.
(8) A.I.R. 1930 Lah. 568.

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case the Courts, at least in provinces like the Punjab, where there is no statutory law on the subject, will be free to depart from it and will endeavour to meet the equity of the case by passing such orders as may be just and fair in the circumstances."

According to Mr. Tuli, it follows from this that the property sold cannot be regarded as charged in the sense in which that word is used in article 132. The charge comes into existence only when the Courts in the suit in which it is sought to be enforced decide in the exercise of their discretion to apply the principle underlying section 55(4)(b). It is not possible to accede to this argument on principle or authority. The language employed in article 132 is of wide import. The unpaid vendor's lien is well recognised both in English and Indian law and even in a case where section 55(4)(b) of the Transfer of Property Act does not in terms apply, the charge of the extent of the unpaid money subsists on the property on the principle of that section. It may be that in certain events where justice and equity so require the Court may decline to enforce that charge but it cannot be accepted that before the Courts make a decree no charge exists on the property in respect of the unpaid purchase price. Apart from the Bombay case, to which reference has been made, in *Nagala Kotayya* v. *Koganti Kotappa* (9), Phillips, J., entertained the view that the mere fact that the charge did not come within the meaning of section 100 of the Transfer of Property Act did not necessarily imply that it was not a charge within the meaning of article 132. It is noteworthy that there is nothing in the language of the substantive part of article 132 to indicate that the word "charged" has to be interpreted with reference to the charges defined

(9) A.I.R. 1926 Mad. 141.

by section 100 of the Tranfer of Property Act. For these reasons it must be held that article 132 of the Limitation Act governed the present suit and it was not barred.

Mr. Tuli next contends that so far as the charge on the property is concerned, there was a contract to the contrary and, therefore, the principle of section 55(4)(b) cannot be and ought not to be applied. In this connection reference has been made to Exhibit D. I., which is a letter written by Shri Salig Ram, an Advocate, on behalf of Mr. Deeks to Shri R. N. Malhotra, on 19th September, 1947. Shri Malhotra was apparently the Advocate for the defendant. In this letter, it is stated *inter alia*—

> "I have carefully gone through the copy of Mr. Deeks letter and your draft of conveyance. I find that the terms for the payment of Rs. 25,000 at a time when the vendee is in a position to do so is too vague and indefinite and there is no legal guarantee for the payment thereof. Mr. Deeks is leaving this country and in view of the present disturbances he was, as I am told, persuaded to agree to part with his property at such a low price. If a term for the payment of a part of the sale price at the sweet will of the purchaser is inserted in the transfer deed that is not legal guarantee for payment and I have, therefore, advised my client that he should not agree to this term unless some legal guarantee for payment of the said sum by a definite date is given to him or a legal charge to that extent is created in his favour on the estate."

In his statement Shri Sohan Singh, the husband of the defendant, stated that he had received this letter from

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Shri Salig Ram but no change in the proposed draft of the sale deed was made as no suggestion was made for any change. Mr. Tuli says that the very fact that in spite of what was written in the letter no express provision was made with regard to the charge in the sale deed proves that the parties decided to abandon and give up the demand made in the letter. Thus by necessary implication the parties stipulated that no charge shall subsist on the property which was being sold and that the liability for the unpaid balance price would be purely personal. It is not possible to accede to this view particularly because of the statement of Shri Sohan Singh to which reference has been made and which does not lend any support to the position now advanced by Mr. Tuli nor is there any evidence or material on the record from which any such inference can be made. Moreover, it is very doubtful whether the letter of Shri Salig Ram, Exhibit, D.I., could be looked at for the purposes of finding out the terms and conditions embodied in the sale deed. As has been held in *Bomanji Ardeshir Wadia* v. *Secy. of State* (10), when parties have entered into a formal contract that contract must be construed according to its own terms and it cannot be explained or interpreted by the antecedent' 'communings' which led up to it. In *Bhaskar Waman Joshi* v. *Shrinarayan Rambilas Agarwal* (11), it has been laid down that oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. If there is no ambiguity in the language employed the intention may be ascertained from the contents of the deed with such extrinsic evidence as the law may permit to be adduced to show in what manner the language of the deed was related to existing facts. It cannot, therefore, be held that the parties agreed or

(10) A.I.R. 1929 P.C. 34,
(11) A.I.R. 1960 S.C. 301.

entered into a contract to the contrary in respect of the charge which would come into existence by virtue of the application of the principle of section 55(4)(b) of the Transfer of Property Act.

Before the question of interest is decided it will be convenient to dispose of the objection relating to the jurisdiction of the Simla Court to grant Letters of Administration in favour of the plaintiff Bank. It is submitted that the Letters of Administration were granted by the Senior Sub-Judge, Simla, as District Delegate and that according to section 272 of the Indian Succession Act, 1925, he could do so only if it appeared by petition that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the jurisdiction of such Delegate. It is pointed out that paragraph 1 of the plaint runs thus:—

> "The plaintiff is the Administrator of the estate of late Mr. W. G. Deeks, lately of Main Road, Bothas Hill, Natal South Africa, deceased * * * *."

It is said that since he was a resident of South Africa, the District Delegate at Simla had no jurisdiction to grant him the Letters of Administration. Reliance has also been placed on a similar statement contained in the grant of Letters of Administration, Exhibit P. A. and another letter, Exhibit P. 2, sent by Shri Thakur Dass, dated 22nd January, 1957, to the defendant in which he has stated:—

> "I have been instructed by Messrs Barclays Bank of Natal, Executor and Trustee to the Estate of late Mr. W. G. Deeks, through Messrs Sandersons and Morgans Solicitors, 5 and 7 Netaji Subhas Road, Calcutta, to serve

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the followng notice * * *
* * * * "

According to Mr. Tuli, it is clear from all these documents that the late Mr. Deeks was residing in Africa and not in India or at Simla at the time he died No such facts or any relevant facts whatever find any mention in the written statement which has been filed by the defendant wherein all that has been stated is—

> "The alleged probate proceedings were not *bona fide* and were even without jurisdiction and as such did not, as they could not, bind the defendant. As submitted above, the plaintiff Bank has no *locus standi* to sue."

Clearly the District Delegate was competent to grant Letters of Administration if according to what appeared from the petition the deceased had a fixed place of abode within his jurisdiction at the time of his death. No attempt was made to produce a copy of the petition which was filed for grant of Letters of Administration nor was any other evidence led which would show lack of jurisdiction in the District Delegate to make the grant in respect of the estate of Mr. Deeks at Simla. Section 273 of the Indian Succession Act makes the grant of probate or letters of administration conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him. Even if it is open to the defendant under section 44 of the Evidence Act to show, as indeed it has been contended by Mr. Tuli, that a proceeding relevant under section 41 was delivered by a Court not competent to deliver it, it was incumbent on her to allege and prove such facts as would show lack of jurisdiction in the District Delegate at Simla to make the grant. This was not done and as has been stated before, even the decision of the trial Court was not invited with regard to issue No. 8. It is thus too late in the day for anyone

to contend that the District Delegate did not have the jurisdiction under section 272 to grant the Letters of Administration to the plaintiff Bank.

Coming to the question of interest which has been awarded by the Court below, namely Rs. 9,000 up to the date of the suit and future interest at the rate of 6 per cent per annum on the sum of Rs. 34,000 consisting of Rs. 25,000 principle, and Rs. 9,000 interest, it may be pointed out straightaway that the Court below was clearly in error in awarding future interest on the sum of Rs. 9,000 also which consisted of interest prior to the date of the suit. Section 34 of the Code of Civil Procedure provides that where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit. Order XXXIV, rule 11 also does not provide for payment of any interest on any amount which consists of interest prior to the date of the suit. Indeed, Mr. S. K. Kapur has not been able to show under which provision the Court below could direct the payment of the future interest on the amount of Rs. 9,000.

Lastly, it is to be determined whether any interest could or should have been awarded prior to the date of the suit. Mr. Tuli, has relied on the provisions of the Interest Act, 1939, and the observations made with regard to awarding of interest in *Bengal, Nagpur Railway Co., Ltd.*, v. *Ruttanji Ramji* (12), and *Thawardas Pherumal* v. *Union of India* (13), In the Privy

(12) A.I.R. 1938 P.C. 67.
(13) A.I.R. 1955 S.C. 468.

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Council case the plaintiffs had sued to recover from the Bengal-Nagpur Railway Company a certain sum of money on account of the work done by them for the Railway. It was found that the plaintiffs were entitled to recover from the Railway about Rs. 67,000 which the Railway was liable to pay to the plaintiffs on 26th July, 1925. The plaintiffs claimed interest on the money for the period during which it was withheld from them. While considering the question of allowing interest for the period prior to the institution of the suit Sir Shadi Lal, who delivered the judgment of the Board, observed as follows:—

> "Now, interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest, as for instance, under section 80, Negotiable Instruments Act, 1881, the Court may award interest at the rate of 6 per cent per annum, when no rate of interest is specified in the promissory note or bill of exchange. There is in the present case neither usage nor any contract express or implied to justify the award of interest. Nor is interest payable by virtue of any provision of the law governing the case. Under the Interest Act, 32 of 1939, the court may allow interest to the plaintiff, if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But it is conceded that the amount claimed in this case was not a sum certain. The Interest Act, however, contains a proviso

that 'interest shall be payable in all cases in which it is now payable by law'. This proviso applies to cases in which the Court of equity exercises jurisdiction to allow interest."

In the Supreme Court case the claim related to an unliquidated sum and it was agreed that the Interest Act applied as interest was not otherwise payable by law in that kind of a case. It was in that context that the conditions were enumerated which must be fulfilled before interest could be awarded under the Act. It is not disputed that if there be an agreement for payment of interest the Court can certainly award it for the period prior to the date of the suit. It has been held by English Courts [the leading case being *Fludyer* v. *Cocker* (14)], that where on passing of ownership delivery of possession has been given to the buyer but has not paid the purchase money, the act of taking possession will be regarded as an implied agreement on the part of the buyer to pay interest on the purchase money from the date on which he took possession. In *Ratanlal, Chunilal, Panalal* v. *Municipal Commissioner* (15), the Privy Council laid down that the right to interest depends on the following broad and clear consideration. "Unless there be something in the contract of parties which necessarily imports the opposite, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand, the new owner has possession, use, and fruits; on the other, the former owner, parting with these, has interest on the price". According to their Lordships, this was sound in principle and authority fully warranted it and reference in this connection was made to *Fludyer's case* (14), among others.

(14) 33 E.R. 10.
(15) I.L.R. 43 Bom. 181.

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The above rule is apparently based on the theory of an implied agreement arising by the act of taking possession of the property sold by the vendor to the vendee. As far back as the year 1912, Rattigan, J., as he then was, of the Punjab Chief Court held that the vendors would be entitled to a charge upon the property in the hands of the buyers for the amount of the purchase price or any part thereof remaining unpaid and for interest thereon [*Arjan Das* v. *Hakim Rai* (16)]. He relied on an earlier case *Saran and Company* v. *Basheshar Nath* (17), in which the principle underlying section 55(4)(b) of the Transfer of Property Act was held applicable to cases arising in the Province of Punjab. In *A. Tomlinson* v. *W. F. Harding* (18), Shadi Lal, C.J., and Tapp., J., allowed interest on a different principle. According to their decision, from the time of the contract for the sale of immovable property the vendor becomes a trustee of the property for the vendee and the vendee becomes a trustee for the vendor in respect of the purchase money. The vendor was, therefore, entitled to interest over the unpaid purchase money from the time the property vested equitably in vendee to the time of actual realisation of the purchase money. In our view, the rule as laid down by the Privy Council in *Ratanlal-Chunilal-Panalal's case* (15) would be fully applicable to the present case.

Mr. S. K. Kapur, has contended that under section 55(4)(b), the principle of which has been held by us to be applicable interest would be payable on the purchase money but it seems that that clause does not give the vendor an absolute right to interest on the purchase money irrespective of the equities and circumstances of each case. As has been observed in

(16) 39 P.R. 1913.
(17) 148 P.R. 1907.
(18) A.I.R. 1930 Lah. 131.

Muthia Chetty v. *Sinha Velliam Chetty* (19), the object of the clause is to give the vendor a lien on the property for unpaid purchase money and it declares that the lien will enure for the interest as well as for the principal of the purchase money assuming that interest is payable. It does not indicate that the vendor is entitled to interest in every case. At any rate, there can be no doubt that though the Court awards interest on the principle enunciated by the Privy Council the lien will enure for the interest as well as for the principal of the purchase money. The award of interest is certainly discretionary but we find no reason to interfere with the decision of the Court below on the point. It cannot be forgotten that the total amount of interest before the institution of the suit at the rate of 6 per cent per annum would have come well over Rs. 17,000 out of which the claim has been confined to Rs. 9,000 only. In other words, interest for the first five years was given up. The attitude of the plaintiff was apparently fair and proper and the stipulation in the sale deed with regard to the payment of balance consideration of Rs. 25,000 had been certainly kept in view. If that amount was payable within a reasonable time, then a period of five years was more than reasonable for making payment. The awarding of interest by the lower Court in the sum of Rs. 9,000 calls for no interference for all the reasons indicated above.

No other point or ground was urged before us, with the result that the appeal fails on all the points except one, namely, the grant of future interest on the sum of Rs. 9,000. To that extent the appeal is allowed and the order of the Court below is modified. In other words, the decree passed by the lower Court is maintained except that future interest shall be calculated from the

(19) I.L.R. 35 Mad. 625.

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date of the filing of the suit till the date of realisation at the rate of 6 per cent per annum on the amount of Rs. 25,000 only. The defendant shall have three months time from today to pay the amount, failing which the property on which the charge is claimed shall be put to sale. A preliminary decree shall be drawn up in the appropriate form.

Taking into consideration the entire circumstances the parties will be left to bear their own costs in this Court.

Dua, J.

INDER DEV DUA, J.—I agree.

K. S. K.

LETTERS PATENT APPEAL

Before D. Falshaw, C. J., and A. N. Grover, J.

HARI DASS,—*Appellant.*

v.

HUKMI—*Respondent.*

Letters Patent Appeal No. 7 of 1960.

1963

August, 19th

Hindu Women's Rights to Property Act (XVIII of 1937)—S. 3—Property—Whether includes agricultural land—Constitution of India—Seventh Schedule, List III, item 5—Effect of Act—Whether becomes applicable to agricultural lands after the passing of the Constitution of India without fresh legislation.

Held, that before the passing of the Constitution of India, it was laid down that the word "property" as used in the Hindu Women's Rights to Property Act, 1937, must be construed as referring only to those forms of property with respect to which the legislature which enacted the Act was competent to legislate, that is, property other than agricultural land and that legislation with regard to usufructuary mortgages of agricultural land was solely within the purview of the Provincial Legislature. After the enactment of