"*Mahomed* v. *Lakshmipathi*(1) the High Court says that a 'mere "notice' does not afford a cause of action.'" BRAHMAYYA v. LAKSHMI-NARASIMHAM.

Counsel were ot instructed.

JUDGMENT.—The appeal is from a decree which directed ejectment and awarded mesne profits. The court fee should be calculated on the land and the mesne profits which are the subject matter of the appeal.

The Judge is right in his opinion that section 7 of the Court Fees Act is applicable to the case.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

SUNDARAM (DEFENDANT), APPELLANT,

*v.*

SITHAMMAL AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1892. July 19. October 4.

*Limitation Act XV of* 1877, *sched. II, arts.* 91, 144—*Suit for land—Cancellation of instrument affecting the land by plaintiff.*

In a suit brought in 1889 to recover land, it appeared that the defendant had been in possession since 1885, having obtained in 1883 a conveyance of the land from one of the plaintiffs. It was found on the evidence that that conveyance had been obtained by fraud and was supported by no consideration. The other plaintiff claimed under an instrument of 1884 which recited that of 1883 and was executed by the same person. The plaint contained no prayer for the cancellation of the conveyance of 1883:

*Held*, that the suit was not barred by limitation.

SECOND APPEALS against the decrees of C. Venkobachariar, Subordinate Judge of Madura (West), in appeal suits Nos. 278 and 280 of 1890, confirming the decrees of T. Sadasiva Ayyar, District Munsif of Madura, in original suits Nos. 27 and 29 of 1889.

Suit to recover possession of land.

The facts of these cases are stated sufficiently for the purposes of this report in the judgment of MUTTUSAMI AYYAR, J.

The defendant preferred these appeals.

Mr. *K. Brown* for appellant.

*Subramanya Ayyar* for respondents.

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(1) I.L.R., 10 Mad., 368. * Second Appeals Nos. 925 and 927 of 1891.

SUNDARAM v. SITHAMMAL.

MUTTUSAMI AYYAR, J.—The second respondent is a person of weak mind, and the first respondent is his adoptive mother. The land in dispute originally belonged to the former, and on the 22nd December 1883, he executed a sale-deed (exhibit IX) regarding it in appellant's favour for Rs. 50. On the 9th February 1884, he conveyed all his properties, including the land in question, under document B to his adoptive mother. In 1889 respondents brought this suit to recover the land with mesne profits on the ground that appellant took wrongful possession of it in 1885 and since continued to hold possession adversely to them. The plaint did not refer to the sale-deed (IX), nor did it pray that it should be cancelled or set aside, and the suit, as based on the averments in the plaint, was one brought to recover possession of immoveable property from appellant, who held it adversely to respondents, and as such, it would be governed by article 144 of the second schedule of the Act of Limitations. For appellant it was contended that exhibit B was obtained by fraud, and that he was lawfully in possession as purchaser under instrument IX. It was further alleged that both respondents could not maintain the suit, and that the claim was also barred by limitation. The first and second issues fixed in the suit raised three questions, viz., whether the sale-deed (IX) was genuine, whether it was valid, and whether the suit was barred by limitation. As for the first and second questions the District Munsif found that appellant and three others had conspired together to deprive second respondent of his properties, that exhibit IX was the result of such conspiracy, that it was either a forgery or at least a spurious document executed for no consideration, and that appellant took wrongful possession of the land in dispute in the beginning of 1885. On appeal the Subordinate Judge concurred in the findingthat exhibit IX was the result of a conspiracy to defraud second respondent and not a *bonâ fide* transaction supported by consideration. As regards the genuineness of the document, however, he did not come to a clear finding, but observed that second respondent denied his signature in exhibit IX that the signatures did not correspond with his genuine signatures, and that much need not be said about it. The fact, therefore, definitely found by both the Courts below is that exhibit IX was obtained by fraud and is supported by no consideration. As regards the question of limitation, the Subordinate Judge held that the sale being the result of fraud and

based on no consideration whatever, it was void, and that it was not necessary for respondents to set it aside before recovering possession, and that their claim was, therefore, not barred by article 91, Limitation Act. He observed further that even assuming that that article did apply, the sale-deed not being registered, respondents could not have known of its existence, and its production in Court might be taken as fixing them with notice of its existence. It is contended on appellant's behalf that respondents were bound to set aside the sale-deed (IX) before they could recover possession, that a suit to set it aside for fraud would be barred by article 91 of the Act of Limitation, and that on this ground the appeal must be decreed. In support of this contention appellant's Counsel draws our attention to the decisions of the Privy Council in *Janki Kunwar* v. *Ajit Singh*(1) and *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri*(2). On the other hand it is argued on respondent's behalf that they were at liberty to claim possession on title, that the sale evidenced by exhibit IX was part of appellant's case, that it was for him to show that it was true and valid, and that article 91 did not apply to a suit to recover possession. Reliance is placed in support of this contention on *Boo Jinatboo* v. *Sha Nagar Valab Kanji*(3).

In exhibit B a reference is made to exhibit IX and the former being dated 1884. Respondents must be taken to have been aware of its existence at least from 1884. The observation of the Subordinate Judge that respondents must be taken to have discovered its existence only when it was produced cannot be supported. The substantial question is whether respondents are bound first to set aside the sale-deed (IX), and whether by omitting to do so they forfeited their title to the land, though twelve years had not elapsed from the date of the sale, and though the document was really obtained by fraud and there was no consideration for it. It is a clear rule of law that no party can recover property against his own instrument without showing that such instrument is inoperative for fraud. It is also clear that title to land may continue to subsist, though a claim arising therefrom to a particular relief, such as a claim to rent in arrears for more than three years, may be time-barred. The real point for consideration is whether the cancellation or setting aside of an instrument is, upon the true construction of

(1) I.L.R., 15 Cal., 58. (2) I.L.R., 13 Cal., 308. (3) I.L.R., 11 Bom., 78.

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article 91, a specific relief as contemplated by section 35 of Act I of 1877 or a special transaction affecting the title to land. According to the general scheme of the Act of Limitations, title to land is acquired or lost only by adverse possession extending to twelve years or more. It is provided by section 28 of that Act that at the determination of the period thereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. There is hardly room for doubt that a suit to cancel or set aside an instrument is not a suit for possession of property since it is open to the party in possession to institute such suit. I am of opinion that article 91 is not applicable to suits in which the substantial relief claimed is the recovery of land. A reference in such suit to an instrument obtained by fraud is necessary only by way of confession and avoidance and not as part of the relief claimed. This is also the view taken by the High Court at Bombay in *Abdul Rahim* v. *Kirparam Daji*(1), in *Boo Jinatboo* v. *Sha Nagar Valab Kanji*(2). In the former the suit was brought by a person who claimed under the lady who executed the instrument which was impugned as fraudulent, and it was held that article 95 did not bar the suit to recover his share in her estate. In the latter, the document impugned was executed by one of the plaintiffs, and it was yet decided that article 92 was not applicable. This was also the opinion expressed by Straight, J., in *Hazari Lal* v. *Jadaun Singh*(3). The remarks made in with reference to article 92 are equally applicable with reference to article 91. The learned Judges observed there that if it were possible for the Court to award to the plaintiffs' possession of the land and hold that the defendants had no right to keep the same without declaring the bonds to be void, the plaintiffs would hardly care much whether the bonds were cancelled or not, whilst in order to bring the case under article 92, schedule II of the Limitation Act there must be a bare declaration asked regarding the cancellation of the bonds. Again article 91 describes the suit to which it is applicable as one in which the relief claimed is the cancellation or the setting aside of an instrument, and does not in terms apply to a suit for possession in which an averment regarding an outstanding instrument is made by way of confession and avoidance in order to prevent the defendant from

(1) I.L.R., 16 Bom., 189. (2) I.L.R., 11 Bom., 78. (3) I.L.R., 5 All., 76.

setting it up as an answer to the claim. Such an averment, it seems to me, cannot alter the nature of the suit. The appellant's Counsel draws attention to the decision of the Privy Council in *Janki Kunwar* v. *Ajit Singh*(1). But the plaintiffs in that case asked for a decree for their property being restored upon their paying to defendants so much of the consideration as might be found to be justly due under the sale-deed which was impugned for fraud. The prayer for the cancellation of the instrument and for the declaration that it created only a charge for the amount actually paid, was essential part of the relief claimed in the plaint.

Another case on which appellant's Counsel relies is *Unni* v. *Kunchi Amma*(2). The decision in that case proceeded on the ground that the cancellation of the instrument was not an essential part of the relief claimed in the plaint. It is true, as observed there, that, as a matter of substantive law, the party seeking to recover property against his own instrument must show that it is void for fraud for the obvious reason that as long as an instrument creating a later title is not invalid, his prior title cannot prevail. It is also true that so long as the prior title is not extinguished by twelve years' adverse possession, his right to avoid the later instrument by confession and avoidance exists. Otherwise there would be this anomaly. Suppose that the party executing a fraudulent sale-deed is in possession of the property notwithstanding the sale, and that the purchaser brings a suit after the lapse of three years, there must, in that case, be a decree in his favour on the ground that, notwithstanding his possession, the vendor cannot set aside the deed under article 91. Thus the purchaser would acquire a valid title to land in the fourth year, though the sale-deed might be fraudulent, whilst according to section 28 of the Act of Limitation, title to immovable property is not lost unless there has been adverse possession for more than twelve years.

I would dismiss these appeals with costs.

BEST, J.—The parties to these two appeals are the same, and the question for decision in both is also the same, namely, whether the suits (instituted by the respondents) are barred by article 91 of schedule I of the Limitation Act.

As the sale-deeds relied on by the appellant are dated so far

(1) I.L.R., 15 Cal., 58. (2) I.L.R., 14 Mad., 26.

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back as 1883 and 1882, and these suits were not instituted till 1889, they are clearly time-barred if article 91 is applicable.

In support of appellant's contention that the article referred to above applies, reference has been made to a dictum of a Bench of this Court in *Unni* v. *Kunchi Amma*(1), which isas follows: "There can be no doubt that when a person seeks to recover "property against an instrument executed by himself or one under "whom he claims, he must first obtain the cancellation of the "instrument and that the three years' rule enacted by article 91 "applies to any suit brought by such person." *Janki Kunwar* v. *Ajit Singh*(2), which is referred to as authority for the above dictum, was a suit in which plaintiffs came into Court expressly asking that a deed admittedly executed by one of them should be set aside on the ground of its having been obtained by fraud and undue influence, and further praying that the property be restored to them "upon their paying to the defendant so much of the con- "sideration money as might be found to be justly due." The case was thus one in which the conveyance was not only admittedly executed, but had also admittedly had operation given to it, so as to affect the property, and, as was observed in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser*(3), it is difficult to see how a person who omitted or neglected to have such a conveyance set aside within the time allowed for a suit for doing this can afterwards challenge its operation or effect and recover property, "the title in which "it, if valid, operated to transfer, such transfer being further "actually carried out." In the cases now under appeal, however, the finding of the lower Appellate Court is that neither was there consideration for the documents on which appellant relies nor did possession of the property pass under them, but that appellant subsequently got possession of the lands by persuading the tenants to join him to defeat the plaintiff's title. Such being the case, appellant's possession must be held to be that of a trespasser and consequently these suits brought within twelve years from such possession being taken are not time-barred.

I concur therefore in dismissing both these appeals with costs.

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(1) I.L.R., 14 Mad., 26. (2) I.L.R., 15 Cal., 58. (3) I.L.R., 12 Cal., 69.