BHIMARAJU CHETTI v. SRI KUNJA BEHARI GAJENDRA DEVU.

been an outright sale of the zamindari and not a mere mortgage, it could hardly be seriously contended that the zamindar's mortgage interest in the village would pass under such conveyance.

The case of *Rooke* v. *Lord Kensington*(1), which was cited on behalf of the respondent, is a strong authority in support of his contention. In that case, Lord Kensington, the mortgagor, after specifying certain properties, which were mortgaged, also conveyed by way of mortgage, "all other, the lands, tenements and here-"ditaments (if any), in the County of Middlesex." At the date of the mortgage, the mortgagor was seized in fee of a manor at Killahan in the County of Middlesex; and the question arose whether the mortgage instrument conveyed to the mortgagee that manor also. It was held that it did not, Vice-Chancellor Wood observing as follows:—"I think the clear intent and "purport must be held to be simply a sweeping in of other property "*ejusdem generis* with the property which had been so conveyed, if "any there should be; certainly not to include a copyhold property, "and manorial rights in property of a totally different character "from anything attempted to be conveyed or specified throughout "the deed."

The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

1901. March 20.

KOTAPPA (PLAINTIFF), APPELLANT,

v.

VALLUR ZAMINDAR (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 116—"Contract in writing registered" signed by one party thereto—Plaint—Sufficient disclosure of cause of action.

During the course of certain litigation in which B was suing A on a promissory note a compromise was arrived at under which A undertook to execute

(1) 25 L.J., (Ch.), 795.

* Second Appeal No. 1454 of 1899, against the decree of P. S. Gurumurthi Ayya, Subordinate Judge of Kistna, in Appeal Suit No. 543 of 1898, reversing the decree of A. Ramaswami Sastri, District Munsif of Masulipatam, in Original Suit No. 336 of 1896.

a mortgage in favour of B and, in consideration thereof, B undertook to withdraw an appeal which was pending at the time. The mortgage was executed, and the undertaking to withdraw the appeal was embodied in the mortgage deed, which was registered, but signed only by A. B, in breach of his undertaking, permitted the appeal to proceed, and obtained a decree on 20th November 1891, which he subsequently executed against A, recovering the value of the promissory note upon which he had originally sued. He also retained the mortgage which had been executed in the compromise. A now sued to recover from B the amount which B had collected under the decree, stating the cause of action as having arisen on the date of that collection, namely, 29th October 1893, when it was contended that the suit was not maintainable inasmuch as the decree had not been set aside, and that even if treated as a suit for damages for breach of the undertaking to withdraw the appeal, it was barred, as the date of the breach was the date of the decree, (viz., 20th November 1891), which had been wrongly obtained, and this suit had not been brought within three years from that date, the plaint having been filed on 14th September 1896:

Held, that inasmuch as all necessary allegations were made in the plaint, the contract and its breach being alleged, and as the defendant understood what the claim against him was, the plaint sufficiently disclosed a cause of action for damages for the breach of contract:

Held also, that the undertaking in the mortgage was "an agreement in writing registered" within the meaning of article 116 of the Limitation Act and that consequently the claim was not barred. The fact that the instrument was not signed by B did not take the case out of the operation of that article.

SUIT for money. Defendant had, in 1887, sued plaintiff on a promissory note. The case was remanded by the High Court to the District Court, whereupon the parties entered into a compromise, in pursuance of the terms of which plaintiff executed a mortgage deed in favour of defendant, in settlement of the claim. This mortgage bore date the 6th of May 1891, and, after reciting the fact that the present defendant had filed the suit against the present plaintiff, and that an appeal had been preferred, witnessed that the present plaintiff had agreed to pay a specified sum and had mortgaged certain property as security for its payment. The deed concluded thus:—"These mortgaged properties shall remain in my possession alone. I bind myself to discharge the said debt by means of the mortgaged property detailed above by means of my other property and by myself personally. Inasmuch as a second appeal has been preferred by you in the High Court at Madras in No. 1447 of 1889 in connection with the said suit, a petition shall be presented to stop enquiry regarding my share of the debt. This mortgage deed has been executed with consent. (Mark of) Ganne Kotayya."

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The deed was duly executed by plaintiff and registered. Plaintiff took no steps to stop the suit, and defendant also permitted it to proceed, in spite of the compromise, and subsequently executed the decree, which was passed in his favour on 20th November 1891. Plaintiff now sued to recover the sum taken from him by defendant under the decree, contending that the latter had been fraudulently obtained, having regard to the compromise. Defendant pleaded, *inter alia*, that he had executed the decree as plaintiff had been in default in carrying out the terms of the compromise.

The plaint alleged that plaintiff and another were raiyats of defendant, and had executed a promissory note in defendant's favour in respect of a debt due to defendant from a third person; that defendant had brought a suit on the note, when the claim was dismissed for want of consideration; that defendant had then appealed to the District Court, when the decree of the lower Court was confirmed; that defendant had preferred a second appeal to the High Court, when the suit was thrice remanded to the District Court for a finding; that while the second appeal was pending in the High Court, a compromise had been effected, by the terms of which plaintiff was to execute a mortgage and defendant should hold plaintiff free from all further responsibility and file petitions to stay the appeal; that plaintiff had duly executed the mortgage deed, which was registered; that defendant had filed a petition in the District Court, and plaintiff knew no more of the matter till a subsequent date, when defendant, who, in fact, obtained a decree, executed it against plaintiff, and attached his property, whereupon plaintiff had to pay the amount originally due on the promissory note. Plaintiff charged that defendant had acted fraudulently in obtaining and executing the decree in spite of the mortgage deed given under the compromise. He claimed to recover the amount taken from him by defendant in the execution proceedings, and stated the cause of action to have arisen at the date when the money had been collected from him in execution of the decree, viz., 29th October 1893. The plaint was filed on 14th September 1896.

The District Munsif held that it was the duty of the defendant to have notified the compromise to the Court, after accepting this mortgage in satisfaction of his claim. He decreed in plaintiff's favour, but the Subordinate Judge reversed this decree on appeal

Plaintiff preferred this second appeal.

Mr. *Joseph Satya Nadar* and *T. Natesa Ayyar*, for appellant, argued on the facts as stated above.

V. Krishnasami Ayyar and *K. Subrahmania Sastri* for respondent:—The plaint, as framed, is for the recovery of money collected under a decree fraudulently obtained and the cause of action is stated to arise on the date on which the money was collected. It cannot now be construed, in second appeal, to be a plaint brought for damages for breach of contract. In the Courts below, this contention was never even urged. The suit as framed will not lie for the recovery of money collected under a decree so long as the decree stands (*Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery*(1)). The principle that money recovered under legal process cannot be recovered back has been upheld in many decided cases (*Marriot* v. *Hampton*(2)). Until the decree is set aside in a properly-framed suit, no suit will lie for the recovery of money collected under it. The cases of *Krishnasami Ayyangar* v. *Ranga Ayyangar*(3); *Mallamma* v. *Venkappa*(4); and *Viraraghava* v. *Subbakka*(5) relating to adjustments do not apply. If a suit be brought for recovery of damages for breach of contract, the contract being to represent to the Court the fact of an adjustment and to withdraw an appeal, the cause of action arises on the date of the decree which the contracting party has permitted the Court to pass in breach of his contract. The suit is therefore barred, as it was brought more than three years from the date of the decree, which is the real date of the breach. So, even if this suit is construed to be a suit for damages for breach of contract, it must be dismissed on the ground of limitation, as it has been brought more than three years from the date of the breach. [BHASHYAM AYYANGAR, J.:—The money was recovered twice over by you and it is sufficiently clear that the defendant understood the suit to be one for damages for breach of contract. As for limitation, there is an undertaking in the registered mortgage deed that you would represent to the Court the fact of the compromise made by you outside the Court and this brings the case under article 116.] This mortgage deed is not signed by defendant and cannot in law amount to a "contract in writing registered" within the meaning of article 116. The mortgagor signed it and he chose to recite the undertaking in the

(1) 10 M.I.A., 203.
(2) 7 T.R., 269; 2 Smith's L.C., p. 409.
(3) I.L.R., 20 Mad., 369.
(4) I.L.R., 8 Mad., 227.
(5) I.L.R., 5 Mad., 397.

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deed to which he alone affixed his signature. If the undertaking were of such a nature as to be a term of the actual mortgage, defendant might have been charged with constructive notice of it. But it relates to a matter quite extraneous to the mortgage, and therefore express notice of it on defendant's part must be proved. There has been no such proof. [BHASHYAM AYYANGAR, J.:—You have accepted it and even filed a petition stating that the matter was adjusted out of Court, though the lower Court refused to act upon it.]

JUDGMENT.—The only right of action to which the plaintiff, on the allegations made in the plaint, could be entitled, is a right to recover damages for breach of contract. The plaint certainly does not set out in terms that cause of action for the plaintiff seeks to recover the money extracted from him under the decree of the High Court with interest thereon and does not ask for damages. But all the necessary allegations are made in the plaint. The contract and the breach of it are alleged and the written statement shows clearly that the defendant understood what the claim against him was. We think the plaint must be read as sufficiently disclosing a cause of action. It cannot possibly be said that the defendant has been prejudiced by the omission to ask specifically for damages.

Then it is said that the suit is barred by limitation because the breach was made more than three years before the suit was filed. The answer to this is that the undertaking of the defendant to withdraw his second appeal was embodied in the registered mortgage instrument which he accepted from the plaintiff. The fact that the instrument is not signed by the defendant does not take the case out of the operation of article 115 of the schedule to the Limitation Act. We, therefore, hold that the suit is not barred by limitation. It is unnecessary to consider whether any cause of action would have accrued on the mere passing of the decree without any money being exacted under it. The plaintiff is clearly not entitled to the whole amount of the claim. The damage suffered by him is the amount levied from him *minus* the amount due by him under the mortgage with interest up to the date of the tender of the money (viz., the 5th September 1893) that tender having been refused.

We must reverse the decree of the Subordinate Judge and restore that of the District Munsif, modifying it by substituting

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.