the sum of Rs. 1,092-3-3. The defendant must also be directed to give up the mortgage instrument to the plaintiff.

The respondent must pay the costs here and in the Court below on the sum allowed.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Bhashyam Ayyangar.

1901. April 19, 23.

SESHACHALA NAICKAR (DEFENDANT), APPELLANT,

v.

VARADA CHARIAR (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 116—Receipt for money, containing terms of sale, signed by vendor and not by purchaser—"Contract in writing registered."

The mere recital, in a sale-deed, that the consideration has been paid is not a "contract in writing" to pay the consideration, within the meaning of article 116 of the second schedule to the Limitation Act; and where a sale-deed contains the contract of sale which has preceded the actual sale, article 116 may apply even though the sale-deed contains an acknowledgment that the consideration has been paid, when in fact it has not been paid.

Avuthala v. *Dayamma*, (I.L.R., 24 Mad., 233), followed.

Semble, that a document executed and given by a vendor of property to his purchaser, and registered, acknowledging payment of a sum of money on account of the purchase price, and providing that the balance should be paid within a certain date, is a "contract in writing registered," within the meaning of article 116 of the second schedule of the Limitation Act, though it be not signed by the purchaser.

Kotappa v. *Vallur Zamindar*, (I.L.R., 25 Mad., 50), and *Ambalavana Pandaram* v. *Vayuran*, (I.L.R., 19 Mad., 52), approved.

SUIT for money. By a receipt, executed by plaintiff on 17th November 1893, (filed as exhibit IV), he acknowledged that defendant had that day paid him the sum of Rs. 50, as an advance on account of Rs. 10,000, the price agreed to be paid by defendant to plaintiff for the purchase of certain property. The receipt, which was signed only by plaintiff, concluded with the following clause :—"You (defendant) should within two months from this day pay the remaining sum of Rs. 9,950—after deducting these fifty

* Original Side Appeal No. 32 of 1900 against the decree of Mr. Justice Shephard in Civil Suit No. 113 of 1900.

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rupees and duly get a deed executed and registered, &c. . . . If you fail to pay the whole amount within the two months, you should forfeit the abovementioned advance." This document was not registered.

On the same date defendant executed a document (filed as exhibit B), addressed to plaintiff, containing the following:—"As you have sold to me for Rs. 10,000 and executed and given a sale of the properties . . . . , I shall, as I have arranged with you to pay off the whole of the amount thereof, as soon as I go to Hyderabad and return, pay you the same as soon as I go and return."

The balance of purchase money was not paid on the date fixed for its payment in exhibit IV, namely, 17th January 1894. On 19th May 1894 plaintiff executed and gave to defendant a deed of sale of the property. This document, (which was registered and filed as exhibit A), recited the fact that the property had been sold to defendant absolutely for Rs. 10,000, and that Rs. 50 had been received as an advance on 17th November 1893 (the date of exhibit IV). It concluded as follows:—"As I have received from you on this date the remaining rupees nine thousand nine hundred and fifty, and delivered the aforesaid properties in your possession, you yourself shall from this date take possession of the aforesaid properties, and use and enjoy the same from son to grandson and so on in succession, with power to give away in gift, mortgage and sell, etc. To this effect is the sale-deed of land, house and ground, etc., written and given with my free will and consent."

The balance of purchase money had not in fact been paid on the date of exhibit A, though the document contained an acknowledgment thereof. Plaintiff alleged that sums amounting only to Rs. 2,655 had been paid since and that a balance of Rs. 7,345 was still due. Defendant contended that the whole of the purchase money had been paid three days after the sale-deed, and that the payments admitted by plaintiff related to another transaction. He pleaded that the claim was barred by limitation. The plaint was filed on 16th July 1900, and plaintiff relied on a payment alleged to have been made on account, on 9th September 1897, as giving a fresh starting point for limitation. Defendant denied having made this payment, but the Court found that it had been made and that all the part-payments, including this one, had been paid towards the purchase price. A decree for the amount sued for was passed in plaintiff's favour.

Defendant preferred this appeal, on the ground that the claim was barred by limitation.

Sivasami Ayyar for appellant.

R. Kuppusami Ayyar and *Kumarasami Sastri* for respondent.

JUDGMENT.—This is an appeal by the defendant against the decree of Mr. Justice Shephard directing the defendant to pay, with future interest to the plaintiff, the sum of Rs. 7,345 being the amount claimed in the plaint as the balance of the amount of consideration for a sale-deed, dated 19th May 1894, executed by the plaintiff in favour of defendant.

The only ground on which this appeal is preferred is that the suit is barred by limitation.

The consideration for the sale of the house and other properties comprised in the sale-deed was Rs. 10,000 and the plaint sets forth that part-payments amounting to Rs. 2,655 were, subsequent to the execution of the sale-deed and delivery of the property, made by the defendant from time to time, the last of such part-payments having been made on 9th September 1897.

The suit was brought for the recovery of the balance, viz., Rs. 7,345, and it is stated in paragraph 5 of the plaint that the cause of action arose on 9th September 1897, the date of such last part-payment and on 19th May 1894, the date of the sale-deed. The alleged part-payment of 9th September 1897 can furnish a fresh starting point for limitation under section 20 of Act XV of 1877 only on the supposition that the fact of such payment appears in the handwriting of the person making the same. The plaint therefore must be taken as alleging by necessary implication that the fact of such part-payment appears in the handwriting of the defendant or his agent. The defendant, while admitting all the part-payments except the last, pleaded that they were not made towards the consideration of the sale-deed but for a separate and independent transaction. The learned Judge who tried the suit held that all the part-payments, including the last part-payment, were made towards the consideration of the sale-deed; and this finding is not impugned before us.

The plea of limitation was set up in the written statement and an issue was also taken. In the course of the trial of the suit the plea of limitation was abandoned by the defendant's pleader when it was discovered that the plaint was really presented on 16th July 1900, the day on which the Court re-opened after the long vacation

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which commenced on 7th May 1900 and not on the 27th July as was erroneously assumed. The learned Judge gave a decree in favour of the plaintiff on the merits.

It is now urged on behalf of the appellant that the article of the Limitation Act applicable to the suit is article 115 of the second schedule, which prescribes a period of three years, and not article 116 or article 120, under either of which the period is six years. It is conceded that, if the period of limitation applicable be six years, the suit is not barred by limitation in any view and that the plaintiff need not rely upon the part-payment of 9th September 1897 or any other part-payment. On the other hand, if the period of limitation applicable be three years, the suit will be barred by limitation, but for the part-payments within three years before the date of suit and part-payments within three years after 19th May 1894, which payments are all set forth in exhibit D.

The appellant's pleader contends that the contract to pay the purchase money is not "in writing registered" within the meaning of article 116, but that the defendant's obligation, if any, to pay the purchase money arises from a contract "not in writing registered" and that therefore article 115 governs the suit.

His contention eventually was that there was an oral contract implied by law collateral to the sale-deed after the same was executed by the plaintiff and accepted by the defendant. He evidently overlooked exhibit IV in the case which was not brought to our notice during the argument of the appeal. If that exhibit had been brought to notice the argument would have been considerably simplified. That is a receipt, dated 17th November 1893, given by the plaintiff to the defendant acknowledging payment in advance of Rs. 50 in part-payment of the price of Rs. 10,000. It contains the terms of the contract of sale, fixing a period of two months from 17th November 1893 for payment of the balance of purchase money, viz., Rs. 9,950, and the execution of a conveyance. It also provides that in default of payment of the balance of the purchase money within the stipulated time, the defendant should forfeit the Rs. 50 paid by him in advance.

The balance of purchase money was not paid on or before 17th January 1894, the time fixed in exhibit IV; but the conveyance exhibit A was nevertheless executed on 19th May 1894. It recites the payment of Rs. 50 in advance on 17th November 1893 and

acknowledges the receipt of the balance of purchase money as paid on the date of the sale-deed. It is therefore clear that the plaintiff, the vendor, waived the stipulation as to time and completed the sale on 19th May 1894 and delivered to the defendant possession of the properties sold. In a recent decision of the Privy Council, *Sah Lal Chand* v. *Indarjit*(1), it is laid down as the settled law that notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. Under the contract of sale which was entered into in November 1893, the terms of which were reduced to writing in exhibit IV, the defendant agreed to pay the purchase money on or before 17th January 1894, and in the sale-deed the same is acknowledged to have been paid to the plaintiff on the 19th May 1894, when the conveyance was executed, though, in fact, it was not so paid. The present suit therefore is based, not on any contract implied by law on the execution of the sale-deed, but upon the express contract of sale of 17th November 1893, claiming compensation for breach of the contract to pay the purchase money on obtaining the conveyance. Exhibit IV is not registered and the question of limitation therefore is governed by article 115. If the receipt had been registered, we should have been prepared to hold, following the decision of this Court in *Ambalavana Pandaram* v. *Vaguran*(2), and the recent decision of this Court in *Kotappa* v. *Vallur Zamindar*(3), that article 116 would be applicable to the case notwithstanding that exhibit IV was not signed by the defendant. In *Avuthala* v. *Dayumma*(4) which was cited by the learned pleader for the appellant, it was not only held that a suit to enforce the vendor's lien was governed by article 111 and not by article 132, but that, as regards the personal remedy, the benefit of the six years given by article 116 was inapplicable, though the sale-deed which simply recited that the price had been paid was registered. In that decision we concur, for the mere recital in the sale-deed that the consideration had been paid cannot be construed as a contract in writing to pay the consideration money. If the oral agreement or contract of sale which immediately preceded the actual sale be also reduced to writing, as is very often the case, in the deed of sale itself which is registered, the case might be different and article 116 would govern it though

(1) L.R., 27 I.A., 93; I.L.R., 22 All., 370. (2) I.L.R., 19 Mad., 52.
(3) I.L.R., 25 Mad., 59. (4) I.L.R., 24 Mad., 233.

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the sale-deed also acknowledges the payment and receipt of the price when in fact it was not paid, but its receipt was acknowledged in anticipation of payment being made. In the present case, not only is the preliminary contract of sale not reduced to writing in the sale-deed, but it had already been reduced to writing in exhibit IV, which was not registered. According to the terms of the contract of sale the cause of action for enforcing the payment of purchase money by specific performance against the vendee arose on the 17th of January 1894. The time limited for the specific performance having been waived by the plaintiff and the conveyance having been executed on the 19th of May 1894, time for payment of the purchase money was really extended till that date, and the price became payable on that day and the cause of action for the recovery of the purchase money accrued on that day. Even assuming that the limitation commenced on the 17th of January 1894, it will make no difference in the case, inasmuch as on the 19th of May 1894 there was an acknowledgment of liability in writing by the defendant in exhibit B within the meaning of section 19 of the Limitation Act and there were several part-payments subsequent thereto up to the 19th of July 1896 and there was a further part-payment on the 9th of September 1897. The suit having been brought on the 16th of July 1900, it was within three years from the dates of the last two part-payments and would therefore not be barred under article 115 of the Limitation Act, if, as found by the learned Judge, the part-payments have been made, and if, as averred in law, in the plaint, the fact of part-payments or at any rate of the last two part-payments appears in the handwriting of the defendant or his agent. The defendant having abandoned the plea of limitation during the course of the trial of the suit and, as we are told by the respondent's pleader, who also appeared at the original trial, before the plaintiff's case was closed, we cannot allow the appellant to revive, in appeal, the plea of limitation which he had deliberately abandoned in the Original Court, when, as in this case, such plea cannot be decided by the Appellate Court either upon facts as found by the learned Judge or as admitted by the defendant; and it would be necessary to remit the issue of limitation to the learned Judge for further trial if the plea of limitation were now allowed to be raised.

The appeal therefore fails and it is dismissed with costs.