

APPELLATE CIVIL.

Before Mr. Justice Bakewell and Mr. Justice Phillips.

R. V. SREENIVASA AIYANGAR (PLAINTIFF), APPELLANT,

v.

JOHNSA ROWTHER (TWELFTH DEFENDANT), RESPONDENT.*

1919,
February,
18 and 19.

Limitation Act (IX of 1908), arts. 113 and 143—Deed of exchange—Express covenant—Transfer of Property Act (IV of 1882), sec. 119—Implied covenant—Breach of covenant—Dispossession of plaintiff—Suit for recovery of possession of plaintiff's lands—Suit filed more than three years after but within twelve years of dispossession, whether barred.

Where a deed of exchange executed in 1903 between the plaintiff's father and some of the defendants contained a covenant, which only limited the option provided by section 119 of the Transfer of Property Act and was otherwise of the same nature as one that would be implied under that section, and the plaintiff, being dispossessed in 1908 of the lands given by the defendants, sued in 1916 to recover the lands given by his father under the exchange, and the defendants pleaded the bar of limitation.

Held, that article 143 and not article 113 of the Limitation Act applied to the case, and that the suit was in time.

SECOND APPEAL against the decree of C. V. VISWANATHA SASTRIYAR, the Subordinate Judge of Kumbakōnam, in Appeal Suit No. 137 of 1917, preferred against the decree of K. GOPALAN NAYAR, the District Munsif of Valangiman, in Original Suit No. 173 of 1916.

The plaintiff sued in 1916 to recover possession of certain lands from the defendants which had been given to the latter in exchange for certain other lands given to the plaintiff's father under a deed of exchange executed between the plaintiff's father and the principal defendants in 1903. The deed of exchange provided that, "should there arise any dispute in the matter of enjoyment of the property specified in the deed of exchange, each shall enjoy as before their respective lands." In execution of a decree obtained by a third party against the defendants, some of the lands obtained in exchange by the plaintiff's father were sold and the plaintiff who was then a minor lost possession of the same in 1908; and some of the other lands in plaintiff's possession were subsequently taken away in sales in execution of other decrees against the defendants in

* Second Appeal No. 1842 of 1918.

1913. The plaintiff, having attained majority on 10th June 1913, instituted the present suit on 11th March 1916 to recover possession of the lands given by the plaintiff's father to the defendants. But the twelfth defendant who had purchased one of the suit items was joined as a party to the suit only on 12th December 1916, more than three years after plaintiff attained majority. The latter pleaded that the suit was barred by limitation under article 113 of the Limitation Act, as more than three years had elapsed since the plaintiff attained majority and the cause of action arose on the date of the plaintiff's dispossession of the lands obtained by them in exchange, viz., in 1908. The District Munsif, who tried the suit, overruled the plea of limitation and decreed in favour of the plaintiff. The twelfth defendant appealed to the lower Appellate Court; the Subordinate Judge held that the suit as against the twelfth defendant was barred under article 113 of the Limitation Act. The plaintiff preferred this Second Appeal.

C. S. Venkata Achariyar for the appellant.

K. Narasimha Ayyangar for the respondent.

The JUDGMENT of the Court was delivered by

PHILLIPS, J.—It is not disputed that if the covenant or PHILLIPS, J. condition which gives plaintiff a cause of action were a covenant to be implied under section 119 of the Transfer of Property Act the article of limitation applicable would be 143. Even if the covenant in the present case amounts to a contract to the contrary within the meaning of section 119 as was held of a similar covenant in *Abdul Rajah v. Saminatha Pillai*(1) the period of limitation would appear to be the same for the contract to the contrary in this case merely limits the option provided by section 119 and is in effect a specific contract of the same nature as one of the contracts implied in section 119. We do not think this question was considered in *Abdul Rajah v. Saminatha Pillai*(1) to which one of us was a party, for it appears to have been assumed in that case that, if there was a specific contract of any kind, article 113 would apply. The covenant in this case is in the nature of a condition subsequent and the action is based on a breach of that condition and therefore article 143 is applicable and the suit is within time.

(1) Second Appeal No. 1668 of 1916 (unreported).

SREENIVASA
 AYYANGAR
 v.
 JOHNSA
 ROWTHER.

SREENIVASA
 AYYANGAR
 v.
 JOHNSA
 ROWTHER.

The further contention for the respondent that he cannot be bound as he is a bona fide purchaser for value without notice can be met by the fact that the transferee can obtain no larger estate than his transferor.

PHILLIPS, J.

The Second Appeal is accordingly allowed with costs both here and in the lower Appellate Court and the District Munsif's decree restored.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919,
 February,
 19.

UMMA VENKATARATNAM & CO. (PETITIONER)—PETITIONER,

v.

ADAMJI USMAN & Co. AND 17 OTHERS (JUDGMENT-DEBTORS
 AND COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 73—Rateable distribution—Conditions to be satisfied—Fund in Court—Attachment by a decree-holder in execution—Application by him for payment—Other decree-holders, obtaining decrees in their suits subsequently—Right of latter to rateable distribution against former—Priority.

Where a decree-holder having attached in execution of his decree a fund in Court belonging to his judgment-debtor, applied for payment of the amount before other decree-holders of the same judgment-debtor had obtained decrees in their suits, but the latter claimed rateable distribution of the fund along with the former,

Held, that the attaching decree-holder was in law entitled to be paid the amount attached by him in priority to the others.

Katum Sahiba v. Hajee Batcha Sahib (1915) I.L.R., 38 Mad., 221, dissented from; *K. Tiruvengadial v. Tiruvenkadiah* (1903) 26 M.L.J., 364, followed.

PETITION under section 115 of Act V of 1918 to revise the order of R. V. KRISHNA AYYAR, District Munsif of Ellore, in Execution Petition No. 879 of 1916 in Original Suit No. 89 of 1916 on the file of the Subordinate Judge's Court, Ellore.

The petitioner was a decree-holder who attached a certain fund belonging to his judgment-debtor which had been deposited in the Court of the District Munsif of Ellore. The petitioner had instituted his suit in the Sub-Court of Ellore

* Civil Revision Petition No. 829 of 1917.