APPELLATE CIVIL.

Before Mr. Justice Krishnan Pandalai.

1932, October 24.

NAVAMANI NADAR AND ANOTHER (PLAINTIFFS), PETITIONERS,

v.

VEDAMANICKA NADAR AND THREE OTHERS (DEFENDANTS 1, 2 AND NIL), RESPONDENTS.*

Limitation Act, Indian (IX of 1908), arts. 116 and 111—Suit based on contract of indemnity—Article applicable—Sale subject to mortgage—Authority to vendee to discharge mortgage—Vendee's default—Suit by mortgagee—Purchase by third party of mortgaged property—Suit by purchaser for damages from vendor and mortgagee—Contract of indemnity—Suit based on—Art. 116—Applicability of—Recovery of damages—Basis of calculation.

Plaintiff mortgaged certain properties to B and subsequently sold to the defendant by a registered sale deed on 28th April 1919 some of the properties included in the mortgage deed. Out of the consideration for the sale a portion was reserved with the defendant to pay off the mortgage in favour of B. As the defendant did not pay B, the latter brought a suit on his mortgage impleading both plaintiff and defendant and recovered the amount due to him by sale of the entire mortgaged properties. The sale took place on 29th October 1926. Plaintiff brought the present suit on 4th December 1926 for recovery of damages suffered by him by reason of the defendant's default in paying off B.

Held, that the basis of the suit was the contract of indemnity implied in the defendant's agreement in the sale deed to pay off B and could be held to be broken only when the plaintiff actually suffered loss, i.e., on 29th October 1926 when the plaintiff's property was sold; that the suit was governed by article 116 of the Indian Limitation Act and not by article 111; and that it was not barred.

* Civil Revision Petition No. 1495 of 1927.

Held further, that the plaintiff could recover only the loss actually sustained by him, and not the entire amount reserved with the defendant as a portion of it was also to release from the mortgage the property sold to the defendant.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tuticorin in Small Cause Suit No. 2266 of 1926.

G. Jagadisa Ayyar for *T. L. Venkatarama Ayyar* for petitioners.

A. Swaminatha Ayyar for *L. S. Veeraraghava Ayyar* for respondents.

Cur. adv. vult.

JUDGMENT.

The question in this petition is one of limitation. The suit was dismissed by the learned Subordinate Judge of Tuticorin on the ground that it was barred under article 111 of the Limitation Act as one for unpaid purchase-money personally from the purchaser, brought more than three years after the date of sale. The facts are as follows. The plaintiff's father sold to the defendant on 28th April 1919 for Rs. 500 a portion of the property which had been mortgaged by the vendor to a third party prior to the sale. The consideration of Rs. 500 was made up as follows :

"Rupees 312 being the amount reserved with you (purchaser) in order that you (purchaser) may redeem the hypothecation executed by me; Rs. 88 received in cash and Rs. 100 to be paid before the Registrar, total Rs. 500."

The purchaser paid Rs. 188 and took possession of the property. He did not pay the amount of the hypothecation to the third party who therefore brought a suit in 1924 impleading the mortgagor-vendor and purchaser-defendant and having obtained a decree sold the whole of the mortgaged property in execution on 29th October 1926 including the property which was in

NAVAMANI NADAR v. VEDAMANICKA NADAR.

the possession of the mortgagor as well as that which was sold to the defendant. This suit was brought on the 4th of December 1926 for Rs. 738-0-7 made up of Rs. 312 with interest thereon.

The lower Court relied upon *Chunilal* v. *Bai Jethi*(1) in support of its view that article 111 governs the case, and distinguished the decision in *Seshachala Naickar* v. *Varadachariar*(2) which pointed out that where a contract to sell is embodied in the deed of sale the article applicable would be article 116. I think article 111 has no application to the present case. That article governs suits for unpaid purchase-money payable to or to the order of the vendor under an agreement to sell and, as the third column shows, is independent of rights arising by the deed of sale because the *terminus a quo* is the date fixed for completing the sale or the date of acceptance of the title, whichever is later. The present suit is not brought on any agreement to sell; nor, on the terms of the sale deed, which we may suppose contains the terms of the agreement to sell, is the amount sued for payable to or to the order of the vendor. *Chunilal* v. *Bai Jethi*(1) related to a parol sale of the year 1890 when the Transfer of Property Act had not been extended to the Bombay Presidency. The sale was for cash to be paid to the vendor, but, instead of paying cash, the purchaser signed an acknowledgment in the vendor's account book. It was held that the sale was completed and the title accepted more than three years before the suit. In the first place there was no registered sale deed in that case and in the second the whole of the consideration was payable in cash to the vendor. As pointed out in *Seshachala Naickar* v. *Varadachariar*(2), where the contract to sell is embodied in a registered deed of sale, the

(1) (1897) I.L.R. 22 Bom. 846. (2) (1901) I.L.R. 25 Mad. 55.

unpaid vendor can rely upon article 116 which allows six years from the date of breach. But the difficulty in the present case is that even six years from the date of the sale deed will not save the suit. It is therefore argued that the date of breach in a case where the purchaser undertakes in the sale deed to pay part of the purchase-money to the vendor's creditors, secured or unsecured, is not the date of the sale deed but some later date, which is put in some cases as a reasonable time after the sale deed, in others as the date of demand and refusal, and in still others as the time when the vendor is himself compelled to pay the creditors whom the purchaser has defaulted to satisfy. Another line of reasoning which favours the postponement of the date of bringing a suit by the vendor is that, where the purchaser agrees in a registered deed of sale to satisfy a mortgage debt or other debt of the vendor with part of the purchase-money, there is implied in that agreement an agreement to indemnify the vendor against losses which may be caused by action taken by the creditors on the default of payment by the purchaser, and such an agreement to indemnify is broken only when the vendor is compelled to pay the creditors himself or his property is sold.

It is curious that no decision of our own Court directly dealing with this topic was cited. In *Raghunatha* v. *Sadagopa*(1), it was held that in a transfer (of two decrees), the consideration for which was that the transferee should pay the transferor's creditors, the transferor could sue the transferee for the money, even though the transferor himself had not paid off the creditors, on the transferee's default to do so within a reasonable time, but that the suit can only be for the

(1) (1911) I.L.R. 36 Mad. 348.

NAYAMANI NADAR v. VEDA-MANICKA NADAR.

consideration for the sale which the vendee failed to pay but not for any further damages which the vendor had not actually sustained. This implies that where the vendor has actually sustained further damages, by having to pay the creditors himself or by having his property sold, he is entitled to recover the damages actually sustained. I do not consider this decision as prohibiting a suit for the damages actually sustained after it has been sustained, if it is reasonable to infer that a contract of indemnity is to be implied in the circumstances.

There are however decisions of other Courts more to the point. In *Raghubar Rai* v. *Jaij Raj*(1), a case like the present except that the vendor had not in fact himself paid the secured creditor whom the purchaser had undertaken to pay, it was held that it was not necessary for the vendor to have paid the creditor before bringing the suit and that as no time was fixed in the sale deed for the payment of the mortgage money limitation began to run from the date of the execution of the deed. This view however was dissented from in *Ram Ratan Lal* v. *Abdul Wahid Khan*(2) where the vendor had been compelled to pay a mortgage debt himself and it was held that limitation in respect of the vendor's suit against the purchaser will not begin to run until he has been compelled to pay. *Makun Lal* v. *Bhola Rai*(3) was a case where the vendor's unsecured creditors had to be paid off by the purchaser and it was held that the vendor could recover the unpaid money within six years from the date of the sale deed. *Ammanibai* v. *Anant*(4) was a case in which the vendor's creditors had recovered the money from the vendor on the purchaser's default to pay. The sale was in 1912;

(1) (1912) I.L.R. 34 All. 429.
(2) (1927) I.L.R. 49 All. 603.
(3) A.I.R. 1931 All. 419.
(4) (1930) 33 Bom. L.R. 136.

the vendor was compelled to pay the same debt in 1921. The vendor's suit against the purchaser was brought in 1924, i.e., within three years of the actual payment but twelve years after the sale deed. It was held that the article applicable was article 116 and that time began to run when the plaintiff actually suffered the loss, which was the date when the purchaser's agreement became impossible of performance by reason of the payment by the vendor himself. *Ram Rachhya Singh Thakur* v. *Raganath Prasad Misser*(1) is a case which adopts the same reasoning. It was held that the *terminus a quo* was not the date of the execution of the sale deed but the date on which the contract was deemed to have been broken, namely the date when either there was a repudiation of the liability under it or when the contract had become impossible of performance on account of the vendor's debt having been satisfied and also that the measure of compensation to be awarded is the amount of the debt with interest.

It occurs to me that it is necessary to distinguish claims of two kinds which may arise in this connection. A vendor may reserve part of the purchase-money with the purchaser entirely for payment of the vendor's debts in the payment of which the purchaser has himself no primary interest. These may be unsecured creditors of the vendor for which the vendor alone is liable or secured creditors of the vendor where the security is other than the property sold. On the other hand such a reservation may be for payment of debts in which the purchaser as owner of the property purchased becomes solely primarily interested. It may be to pay off a previous mortgage covering only the property sold. In this case, except by way of the

(1) (1929) I.L.R. 8 Pat. 860.

NAVAMANI NADAR v. VEDA-MANICKA NADAR.

vendor's personal liability for any deficiency that may arise on the mortgage, the purchaser subject to the mortgage becomes the only person interested in the payment. If he does not pay, the previous mortgage debt will be realised from his own property and no one else's. It is difficult to see how in such a case, except where the vendor is proceeded against on his personal liability, he can bring a suit if the purchaser fails to pay off the mortgage on the property which he has bought. But the reserved portion of the price may be, as it is in this case, to pay off a mortgage which covers not only the property bought but also some other property which the vendor is entitled to be freed from the mortgage by the payment undertaken by the purchaser. In such a case the vendor is entitled to see that by the purchaser's default the mortgaged property left with him is not endangered. In brief, the suits which a vendor is entitled to bring for the reserved amount against the purchaser before himself paying the amount or suffering some other damage are cases in which he alone is entitled to benefit by the payment. But where, as in this case, the benefit of the payment of the reserved amount accrues partly to the purchaser himself and only partly to the vendor, it is not possible for the vendor to sue the purchaser for the whole amount reserved. In such cases he can only sue for the portion of the amount the non-payment of which is likely to affect him, and this can only be properly determined when he has either made the payment himself or has suffered some other damage by the purchaser's default.

The basis of the suit in such a case is the contract of indemnity which the agreement in the sale deed implies and can be held to be broken only when the plaintiff has actually suffered loss. I am therefore of opinion

that the limitation in this case began to run when the plaintiff's property was sold on the 29th October 1928, and therefore the suit was not barred.

Another point depending upon this and following from it is the amount which the plaintiff is entitled to recover. As the plaintiff is not entitled to recover the whole of the Rs. 312 because a portion of it was also to release the property sold to the defendant from the mortgage, he can recover only the loss actually sustained by him. What it is has yet to be ascertained. The decree of the lower Court is therefore set aside and the suit remanded for retrial and disposal according to law. The petitioners must have their costs in this Court from the counter-petitioners.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenven.

MEDARAMETLA KOTAYYA (PETITIONER), PETITIONER,

v.

NIDAMANURU YELLAMANDA AND OTHERS (RESPONDENTS), RESPONDENTS.*

1933, February 24.

Madras Hindu Religious Endowments Act (Act II of 1927), sec. 44—Scope of—Temple service inam—Endowment, not a "charge on the property."

Under section 44 of the Madras Hindu Religious Endowments Act the Court has no power to make an order in respect of services to a temple which are remunerated by a service inam.

The phrase "merely a charge on property" in section 44 necessarily connotes a liability to make a payment in some shape or form to the institution, and probably a payment the extent of which is more or less fixed or ascertainable. In the

* Civil Revision Petitions Nos. 1544 of 1928 and 693 of 1930.