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are constrained to call the attention of the Agency Commissioner to this irregularity in his predecessor's procedure. Secondly, we observe that the Agency Commissioner should, in dealing with the merits of the case, consider before deciding against the petitioner whether the scope of the trial was not unduly limited by an unnecessary regard for the provisions of the inapplicable Order XXI, Rule 59. We direct that costs of the proceedings in the Court here and in the lower Courts to date be costs in the cause and follow the result.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1922, March, 31.

H. M. K. V. SANKARA VARIAR (DEFENDANT), APPELLANT,

v.

T. K. UMMER AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

Limitation Act (IX of 1908), art. 97—Voidable sale by a qualified owner—Dispossession of purchaser under a decree obtained by one claiming paramount title—Limitation.

A purchaser under a voidable sale-deed from a qualified owner was dispossessed in execution of a decree obtained by a person entitled to avoid the sale.

Held, that a suit by the purchaser for the return of the price was governed by Article 97 of the Limitation Act and that limitation began not from the date of the decree but from the date of actual dispossession. *Juscurn Boid* v. *Pirthichand Lal Choudhury*, (1919) I.L.R., 46 Calc., 670 (P.C.), distinguished.

SECOND APPEAL against the decree of ANANTANARAYANA AYYANGAR, Subordinate Judge of Ottapalam, in Appeal Suit No. 80 of 1919, preferred against the decree of A. C. KUNHUNNI RAJA, District Munsif of Ponnāni, in Original Suit No. 701 of 1917.

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* Second Appeal No. 2062 of 1920.

One Valia Thamburatty, the then female manager of Puthia Kovilagom, in South Malabar, granted to the defendant a theethu-deed (Exhibit A) in 1903 by which she mortgaged certain lands and also sold the trees thereon. The defendant assigned his entire right in the lands and in the trees to the first plaintiff in 1904 for Rs. 1,000, and put him in actual possession. The first plaintiff in his turn assigned his rights to the second and third plaintiffs in 1906 and put them in possession. In a suit brought by the successor in office of Valia Thamburatty a decree was made on 10th February 1914, and the theethu-deed of 1903 was set aside as not binding on the Kovilagom. The decree was affirmed on Appeal on 22nd December 1914, and on 3rd July 1915 the plaintiffs were dispossessed in execution of the decree. Thereupon the first plaintiff satisfied by payment the second and third plaintiffs for the loss they sustained by the dispossession, and brought this suit on 18th December 1917 against the defendant for the return of the Rs. 1,000, viz., the consideration paid by him for the assignment. The defendant pleaded *inter alia* that the suit was barred by limitation as having been brought more than three years after the date of the decree setting aside the theethu-deed. Both the lower Courts held that the suit was not barred by limitation and gave the plaintiff a decree. The defendant preferred this Second Appeal.

K. P. M. Menon and *P. Govinda Menon* for appellant.—The suit is barred by limitation. Article 97 applies. The cause of action arose not when possession was actually disturbed but on the date of original decree. See *Juscurn Boid* v. *Pirthichand Lal Choudhury*(1).

(1) (1919) I.L.R., 46 Calc., 670 at 687 (P.C.).

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C. Madavan Nayar for respondent.—The suit is not barred. Article 97 may apply; but the starting point is the date of actual dispossession; for the consideration failed only then and not on the date of the decree. *Juscurn Boid* v. *Pirthichand Lal Choudhury*(1) does not refer to a case of disturbance of an actual possession but only to a case of symbolical possession such as that of a landlord. It is so explained in *Mahomed Ali Sheriff* v. *Venkatapathi Raju*(2). Moreover in this case the sale to the plaintiff was not void from the beginning but only voidable. The decree setting aside the sale is immaterial, and so long as the plaintiff was not disturbed in his possession the consideration for his purchase money did not fail. See *Narsing Shivbakas* v. *Pachu Rambakas*(3), *Sukmoy Sarkar* v. *Shashi Bhushan Bhattacharyya*(4), *Ramanatha Iyer* v. *Ozhapoor Pathiriseri Raman Nambudripad*(5), *Subbaroya Reddiar* v. *Rajagopala Reddiar*(6), *Ram Chandar Singh* v. *Tohfah Bharti*(7), *Meenakshi* v. *Krishna Royar*(8). If Article 97 does not help me, Article 116 applies and I am in time even if time begins from the date of the decree. See *Mahomed Ali Sheriff* v. *Venkatapathi Raju*(2).

K. P. M. Menon in reply.—This is not a suit for damages but a suit for the return of the consideration; hence Article 97 alone applies and not 116. He distinguished the cases quoted by the respondent.

JUDGMENT.

ODGERS, J.

ODGERS, J.—In this case the only point argued is that of limitation. The respondent's vendor in 1903 obtained a theethu-deed (Exhibit A) which was assigned to the respondents in April 1904 by Exhibit B for a

(1) (1919) I.L.R., 46 Calc., 670 at 637 (P.C.).
(2) (1920) 39 M.L.J., 449 at 455
(3) (1913) I.L.R., 37 Bom., 538.
(4) (1911) 10 I.C., 486.
(5) (1913) 14 M.L.T., 524.
(6) (1915) I.L.R., 38 Mad., 887 at 889.
(7) (1904) I.L.R., 26 All., 519.
(8) (1916) 32 I.C., 176.

period of 12 years and for a consideration of Rs. 1,000. Exhibit A was granted by the then female manager of the Kovilagom styled Valia Thamburatty. It is not only a mortgage but also a conveyance of the trees on the land. The respondent obtained possession and enjoyed the property till February 1906, when he conveyed it to others who were subsequently evicted as the consequence of a suit brought by a subsequent Thamburatty to set aside the theethu-deed (Exhibit A) on the ground that the vendor had no title to sell. This decree is dated 10th February 1914 (Exhibit F) in the case and by it the defendant (appellant here) is ordered to deliver up all documents relating to the suit property and retransfer the same to plaintiff free from the mortgage and all other encumbrances created by the defendants or any person claiming under them. This decree was confirmed on appeal on 22nd December 1914 and on 3rd July 1915 the plaintiffs were dispossessed in execution thereof. The plaintiffs brought the present suit on 18th December 1917 to enforce payment of the consideration which plaintiff had paid for Exhibit B. It was, I think, admitted by both sides at the appeal before us that Article 97 of the Limitation Act applies and although at the end of the case the learned counsel for the respondents contended in the alternative that Article 116 would, in any case, apply, by virtue of the covenant for 12 years' quiet enjoyment contained in Exhibit B, I think he must be held to have admitted that the matter is governed by Article 97. The short point arising from these facts is, does limitation run from the date of the original decree (10th February 1914), in which case the plaintiff's suit is barred under article 97, or does it run from the date of actual dispossession of the plaintiffs which occurred in July 1915, in which case the suit is within time. Mr. K. P. M. Menon for the appellant who was

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unsuccessful in both the lower Courts relied exclusively on the ruling of the Privy Council reported in *Juscurn Boid* v. *Pirthichand Lal Choudhury*(1). Had their Lordships laid down a general principle which would govern all cases of this nature, we should of course be bound by it. They, however, say that the plea that the period of limitation began to run when possession was lost was "belated" and proceed to hold that the decree of the first Court is the starting point of limitation, qualifying this however by this passage,

"There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run, but that is not the case here. The quality of the possession acquired by the present purchaser excludes the idea that the starting point is to be sought in a disturbance of possession or in any event other than the challenge to the sale and the negation of the purchaser's title to the entirety of what he bought involved in the decree of the 24th August 1905. If further support of this view be required, it may be found in the express provision of section 14 of the Regulation which directs that in the suit for reversal itself the purchaser is to be indemnified against all loss." (P. 679).

What was the quality of the possession in the case before them? Apparently the purchaser received an *amaldastak* or order for possession under section 15 of Bengal Regulation VIII of 1819. This does not seem to have put him in actual physical possession of the property but to have been an order to the ryots to attorn to him as the purchaser. I think the possession was different in the case before us and that actual possession was delivered to the respondent under Exhibit B. Further the deed (Exhibit B) would appear to be not void *ab initio* but only voidable. It would have been open to the succeeding Thamburatty to have confirmed the transaction (c.f., *Ananda Chandra*

(1) (1919) I.L.R., 46 Calc., 670 at 687 (P.C.).

Bhuttacharjee v. *Carr Stephen*(1), and it seems reasonable to hold that the consideration did not fail till respondent was deprived of the possession of the property which he had acquired under Exhibit B. He had possession either personally or through his transferees from 1904 to 1915. See per MILLER, J., in *Ramanatha Iyer* v. *Ozhapoor Pathiriseri Raman Nambudripad*(2). The Privy Council case has further been distinguished by a Bench of this Court in *Mahomed Ali Sheriff* v. *Venkatapathi Raju*(3). True that was a case under Article 116 and the cause of action which was the breach of the covenant for quiet enjoyment was treated as arising as from the date of disturbance of plaintiff's possession. The learned Judges say at page 455,

"But they (i.e., Privy Council) held that the quality of possession acquired by the purchaser in that case (it was apparently merely formal and not actual possession) was such as to exclude the idea that the starting point was to be sought in the disturbance of possession. But that could not be predicated of the possession of the present plaintiffs who were in actual possession and enjoyment of the property until dispossessed in execution of the decree obtained by the reversioners,"

thus clearly distinguishing the Privy Council case from a case where the purchaser was put in actual possession and enjoyment of the property. There are other decisions which take this view—*Narsing Shivbakas* v. *Pachu Rambakas* (4), which the Privy Council says does not call for serious consideration though it is very doubtful if they meant to say that it was bad law—their Lordships do not say so directly. In the Bombay case the learned Judges dealing with *Hanuman Kamat* v. *Hanuman Mandur*(5), say at page 541.

"But their Lordships, we think, were not considering a case in which possession had actually been given, although the

(1) (1892) I.L.R., 19 Calc., 127.
(2) (1913) 14 M.L.T., 524 at 526.
(3) (1920) 39 M.L.J., 449 at 455.
(4) (1913) I.L.R., 37 Bom., 538.
(5) (1892) I.L.R., 19 Calc., 123.

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contract subsequently turned out to have been void *ab initio*. In such a case the promisee has received the only consideration he has stipulated for. In all cases of that kind it appears to us that it is only when the promisee is deprived of that consideration and the true character of the contract thus becomes revealed that he has any ground for complaint. And that is the proper time from which to compute the period of limitation. That is the principle distinctly underlying the provisions of Article 97. We think that both in terms and in spirit it does and was intended to cover cases of this kind."

The Calcutta High Court in *Sukmoy Sarkar* v. *Shashi Bhushan Bhattacharyya*(1), held that under Article 97 time runs from the date when plaintiff was actually evicted from the land and that the question of limitation must depend upon the special facts of each case. In *Subbaroya Reddiar* v. *Rajagopala Reddiar*(2), SESHAGIRI AYYAR, J., said with reference to cases where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale that

"the cause of action can only arise when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified. The cause of action will therefore arise when his right to continue in possession is disturbed."

In *Meenakshi* v. *Krishna Royar*(3), PHILLIPS, J., held that as possession had been given under a contract of sale the sale was not void *ab initio* and plaintiff was entitled to recover his purchase money under Article 97, Limitation Act. He held that the starting point for limitation was not the date of the sale-deed, 1883, but the date of dispossession in 1910.

In *Ram Chandar Singh* v. *Tohfah Bharti*(4), in a suit brought on a sale-deed whereby the vendor contracted to recoup the vendees in the event of disturbance of

(1) (1911) 10 I.C., 486.
(2) (1915) I.L.R., 38 Mad., 887.
(3) (1916) 32 I.C., 176.
(4) (1904) I.L.R., 26 All., 519.

possession, it was held that the cause of action did not arise till possession was in fact disturbed.

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Under these circumstances it appears to me that the Privy Council decision, qualified as it is, must be taken to be applicable to the facts of the particular case before their Lordships and that we are not justified in extending it generally to cases in which actual possession of the property has been given and been enjoyed for a number of years. In such a case, on the authorities quoted above, the starting point of limitation must be (at all events in the case of a sale not *ab initio* void but only voidable) the date of dispossession. I am therefore of opinion that this Second Appeal should be dismissed with costs.

Ayling, J.—I agree.

AYLING, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

T. RAMASAMY AIYAR (FIRST PLAINTIFF), APPELLANT,

1922, April, 20.

v.

T. SUBRAMANIA AIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Suit for partition—Co-owner — Trustee—Mesne profits—Profits claimed by a member of Hindu joint family, whether mesne profits—Interest on such profits, whether awardable—Past and future profits in a partition suit, right to.

The claim for profits, made by a member of a Hindu joint family in a suit for partition, is not technically one for "*mesne profits*," as used in the Civil Procedure Code.

* Civil Miscellaneous Second Appeal No. 40 of 1919.