

boy for breach of a contract agreeing to marry the boy to the plaintiff's daughter falls within article 55, clause (g) of the Provincial Small Cause Courts Act "which relates to a suit for breach of contract of betrothal or promise of marriage." We hold, agreeing with the decision of the Calcutta High Court in *Kali Sunker Dass v. Koylash Chunder Dass*(1), that the article covers such a case; see also *Nga La v. Nga Than*(2). The fact that the article exempts from the jurisdiction of a Small Cause Court a suit for breach of a contract of betrothal which must be against a person other than the husband or wife supports that view.

We have no doubt that the claim for compensation for the loss sustained by the plaintiff in consequence of the articles and provisions got ready by him for the marriage became wasted must be treated as a claim for compensation for the breach of the contract. Our answer to the reference is that the suit is not cognizable by a Small Cause Court.

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POKER.  
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## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.*

VAIRAVAN CHETTIAR AND ANOTHER (PLAINTIFFS NOS. 2  
AND 4), APPELLANTS,

1913.  
April 23  
and 29.

v.

AVICHA CHETTIAR AND THREE OTHERS (DEFENDANTS NOS.  
1 TO 3 AND THIRD PLAINTIFF), RESPONDENTS.\*

*Limitation Act (XV of 1877), arts. 36, 115 and 120—Contract to sell another's goods without authority, breach of—Cause of action only in contract and not in tort as on misrepresentation—Indian Contract Act (IX of 1872), sec. 235.*

A suit against a person for breach of contract to sell to the plaintiff certain goods of another on the implied representation that he had authority from his principal to sell them, when in fact he had none, is not one arising in tort or one independent of contract but one arising out of and incident to a contract and is governed by article 115 of the Limitation Act (XV of 1877) and not by article 36 or 120.

Section 235 of the Indian Contract Act, discussed.

APPEAL against the decree of V. K. DESIKACHARIAR, the Subordinate Judge of Negapatam, in Original Suit No. 28 of 1907.

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(1) (1888) I.L.R., 15 Calc., 833.

(2) (1912) 14 I.C., 837.

\* Appeal No. 139 of 1908.

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The plaintiffs alleged (i) that the third defendant on behalf of his father Chockalinga Chettiyar, who was the guardian of defendants Nos. 1 and 2 agreed by means of Exhibit C on 31st July 1903 with the plaintiffs' predecessor in title (a) that the barque 'Vettivel' should be sold, (b) that the pass for it should be transferred to the plaintiffs' predecessor-in-title within one month after the vessel returned from its then voyage to Negapatam or Tondi, (c) that though the vessel returned to Tondi on 12th January 1904, no sale was effected nor the pass transferred, and (d) that the consideration paid for the agreement should be returned. The plaint was filed on 31st July 1907.

The original plaint did not mention any ground of exemption from limitation on the impression that the cause of action arose in August 1904. But in the amended plaint it was stated that the cause of action arose on 13th February 1904, and that the suit was not barred by limitation on account of an acknowledgment of liability contained in a power of attorney (Exhibit A) executed on 28th November 1906, by the mother of first defendant and the mother of the second defendant in favour of the third defendant. The defendants denied that the third defendant had any authority to execute Exhibit C on behalf of his father or that it was ratified or that any liability was acknowledged in Exhibit A. The defendants also stated that the suit was barred by limitation.

Upholding the contentions of the defendants the suit was dismissed against all the defendants.

Plaintiffs preferred this appeal.

*K. Srinivasa Ayyangar* for the appellants.

*S. Srinivasa Ayyangar* for respondents Nos. 1 and 2.

*K. V. Krishnaswami Ayyar* for the third respondent.

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JUDGMENT.—So far as the first and second respondents are concerned this appeal must fail on the finding of the Subordinate Judge, with which we agree, that there is no evidence that the third defendant (third respondent) executed Exhibit C with the authority of his father, Chockalinga or that Exhibit C was subsequently ratified either by Chockalinga or by Srirangam Achi and Sivagami who succeeded Chockalinga in the guardianship of the first and second defendants. The third defendant's testimony is completely against the plaintiffs. It may be that he is not speaking the truth, but in the absence of any evidence

to prove the plaintiff's case their claim against the first and second respondents must fail. Exhibit A does not show that Srirangam Achi and Sivaḡami intended to ratify Exhibit C. The appeal must therefore be dismissed with costs as against the first and second respondents.

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The next question is whether the third defendant is liable to compensate the plaintiffs for the damage caused to them by his executing Exhibit C without the authority of Chockalinga. Several questions of fact and law, the solution of some of which is not free from difficulty have been argued in connection with this point, but we abstain from discussing them as we are of opinion that the claim of the third defendant must fail on the ground of limitation.

The covenant in Exhibit C is that the barque 'Vettivel' should be sold and the pass for it standing in the name of Chockalinga should be transferred to the plaintiffs within one month after the barque returned to Negapatam or Tondi. This took place according to the plaintiffs on the 10th of January 1904. The suit was instituted on the 31st of July 1907 that is more than three and a half years after the boat returned to Tondi. What is the article of the Limitation Act applicable to the case? The third respondent contends that it is article 36 or article 115 while the appellant urges that it is article 120, no other article being applicable. We do not think that article 36 can be held to be applicable. It relates to a suit for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not specially provided for in the schedule. Assuming that the action may be held to be one in tort, it is certainly not for a wrong independent of contract but one connected with a contract and arising from one of the incidents of a contract. A person entering into a contract on behalf of a principal ought not to do so without authority from the principal. His acting on behalf of the alleged principal amounts to a representation that he has authority from the latter to do so. His acting without such authority is a wrong connected with the contract. The case cannot therefore fall within the purview of article 36.

Article 115 provides "for compensation for the breach of any contract express or implied, not in writing registered and not herein specifically provided for." Is the cause of action in this case the breach of an implied contract?

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The Indian Contract Act, section 235, enacts as follows :—  
 “A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.”  
 In treating of the measure of damages awardable against an agent acting without the authority of the principal, Messrs. Pollock and Mulla observe that in English law “the duty is grounded on an implied warranty by the agent that he has the authority, and the action being in contract lies even if the agent honestly believed he had authority and against executors: which in England an action in tort for deceit does not . . . It is open to question whether in India the compensation recoverable under the section will be assessed on the same principle. The language used seems more appropriate to an action in the nature of deceit than to one founded on warranty.” The language of the section no doubt supports the statements of the learned commentators, that the suit appears to be treated as one for damages for misrepresentation and not one on a contract. Section 9 of the Act defines an implied contract as one in which there are an actual proposal and acceptance though made otherwise than in words. Obligations imposed by law similar to contractual obligations are not included in the definition and are placed in the Act in a separate category in Chapter V, but there can be no doubt that according to English law a contract that the agent has authority to act on behalf of the principal would be implied by law whenever he contracts on behalf of a principal. In construing article 115 of the schedule to the Limitation Act it must be remembered that Act IX of 1871 which enacted article 115 was passed before the Indian Contract Act which was enacted in 1872. We think that the expression ‘implied contract’ was used in the article in the sense in which it is understood in English law. The Contract Act and the Limitation Act are not statutes *in pari materia* and it should not be assumed that article 115 is confined to cases of what would be implied contracts according to the definition in the Contract Act. The result of confining it to such cases would be that where a suit is instituted against the principal and an agent together and relief is claimed against them in the alternative

according as the act was authorised or not by the principal a different period of limitation would be applicable against each of them, though the obligation arises out of the same transaction. We do not think that this could have been intended. We are of opinion on the whole that article 115 must be applied to the case. In *Dukur Pershaud Bustooree v. Mussamut Fookumaru Dabu*(1), the Privy Council held that the obligation of a *del credere* agent to pay the vendor of goods their price when it is not paid by the purchaser is one on an implied contract. Paragraph 14 of the plaint states that the cause of action arose on the 13th February 1904, that is, one month after the arrival of the boat at Thondi. On this allegation the suit must be held to be barred. It is urged that as the first and the second defendants' guardians executed the power of attorney Exhibit A, with a view to transfer the pass of the barque on the 28th of November 1906 to the plaintiffs' names the contract was not really broken on the 13th February 1904. But the execution of Exhibit A was not in performance of the agreement Exhibit C, but in consequence of a request by Erambamurthi Pillai to whom Chockalinga had sold the barque to the guardians asking them to transfer it to the plaintiffs on the ground that he had sold the barque to them. There is nothing in the facts of the case to postpone the commencement of limitation beyond one month after the arrival of the barque at Thondi. We must therefore hold that the suit as against the third defendant is barred by limitation. In the result the appeal is dismissed with costs against him also.

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(1) (1871) 16 W.R., 35 (P.C.).

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