MUTHAYYA RAJAGOPALA THEVAR v. MINAKSHI SUNDARA NACHIAR.

adopted son is completely severed from his natural family. None of the texts quoted to us is in conflict with that ruling.

It is unnecessary to consider or decide whether the natural relationship would be efficacious to intercept an escheat to the Crown.

The appeal, therefore, fails and is dismissed with separate costs for each set of respondents except in regard to the vakil's fee of which each will get a moiety.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1901. August 30.

SRIRAMULU (PLAINTIFF), APPELLANT,

v.

CHINNA VENKATASAMI (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, arts. 62 and 97—Assignment of mortgage over immoveable property by unregistered document—Receipt by assignor of mortgage amount in fraud of assignee—Suit by assignee against assignor within three years of receipt of mortgage money.

By an agreement in writing, but not registered, bearing date 21st August 1895, defendant assigned a mortgage over certain lands to plaintiff for a consideration which was duly paid. In 1898, the mortgagor brought a suit against plaintiff and defendant to redeem the mortgage and to recover possession of the property, and a decree was passed on 15th October of that year, in which the Court refused to recognise plaintiff's title because of the non-registration of the assignment. Defendant thereupon received the mortgage amount as mortgagee from the mortgagor. Within three years of the said receipt by defendant of the mortgage amount, plaintiff brought this suit to recover from defendant the sum paid as consideration for the transfer of the mortgage in 1895. Upon the defence of limitation being raised:

Held, that the suit was not barred. Defendant by receiving the mortgage amount from the mortgagor, in fraud of plaintiff's right, received it for plaintiff's use. The suit was therefore governed by article 62 of schedule II to the Limitation Act and was not barred inasmuch as it had been instituted within three years of the receipt of the money by defendant. Moreover, as possession of the

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* Second Appeal No. 454 of 1900 against the decree of M. D. Bell, District Judge of Vizagapatam, in Appeal Suit No. 235 of 1899, affirming the decree of C. Bapayya Pantulu, District Munsif of Vizagapatam, in Original Suit No. 171 of 1899.

mortgaged land had been given, under the document of 1895, to plaintiff and held by him until its redemption by the mortgagor, there was consideration at the time when the assignment was made, and that consideration afterwards failed. Inasmuch as the suit had been brought within three years of the date of the failure of consideration, article 97 would apply and the suit would not be barred.

SUIT to recover the principal and interest alleged to be due to plaintiff under an agreement, as witnessed by an unregistered document. Plaintiff and defendant were brothers, and in a previous partition of their property with their father, plaintiff acted as guardian of defendant, who was then a minor. Amongst other property that fell to the defendant's share was a mortgage on lands. This mortgage, defendant, on attaining his majority, agreed to assign to plaintiff, in consideration of a payment by plaintiff of a certain sum of money. The agreement was reduced to writing in the form of a puroni, or letter, which purported to transfer the mortgage to plaintiff, but which was never registered. Plaintiff paid the agreed sum to defendant and obtained a receipt. Both letter and receipt bore date 21st August 1895. Plaintiff was also put into possession of the mortgaged property and of the deed of mortgage. In 1898, the mortgagor brought a suit against the present plaintiff and defendant to redeem the mortgage and to recover possession of the property. The Court granted a decree against the present plaintiff, holding that, inasmuch as the letter of 21st August 1895, which purported to transfer the mortgage to plaintiff, had not been registered, it was inoperative and plaintiff had no title. That decree was passed on 15th October 1898. Defendant, as mortgagee, received the mortgage money from the mortgagor. Plaintiff now sued defendant for the amount paid to him in consideration of the assignment of the mortgage, claiming that the cause of action had arisen at the date on which the last-mentioned decree had been passed. The suit was instituted within three years of the receipt of the mortgage amount by defendant from the mortgagor. There was no defence on the merits, but defendant pleaded that the claim was barred by limitation. The Munsif upheld this plea. He considered that the cause of action was based on the document of 21st August 1895 and not on the decree of 1898, and dismissed the suit.

The plaintiff appealed to the District Judge who said:—"The Munsif has dismissed the suit on the ground that it was barred by limitation. The question is whether article 62 or 97 of the

SRIRAMULU v. CHINNA VENKATA-SAMI.

Limitation Act applies. I am clearly of opinion that the Munsif was right in applying article 62. In the present case as in *Hanuman Kamut* v. *Hanuman Mandur*(1) there was no subsequent failure of the consideration upon which the money was paid, but the consideration was void from the beginning. The present suit is based on the *puroni* and the time of limitation begins from the date on which the money was paid." He dismissed the appeal.

Plaintiff preferred this second appeal.

V. Krishnasami Ayyar for appellant.

V. Ramesam for respondent.

JUDGMENT.—We think that the Courts below were in error in having dismissed the plaintiff's suit as barred by limitation. No doubt the mortgage assignment, dated 21st August 1895, executed by the defendant to the plaintiff, being unregistered, could not affect the mortgaged property. It was inoperative as regards the land mortgaged as security for the debt, but it was not inoperative as an assignment of the debt itself; *Jagappa* v. *Latchappa*(2); *Gomaji* v. *Subbarayappa*(3); and *Subramaniam* v. *Perumal Reddi*(4).

Whether the defendant in fraud of the plaintiff's right received the money from the mortgagor, he must be regarded as having received it for the plaintiff's use. In this view the suit would fall under article 62 of the Limitation Act, and was not barred since it was brought within three years of the receipt of the money by the defendant. Moreover, under the instrument of the 21st August 1895, possession of the mortgaged land passed from the defendant to the plaintiff who enjoyed the usufruct until the mortgagor, having paid the mortgage money to the defendant, recovered the land from plaintiff. There was, therefore, consideration at the time when the assignment was made and that consideration afterwards failed. In this view article 97 of schedule 2 of the Limitation Act would seem to be applicable and the suit regarded as one to recover money paid on an existing consideration which afterwards failed would not be barred, for it was brought within three years from the date of the failure of consideration.

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(1) I.L.R., 15 Calc., 51.
(2) I.L.R., 5 Mad., 119.
(3) I.L.R., 15 Mad., 253.
(4) I.L.R., 18 Mad., 454.

In any view, therefore, the suit was not barred. There is no defence on the merits. We must therefore set aside the decrees of the Courts below and, allowing the appeal, give plaintiff a decree for the sum sued for with costs throughout. Interest will be allowed from date of plaint at six per cent. per annum.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

CHENNU MENON AND OTHERS (DEFENDANTS NOS. 2, 3, 6, 7, 9 AND 10), APPELLANTS,

v.

KRISHNAN AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 4, 5, 8, 11, 13, AND 18 TO 24), RESPONDENTS.*

1901. September 13.

Civil Procedure Code—Act XIV of 1882, s. 30—Leave to sue given after commencement of action—Previous refusal—Validity of suit.

Leave to sue under section 30 of the Code of Civil Procedure need not necessarily precede the commencement of the suit, but may be given after it has commenced. Where leave has been so given, it is immaterial that an application for permission to sue has been previously refused.

SUIT to recover certain property with arrears of rent. Plaintiff sued as the present manager of the Cherupalangat samuham of which defendants Nos. 18 to 23 were also members. The property claimed belonged to the samuham, and had been demised on kanom by a former manager of the samuham to the karnavan of defendants Nos. 1 to 17. The defence was raised that plaintiff had no right to sue, and that as there were more than fifty members in the samuham, the suit was opposed to section 30 of the Code of Civil Procedure. Leave to sue under section 30 was thereupon obtained during the course of the case. The seventh issue was as follows:—"Whether there are other members in the samuham not brought in as parties to the suit and if so, whether the suit is

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* Second Appeal No. 326 of 1900 against the decree of K. Krishna Rao, Subordinate Judge of Calicut, in Appeal Suit No. 161 of 1899, affirming the decree of V. Rama Sastri, District Munsif of Betutnad, in Original Suit No. 335 of 1897.