

BOMBAY HIGH COURT

Gulabahand Daulatram

Vs.

Suryajirao Ganpitrao

S.A. No. 720 of 1947, in App. No. 316 of 1940

(Rajadhyaksha and Shah, JJ.)

10.02.1950

JUDGMENT

Shah, J.

1. This is an appeal against a decree of the District Court at Jalgaon in App. No. 316 of 1940 reversing the decree of the Civil Judge, Junior Division, at Bhusawal in Suit No. 218 of 1939. The facts of the case must be stated in detail in order to appreciate the contentions raised.

2. The Court of Wards assumed the management of the estate of one Ganpatrao Sagajirao Nimbalkar sometime in June 1907. The estate remained in the management of the Court of Wards till June 1917. The management was then withdrawn, and the estate was re-entrusted to Ganpatrao. By reason of the provisions of Section 40, proviso 3, Bombay Court of Wards Act, I (1) of 1905, no land-holder, who has been made a Government ward in pursuance of Section 9(1) of the Act, is competent on the withdrawal of the superintendence of the Court of Wards to transfer or create any charge on or interest in his property or any part thereof beyond the term of his natural life, except with the previous sanction of the Collector. Ganpatrao owned among other properties two houses, Municipal census Nos. 822 and 230, at Bhusawal, which will hereafter be referred to as the suit houses. By a sale-deed dated 18-5-1918, Ganpatrao sold the suit houses to the plaintiff's brother, Onkardas Daulatram, and his cousin, Kanayalal Vithaldas, for Rs. 1,000, and delivered possession to them. Under the sale deed Ganpatrao purported to convey an absolute interest in the property to the vendees. It does not appear that either the vendor or the vendees were aware of the statutory disability imposed on Ganpatrao by reason of Proviso 3 to Section 40, Bombay Court of Wards Act. The transaction appears to have been open and honest, and the invalidity of it beyond the lifetime of Ganpatrao was not present to the mind either of Ganpatrao or the vendees. At a partition which took place between the plaintiff, Onkardas and Kanayalal, the suit houses fell to the share of the plaintiff. Ganpatrao died on 8-12-1919, and his property devolved upon his son Suryajirao, who will hereafter be referred to as the defendant.

The defendant filed Suit No. 1140 of 1930 in the Court of the Subordinate Judge at Bhusawal against the plaintiff for possession of the suit houses on the ground that the gale of the said biases was void beyond the lifetime of Ganpatrao, and Ganpatrao having died, he the defendant was entitled to obtain possession of the suit houses. The trial Court dismissed the suit. In appeal the District Court at Jalgaon reversed the decree and passed a decree for possession of the suit houses and for mesne profits. In second Appeal No. 874/33 this Court confirmed the decree of the District Court on 9-3-1936. The defendant executed the decree and obtained possession of the suit houses sometime in August 1936. The plaintiff there after filed the suit from which this appeal arises, being Suit No. 218 of 1939, against the defendant claiming Rs. 3,600 as damages for breach of the covenant for title and quiet enjoyment. He claimed that the suit houses were worth Rs. 2,000, and that he had spent Rs. 1,000 for the litigation and Rs. 600 were paid by him by way of mesne profits to the defendant.

3. The defendant by his written statement contended that Ganpatrao did not sell anything more than his life interest in the property, and that he was incompetent to dispose of the suit houses beyond his natural lifetime. He further contended that the claim was barred by the law of limitation and was also barred as *res judicata*, and in any case the plaintiff was not entitled to any damages.

4. The trial Court held that the sale deed purported to convey an absolute interest, and that the plaintiff's claim was neither barred as *res dicaia* nor by limitation, and the plaintiff was entitled to damages amounting to Rs. 2,600. In appeal the learned Assistant Judge at Jalgaon, who hoard the appeal, held that there was no breach of the covenant of title and quiet enjoyment. He observed :

" . . the sale as such same to an end on the death of Ganpatrao and the purpose of the covenant was fulfilled, when there was no hitch or hindrance to quiet enjoyment during the lifetime of Ganpatrao. There was, therefore, no breach of the covenant."

The learned Judge did not record any finding on either of the two remaining issues as to limitation and the extent of damages, but on his finding on the issue as to breach of the covenant reversed the decree of the trial Court and dismissed the suit. In S.A. No. 833 of 1942, Divatia, J. who heard the appeal, was of the opinion that the sale deed incorporated a cover act of title and quiet enjoyment, and that so far as Ganpatrao was concerned there had been a branch of the same. In view, however, of the fact that the question, whether Ganpatrao's son, the defendant, was bound by the covenant had not been adjudicated upon, Divatia, J. reversed the decree of the District Court and remanded the appeal for bearing to the District Court on the issues, (1) whether the defendant was bound by the covenant entered into by his father, (2) whether the claim was barred by limitation, (3) whether the claim was barred as *res judicata* and (4) what relief the plaintiff was entitled to get.

5. The appeal was thereafter beard by the District Judge at Jalgaon. He was of the opinion that

the defendant was not bound by the covenant entered into by Ganpatrao and that the suit was not barred by limitation or as res judicata. On the view that the covenant of title and quiet enjoyment did not bind the defendant, the learned District Judge reversed the decree of the trial Court and ordered that the plaintiff's suit be dismissed. The present appeal has been filed against the decree of the learned District Judge and has been placed before this Division Bench in view of the importance of the questions of law involved.

6. Now, before proceeding to discuss the questions which arise in the appeal, it must be observed that this Court in S.A. No. 874 of 1933 held that the alienation by Ganpatrao was void beyond his lifetime. Further in S.A. No. 833 of 1942 it was held by this Court that there was a breach of the covenant in the sale deed relating to title and quiet enjoyment, and that an action could lie on that breach

7. Mr. Kotwal on behalf of the defendant has argued two points in this appeal. He submits that the suit is barred by limitation and that the covenant of title and quiet enjoyment in the sale deed was not enforceable as it was void beyond the lifetime of Ganpatrao. The argument of the learned advocate on the second point was twofold, (a) that the covenant for quiet enjoyment came to an end on the death of Ganpatrao when the sale deed itself became void and (b) that the covenant for quiet enjoyment to allow the transferee to remain in possession from generation to generation without obstruction amounted to an agreement to do what was prohibited by the Bombay Court of Wards Act, and hence the agreement was void and unenforceable and damages could not be recovered for failing to carry out that covenant.

8. Now the suit filed by the plaintiff is one for damages for breach of a contract in writing registered. The relevant words in the sale deed are :

"you should enjoy the said property from generation to generation. I have no right, title or interest left over the said property. Should my kinsmen and heirs put forward any claim over the said property, all that is null and void."

Under Section 55(2), Transfer of Property Act there is an implied covenant of title. In the present case the plaintiff was entitled to rely upon a covenant of title and quiet enjoyment arising by implication of law under Section 55, clause (a), Transfer of Property Act, as well as by the express words of the sale deed.

9. If on the allegation that the covenant of title and quiet enjoyment was broken, the plaintiff claims damages, the suit prima facie falls under Article 116, Limitation Act, as the covenant is contained in a sale deed, which is duly registered. Mr. Kotwal, however, urged that the plaintiff should have prayed for a refund of the purchase money on the footing that the consideration for the sale failed on the death of Ganpatrao, and he contended that that was the only relief which the plaintiff was entitled to and if a claim for refund of the purchase money had been made, the claim of the plaintiff would necessarily be barred by Article 62, Limitation Act. However, the provisions of the Limitation Act applicable to a suit can only be ascertained on the allegations

made in the plaint and the reliefs prayed for and not by speculating as to what relief the plaintiff should have prayed for. If the plaintiff prays for a relief to which he is not entitled, the Court may reject his claim, but the Court has no jurisdiction to find out what relief he should have claimed and then apply the provisions of the Limitation Act by reference to the relief which the plaintiff should have claimed but has not claimed.

10. On the plaint claiming damages as framed by plaintiff the article of the Limitation Act applicable must be Article 116. The period of limitation applicable to a suit for damages for breach of the covenant cannot be decided by speculating as to what additional or alternative relief the plaintiff should have prayed for on those covenants. By the combined operation of Articles 114 and 116, Limitation Act, a period of six years is provided for a suit for compensation for breach of a contract in writing and registered, and the period of limitation commences to run when the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs.

11. Mr. Kotwal further urged that even on the view that Article 116 applies, the plaintiff's suit was barred by limitation. He submitted that the period of limitation commenced to run from the date on which Ganpatrao died on 8-12-1919, or from the date on which manse profits were awarded by the Court in suit No. 1140 of 1930, or in any case from the date of institution of Suit No. 1140 of 1930 by the defendant. He urged that the title of the plaintiff came to an end on the death of Ganpatrao and that his possession thereafter was wrongful; and, even if the plaintiff was not disturbed in his possession, his possession could not be said to be in pursuance of or in recognition of a title. Now the whole argument of Mr. Kotwal proceeds upon the assumption that the covenant of title and the covenant of quiet enjoyment are broken when the title to the property terminates by reason, of the absence of authority of the vendor either initial or supervening to transfer what he has purported to transfer. In my opinion there is no justification for this assumption. So long as the transferee remains in peaceful possession of the property there is no breach of the covenant. The possibility of a person, who has since the date of the sale acquired title to the property, initiating steps to obtain possession of the property cannot amount to a breach of the covenant. If the argument of the learned advocate is accepted, it would lead to the startling result that a right to file a suit for damages for breach of a covenant of title and quiet enjoyment would arise before any injury is suffered by the vendee, and in several cases the right to sue for damages may even become barred even before the person in whom the title so vested takes any steps to enforce his rights. The learned advocate was unable to cite any authority for the proposition that a mere possibility of an action being initiated in future by a person having or claiming a right to property constitutes a breach of the covenant of quiet enjoyment.

12. Mr. Kotwal suggested, however, that the case in *Krishnaji Sakharam v. Kashim*¹, supported his submission. That was a case in which certain watan lands were mortgaged with possession in the year 1893 for a period of 12 years by the watanदार. The mortgage deed contained as covenant :

"If there be any hindrance to the continuance of the land, I shall pay the said sum together with interest thereon at the rate of one per cent per annum out of my other estate and personally in the year in which the hindrance may arise."

The mortgager died in the year 1901, and his son recovered possession of the lands in the year 1914 on the ground that the mortgage was void under Section 5, Watan Act. The mortgagee thereupon filed a suit to recover the mortgage amount with interest. It was held that the claim was barred by limitation. The Court held that the suit for mortgage money was barred as it was not filed within six years after the expiry of the period of the mortgage. The Court also construed the covenant in the deed to mean that the mortgagor should pay the amount if any hindrance was caused to the mortgagee's possession during the mortgagor's lifetime. The time for paying the purchase money commenced to run,

¹44 Bom 500 : AIR 1920 Bom 48

according to the learned Judges who decided that case, as from the death of the mortgagor and not from the date of the subsequent dispossession. Now *Krishnaji's case*, (44 Bom 500 : AIR 1920 Bombay 48) obviously does not lay down any general proposition. On the construction of the covenant in the mortgage deed, it was held that the absence of hindrance that was guaranteed by the mortgagor was only during the lifetime of the mortgagor. That case can have no application to the facts of the present case.

13. The contention that the period of limitation commenced to run from the date on which the mesne profits were awarded is entirely futile. The decree passed by the Court in suit No. 1140 of 1930 for possession and mesne profits was passed on the footing that the title of the plaintiff having terminated in 1920, his possession since then must be regarded as unlawful. Mesne profits were, however, awarded for a period of three years before suit, not because there was any particular sanctity in that period but because mesne profits for a period longer than three years before the suit could not be awarded by reason of the provisions of the Limitation Act. For reasons mentioned for rejecting the contention that the period of limitation began to run from the date of Ganpatrao's death, this contention also must fail.

14. The contention that the period of limitation commenced to run from the date on which suit No. 1140 of 1930 was filed on the ground that at the latest on that date the plaintiff must be deemed to have discovered that he had no title is equally without substance. If in order that there should be disturbance in the covenant of quiet enjoyment there should be some physical obstruction to the possession of the vendee or that he must be deprived of his possession, the argument that the period commenced to run from the date of the suit when the plaintiff was informed about the defect of his title cannot have any weight. In our view the period of limitation in a suit for damages for the breach of covenant of quiet enjoyment commences to run from the date of the actual dispossession, and the suit having been filed within six years from the date of actual dispossession is within time.

15. In *Subbaroya v. Rajagopala*², Seshagiri Ayyar, J., classified suits for compensation filed by the vendees on the ground of breach of covenant for quiet enjoyment as follows (p. 888) :

"These cases can roughly speaking be classified under three heads : (a) where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property; (b) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale; and (c) where though the title is known to be imperfect, the contract is in part carried out by giving possession of the properties. In the first class of cases, the starting point of limitation will be the date of the sale ...In the second class of cases the cause of action can arise only when it is found that there is no good title. ...In the third class of cases also it is said that the cause of action will arise only on the disturbance of possession."

With reference to the facts of that case Seshagiri Ayyar, J. observed (p. 890) :

"The case before me, property speaking comes under the second class. If the
²³⁸ Mad 887 : AIR 1915 Mad 708

widow Guanammal did not recover possession, the plaintiff would never have been disturbed. The sale was not void ab initio. It was only voidable if Guanammal chose to avoid it. Even if this view is not come, I am prepared to hold that this case comes under the third class of cases where under an invalid contract possession had been given until that possession is interfered with, the purchaser is not bound to ask for the return of his purchase money on the possible ground that at some future time his title may be impeached. I therefore hold that the cause of action for this suit arises when under the decree obtained by Guanammal, the possession of the plaintiff was disturbed."

The observations made by Seshagiri Ayyar, J. would apply with equal force to the facts of the present case.

16. The principle laid down in the Madras case was approved of in a decision of the Judicial Commissioner's Court at Nagpur in *Kashirao V. Zabil*³, A Full Bench of that Court held (p. 5) :

"In a suit, for damages for breach of covenant of title contained in a registered deed, in a case in which the vendee has been put in possession of the property by the vendor and the sale is void ab initio as against the rightful owner, the limitation begins to run not from the date of the sale but from the time the vendee is dispossessed by the rightful owner."

In that case it was observed (p. 8) :

"In both the voidable and void sales if the vendor places the vendee in possession of the

property sold the principal object of the sale, that is possession and enjoyment of property is secured to the vendee and therefore until these are disturbed by the rightful owner it could not legally be said that there is a breach of contract within the meaning of Article 116, Limitation Act...In both the cases where possession is delivered to the vendee, the sale, for all practical purposes, remains good until it is avoided by the rightful owner. The cause of action to claim damages for breach of contract cannot arise in either voidable or void sales to a vendee, if he is placed in possession of the property sold, before he is evicted by the rightful owner for the very obvious reason that he, in fact, suffers no damages till then."

The view taken by the Madras and Nagpur Courts is followed by the Allahabad High Court in *Jhamman Singh v. Ratan Lall*⁴ and by the Oudh Court in *Ahsan Ali Khan v. Suraj Narain*⁵,

17. In *Ratanbai v. Ghasiram*,⁶ Patkar, J. accepted the classification made by Seahagiri Ayyar, J., in *Subbaroya v. Rajogopala*⁷, That was a case in which a suit for compensation for breach of covenant to indemnify against loss of possession by action which it was apprehended may be taken by a person interested to avoid a transfer was held to be

³ AIR 1932 Nag 5 : (28 NLR 31 FB)

⁵ 17 Luck 289 : (AIR 1942 Oudh 82)

⁴ AIR 1949 All 480 : (1950 ALJ 17)

⁶ 33 Bom LR 1092 : AIR 1932 Bom 36

⁷ 28 Mad 687 : AIR 1915 Mad 708

governed by Article 116, Limitation Act, and the period commenced to run from the date of dispossession. Patkar, J. followed an earlier decision of the Court in *Narsing Shivbakas v. Pachu Rambakas*⁸, wherein a suit for refund of purchase money governed by Article 97 filed against a vendor, who, in the belief that he was entitled to certain property, had sold the property to the plaintiff, and subsequently the plaintiff was dispossessed of the property by the real owner, the period of limitation was held to commence to run from the date of dispossession.

18. Now, it is true that the title of the plaintiff to the property terminated on the death of Ganpatrao, but if in the case of a suit filed for compensation for breach of a covenant for quiet enjoyment under a sale, which was void or voidable, the period of limitation commences to run from the date of dispossession, it is difficult to appreciate any ground on which a different rule should apply to a case in which compensation for breach of a covenant for quiet enjoyment is claimed where the sale was good until a certain event happened, and on the happening of that event, the sale became void.

19. In my view, the consensus of judicial opinion is consistent with the essential nature of the covenant of title and quiet enjoyment. A covenant for title and quiet enjoyment involves a right to undisturbed possession and this covenant remains effective so long as the vendee is in quiet enjoyment or possession. The covenant becomes enforceable in case there is obstruction or dispossession and cannot obviously be broken on the date either of the sale or the happening of the future event, which terminates the title of the vendee. A breach of the covenant can occur only on the disturbance of the vendee's possession. So long as the vendee remains in possession,

he suffers no loss which would sustain an action for damages for breach of the covenant. In my view, therefore, the lower Courts were right in holding that the suit was within time.

20. It is difficult to appreciate the argument that the covenant for quiet enjoyment came to an end as the title which the vendor purported to transfer came to an end. The covenant was obviously not a personal covenant, and was not expressly or impliedly limited in its duration to the lifetime of the vendor; and it would indeed be a startling result of the incident of the covenant, if it was to be extinguished precisely at the moment when the necessity for the protection afforded by it arises.

21. Nor is there any substance in the argument that when the title of the plaintiff came to an end by reason of the death of Ganpatrao the covenant for quiet enjoyment thereafter must be deemed to be granted for an unlawful consideration and hence void. The Bombay Court of Wards Act imposes a disqualification upon the rights of a person whose estate is passed under the superintendence of the Court of Wards and which has since been withdrawn. Without the previous sanction of the Collector such a person is not entitled to dispose of his property beyond his natural lifetime. The Bombay Court of Wards Act, however, does not impose a general incapacity upon such a person to contract with regard to his property. Nor is a contract with regard to property declared void by the Act. The Legislature has for preventing imprudent holders of land provided that even after the withdrawal of the superintendence of the Court of Wards the proprietor is disqualified without the sanction of the Collector from transferring the property so as to convey an interest which would extend beyond his natural lifetime. If an owner of property which is

⁸³⁷ Bom 538 : (20 IC 254)

made non-transferable by statute, agrees to transfer that property in a manner intended to circumvent the provision of the statute, the agreement is void in law and unenforceable, and damages cannot be awarded for breach of such an agreement. But, if a person purports to convey what he has no authority to convey and agrees to guarantee quiet enjoyment to the vendee, the vendor or the person claiming under him cannot avoid an obligation to pay damages for breach of the covenant on the ground that the vendor had either no interest or had a limited interest, which has since the date of the sale ceased. The vendor cannot escape from his obligation when he guarantees to a vendee that he has title to the property which he disposed of and ultimately it is found that either he had no title or that his interest was not as extensive as he purported to convey. In such a case the fact that the conveyance is void to the extent to which it exceeds the authority of the vendor by reason of the absence of title in him or by reason of a personal disqualification imposed upon him does not affect the liability of the vendor or person claiming under him to compensate for breach of the covenant of title and enjoyment.

22. In *Moti Chand v. Ikram Ullah Khan*⁹, the head note states :

"The proprietors of a mahal, within the meaning of the North-Western Provinces Tenancy

Act, 1901, executed a deed by which they sold the mahal together with the sir lands in their occupation, and agreed to execute a deed relinquishing the utter in default of giving the purchaser possession of the sir lands; agreed to pay him Rs. 16 per bigha damages :

Held, that the agreement was invalid as being contrary to the policy of the above-mentioned Act, and that the damages were not recoverable upon a failure to give possession of the sir lands."

Section 20, clause (2), N.W. Provinces Tenancy Act, II [2] of 1901, provides that the interest of an ex-proprietary tenant, an occupancy tenant, or a non-occupancy tenant is not transferable otherwise than by a voluntary transfer between persons in favour of whom, as co-sharers in tenancy such right originally arose, or who have become by succession co-sharers therein. It was found in Moti Chand's case, 44 IA 54 : (AIR 1916 PC 59), that the execution of the deed of relinquishment was merely a step towards giving effect to an agreement for relinquishment contained in the sale deed and therefore was an attempt to do something which was prevented by law. The High Court at Allahabad held that the transaction as to the sir lands, whether it was to be regarded as an attempted sale of ex proprietary rights or an agreement to relinquish those rights when they should arise, was unlawful, and consequently decided that the claim for damage for breach of the agreement could not be maintained. Their Lordships of the Privy Council! approved of this decision, and stated that the policy of the Act (N.W. Provinces Act, II (2) of 1901) was to secure and preserve rights of occupancy whether the proprietor desired it or not and notwithstanding an agreement to the contrary entered into between him and the transferee and observed (p. 58) :

"The policy of the Act is not defeated by any ingenious devices, arrangements of agreements between a vendor and a vendee for the relinquish merit by the vendor of his sir lands which he had cultivated continuously for twelve years at the date of

⁹⁴⁴IA 54 : (AIR 1916 PC 59)

the transfer, for a redaction of purchase money on the vendor's failing or refusing to relinquish such lands, or for the vendor being liable to a and for breach of contract on his failing or refusing to relinquish each lands. All such devices, arrangements and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any civil Court or in any Court of Revenue."

23. This case, relied upon by Mr. Kotwal, cannot, govern the facts of the present case. It is obvious that on grounds of public policy sir lands were by tenure non-transferable, except to certain persons, and an agreement which intended to defeat the statutory provisions which prohibited that transfer was void and could not be enforced, and damages could not be awarded for failure to carry out the agreement. The restrictions imposed by the Court of Wards Act in the present case are not a part of the tenure of the land but are imposed personally against the holder.

The Act contains no general restrictions on the right to contract with regard to the estate and the covenant of quiet enjoyment cannot be regarded as an attempt to defeat the policy of the law.

24. Mr. Kotwal also referred us to a decision of this Court in *Bai Diwali v. Umedbhai Bhulabhai*¹⁰, That was a suit in which an unrecognized sub-division of a bhag was mortgaged with possession contrary to the provisions of the Bhagdari and Narwadari Act, Bombay Act V (6) of 1862. The mortgage deed also contained a covenant to pay the mortgage money after the period of the mortgage. The interest of the mortgagee under the mortgage was sold in execution of a money decree and was purchased at a court auction by the plaintiff. The purchaser filed a suit to recover the amount due on the mortgage. It was held that the consideration for the mortgage being unlawful by reason of the provisions of Section 24, Contract Act, the contract failed ab initio, and the agreement contained in the mortgage deed to pay the mortgage debt was void and unenforceable. The principle of that case is, in my opinion, inapplicable to the present case for several reasons. The transaction of sale in the present case was not void ab initio. It was good for the lifetime of the vendor. The vendor having no right to convey the property beyond his lifetime by reason of a personal disqualification the title sought to be created beyond his lifetime failed. It did not fail by reason of any incident of the tenure of the land but by reason of a personal disability. In *Bai Diwali's* case, 40 Bom 614 : AIR 1916 Bombay 318 the mortgage was void ab initio, and it was void because of the statutory prohibition against alienations of unrecognized portions of bhag lands apart from the bhag. The observation that because

"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" cannot be accepted as a correct statement of the law without limitations, in view of the pronouncement of the Privy Council in *Nisar Ahmad Khan v. Raja Mohan Manucha*¹¹,

25. In *Nisar Ahmad Khan v. Raja Mohan Manucha*¹², a deed of mortgage was executed in the course of execution proceedings pending before the Collector, when he was entitled to exercise or perform the powers or duties under paras. 1 to 10 of sch. III, Civil Procedure

¹⁰40 Bom 614 : AIR 1916 Bom 318

¹²67 IA 431 : (AIR 1940 PC 204)

¹¹67 IA 431 : (AIR 1940 PC 204)

Code was held null and void as it was executed without the Collector's permission, but the covenant to pay the mortgage money was held enforceable. The provisions of sch. III, Para. 11, Civil Procedure Code, as a result of which the mortgagor in *Babu Nisar Ahmad's* case, 67 IA 431 : (AIR 1940 PC 204) was held incompetent to mortgage the property, are in part materia, with proviso 3 to Section 40, Bombay Court of Wards Act. The provisions contained in the Civil Procedure Code and in the Court of Wards Act impose a personal disqualification upon a holder of the land to deal with the property. If a covenant to pay the mortgage money under a deed of mortgage which is held to be void as being contrary to the provisions of Schedule III, para. 11, is enforceable, there is no ground for holding that damages for breach of covenant for quiet enjoyment entered into by a vendor who sells property and the sale contravenes the provisions of Section 40, proviso 3, Bombay Court of Wards Act, cannot be recovered.

26. *Raja Mohan Manucha v. Manzoor Ahmad Khan*¹³, was a case which arose from the same execution proceedings out of which the case in *Nisar Ahmed Khan v. Raja Mohan Manucha*¹⁴, arose in *Raja Mohan Manucha v. Manzoor Ahmad Khan*¹⁵, there was a mortgage executed by a person whose property was in the management of the Collector under Schedule III, para 11, Civil Procedure Code. When the mortgagee filed a suit to recover the mortgage money by sale of the mortgaged property and by enforcement of the personal covenant to pay the money, the mortgagor contended that the mortgage was void having been made in circumstances which brought into operation the provisions of Para 11 of Schedule III, Civil Procedure Code. The right to recover the mortgage money under the personal covenant had become unenforceable by reason of the expiry of the period of limitation. Consequently, before the Privy Council the mortgagee formally abandoned his claim, both on the mortgage as well as the personal covenant, and claimed to recover the loan advanced by way of restitution under Section 65, Contract Act. Their Lordships held that the mortgagee could recover the amount advanced under Section 65, Contract Act, as it could be said that the security was discovered to be void in the special circumstances of the case after the suit was instituted. At p. 10 their Lordships observed :

"The principle underlying Section 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation. If it be settled law that the incapacity imposed on a judgment debtor by Para 11 of Schedule III an incapacity to asset his property and not a general incapacity to contract it follows that a covenant to repay is not made void by the mere operation of the paragraph."

In view of the imposition of an incapacity to dispose of property their Lordships held that the mortgagee was entitled to abandon the mortgage security as well as the covenant to repay and was entitled to claim the money advanced under Section 65, Contract Act. The observations of their Lordships of the Privy Council support the view that the plaintiff is entitled to recover damages relying upon a contract where the provisions which impose an incapacity upon the vendor Ganpatrao did not seek to render either the contract void or to impose a general incapacity upon him to enter into contracts with regard to his property.

¹³70 IA 1 : (AIR 1943 PC 29)

¹⁵(70 IA 1 : AIR 1943 PC 29)

¹⁴67 IA 431 : (AIR 1940 PC 204)

27. It is unnecessary to consider in detail the other cases cited by *Mr. Kotwal, Har Prasad v. Sheo Gobind*¹⁶, *Murlidhar v. Pem Raj*¹⁷ and *Bikham Singh v. Har Prasad*¹⁸, The case in *Har Prasad v. Sheo Gobind*¹⁹, merely follows the case in *Murlidhar v. Pem Raj*²⁰, The facts of the case in *Murlidhar v. Pem Raj*²¹, and *Bikham Singh v. Har Prasad*²², appear to be precisely the same as the facts in *Motichand v. Ikram, Uilah Khan*²³, The considerations relied upon by their Lordships of the Privy Council in that case are as pointed out earlier plainly not applicable to the facts of the present case.

28. Both the contentions raised by Mr. Kotwal therefore, fail, and it must be held that the view taken by the learned appellate Judge that the covenant was not enforceable against the defendant

in a suit for damages filed by the plaintiff must be set aside. The learned appellate Judge unfortunately has not dealt with the question as to what damages the plaintiff is entitled to if his suit is held maintainable. We are, therefore, compelled to remand this case to the District Court again for hearing and disposal on the issue as to damages.

29. The appeal will, therefore, be allowed, the decree of the lower appellate Court set aside and the case remanded to the lower appellate Court to be dealt with according to law on the issue as to damages.

30. There will be no order as to costs of this appeal. Costs of the lower Court and the trial Court will abide the result of the appeal in the District Court.

Case remanded.

¹⁶44 All 486 : AIR 1922 All 134

¹⁷22 All 206 : (1900 AWN 10)

²⁰22 All 205 : (1900 AWN 10)

²¹(22 All 205 : 1900 AWN 10)

¹⁸19 All 35 : (1896 AWN 167)

¹⁹44 All 486 : AIR 1912 All 134

²²19 All 35 : (1896 AWN 167)

²³44 All 54 : (AIR 1916 PC 59)