

JUDGMENT:—Upon the finding we must allow this appeal, and setting aside the decree of the Lower Appellate Court, restore that of the Court of First Instance.

GOVINDA
PILLAI
v.
RAMANUVA
PILLAI.

The present case is not on all fours with that in *Mohima Chunder Mosoomdar v. Moresh Chunder Neoghi*(1). In that case the defendants denied the plaintiff's title as proprietor and set up that of a third party. Here the plaintiff's title is found to be established, and the defendants' plea of non-payment of melvaram is found not to have been accompanied by assertion of adverse title.

We, therefore, allow this appeal and decree as above and direct respondents to pay appellant's costs in this Court and in the lower Appellate Court.

APPELLATE CIVIL.

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

VENKATANARASIMHULU (PLAINTIFF), APPELLANT,

1894.
Dec. 12.

v.

PERAMMA (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, sch. II, arts. 62, 97—Suit to recover price paid on a void sale.

In 1885 the plaintiff obtained from the defendant a sale-deed of a certain land and paid part of the purchase money. Subsequently a judgment-creditor of the defendant's husband sought to execute his decree against the land in question, and eventually, in October 1889, obtained a decree in the High Court under which the plaintiff was ejected. The plaintiff now sued in 1892, less than three years from the date of the last-mentioned decree, to recover the sum paid by him to the defendant as above mentioned :

Held, that the suit was not barred by limitation.

SECOND APPEAL against the decree of N. Swaminadha Ayyar, Subordinate Judge of Vizagapatam, in appeal suit No. 346 of 1893, confirming the decree of Y. Janakiramayya, District Munsif of Vizagapatam, in original suit No. 632 of 1892.

Suit to recover from defendant Rs. 800. It was averred in the plaint that on 16th April 1885 the defendant executed a

(1) I.L.R., 16 Calc., 473.

* Second Appeal No. 1327 of 1894.

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sale-deed of certain land and received the agreed consideration and placed the plaintiff in possession; that the defendant sued in original suit No. 414 of 1885 in the Court of the District Munsif of Bimlipatam for the cancellation of the sale-deed, but her suit was dismissed; that subsequently a judgment-creditor of the defendant's husband sought to execute his decree against the land in question, and eventually, on the 31st October 1889, obtained a judgment in his favour in the High Court, where it was held that the present defendant had no title to convey to the present plaintiff; and that the present plaintiff was ousted in consequence of the decision of the High Court. This suit was instituted less than three years from the date of the judgment of the High Court. The District Munsif held that the suit was barred by limitation and his judgment was upheld on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Ramachandra Rau Sahib for appellant.

Respondent was not represented.

JUDGMENT.--The article applicable is clearly No. 97 of schedule II, and the cause of action accrued on the date of failure of the consideration, *i.e.*, the date of the High Court's decree, dated 31st October 1889. This suit brought within three years from that date is in time.

It has been found in a former suit between the same parties that Rs. 737 were paid and that the sale-deed could not be set aside by the respondent by whom it was executed voluntarily.

In order that the cause of action should run from the date of the sale, it must be found that the sale was void *ab initio*.

It is only in such a case that article 62 can apply, *cf. Hanuman Kamat v. Hanuman Mandur*(1). It was found, no doubt, in the former suit that the plaintiff had the means of knowing that defendant's husband had been absent for only three or four years. But the ground of the present suit is failure of consideration, which must depend upon the result of the suit and not on a particular finding in that suit.

We set aside the decrees of the Lower Courts and remand the suit for replacement on the file and the disposal on merits.

The costs hitherto incurred will abide and follow the result.

(1) I.L.R., 19, Calc., 123.