APPELLATE CIVIL.

Before Mr. Justice Piggott and Justice Walsh.

1918
April, 15.

RAM DULARI (DEFENDANT) v. HARDWARI LAL AND OTHERS (PLAINTIFFS).*

Act No. IX of 1908 (*Indian Limitation Act*), *schedule* 1, *article* 116—*Limitation—Sale—Covenant to make good loss in case of vendee being compelled to pay money in excess of sale consideration—Breach of covenant—Suit against vendors on covenant of indemnity.*

Where vendees are suing their vendors on a covenant of indemnity contained in their sale-deed, having been obliged to redeem a prior mortgage, the existence of which the vendors did not disclose, limitation runs, not from the date of the sale deed, but from the date when the plaintiffs suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. *Hari Tiwari* v. *Raghunath Tiwari* (1) referred to.

THE facts of this case were as follows:—

The predecessor in interest of the appellant executed on the 23rd of April, 1889, a simple mortgage of certain property in favour of one Chatri Lal. Subsequently, on the 4th of July, 1901, he sold the same property to the plaintiffs. In the sale-deed there was no mention of the mortgage; on the other hand, there was a covenant to the effect that the property had been sold to the vendees free from all liabilities and debts, and that if any portion of the property passed out of the possession of the vendees or *if any excess amount were charged against them*, then the other properties of the vendor would be liable for the same, together with damages and costs. On an alternative reading of the words in vernacular the italicised words would be replaced by "if they were made liable for any prior encumbrance." On the 1st of August, 1902, Chatri Lal sued on his mortgage and obtained a decree for sale of the property. Eventually the 20th of May, 1915, was fixed for the sale, and on the 19th of May, 1915, the plaintiffs paid the amount of Chatri Lal's decree into Court and saved the property from sale. On the 10th of July, 1915, the plaintiffs brought a suit against the appellant for recovery of the amount together with interest from the estate of the vendor. Paragraph 4 of the plaint set out the covenant mentioned above; and the cause of action was said to have arisen

* First Appeal No. 57 of 1916, from a decree of Harihar Lal Bhargava, Subordinate Judge of Shahjahanpur, dated the 1st of December, 1915.

(1) (1888) I. L. R., 11 All., 27.

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on the 19th of May, 1915. One of the pleas in defence was that of limitation. The court of first instance held that the cause of action for the suit did not accrue till the plaintiffs had to pay the money on the 19th of May, 1915, and that the suit was therefore within time. The court decreed the suit. Hence this appeal.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Babu *Sarat Chandra Chaudhri*) for the appellant:—

The suit is essentially one for damages for breach of the covenant of title contained in the sale-deed. That covenant was in the following terms, "the property has been sold to the vendees free from all liabilities and debts." The title was guaranteed to be free; but it was not free owing to the existence of the mortgage of 1889. The stipulation amounted to this, that the vendor was undertaking that there were no encumbrances or that if there were any, they had been cleared by him or would be cleared by him before the transaction of sale was completed. At the time when the sale was completed there existed contrary to the stipulation conveying an absolutely free title, an outstanding encumbrance on the property sold. Consequently, the breach of the stipulation occurred as soon as the sale was effected; and the cause of action for a suit for damages for breach of the covenant arose on the date of the sale. It is pointed out in *Halsbury's* Laws of England, Vol. 25, pp. 462, 464, 465, that such a covenant is not a continuing covenant but is broken once and for all at the time of the conveyance if there is a defect in title; and consequently time begins to run forthwith. This principle has been followed in India in the case of *Tulsiram* v. *Murlidhar* (1), and was discussed with approval in the case of *Ardesir* v. *Vajesing* (2). The same rule is laid down in *Dart*: Vendors and Purchasers, 7th Edition, pp. 788, *et seq.*; and a distinction is drawn there, as well as in the passage from Halsbury's Laws of England cited above, between a covenant of title and a covenant for quiet enjoyment, as to the point of time from which limitation for an action for breach begins to run in either case. In the case of *Hari Tiwari* v. *Raghunath Tiwari* (3) EDGE, C. J., remarked

(1) (1902) I. L. R., 26 Bom., 750 (754). (2) (1901) I. L. R., 25 Bom., 593 (603).
(3) (1888) I. L. R., 11 All., 27 (30).

that if the suit had been for the breach of a covenant of title, no doubt the period of limitation would begin to run from the time when the deed was executed. As, however, there was no covenant of title in that case but only a covenant for quiet enjoyment, it was held that the cause of action did not arise until the happening of an event disturbing that enjoyment. Reference was made to *Turner* v. *Moon* (1) and *The Secretary of State* v. *Pemmaraju* (2). The cause of action having arisen on the date of the sale, the suit should have been brought within six years of that date, under article 116 of the Limitation Act. As has been laid down in many of the authorities already cited time begins to run, in such cases, from the date of the conveyance, although the vendee may not have knowledge of the defect in the title. It is, therefore, immaterial when the plaintiffs came to know of the existence of the mortgage. At any rate, they had knowledge of it when they were made parties to Chatri Lal's suit in 1902. Even if it be regarded that the cause of action arose on the date of the decree in that suit, the present suit is still barred by time.

Pandit *Baldev Ram Dave*, for the respondents, was not called upon.

PIGGOTT and WALSH, JJ.:—This is an appeal by the defendant in a suit which, as brought, was a suit for damages on account of the breach of a covenant of indemnity contained in a sale-deed of the 4th of July, 1901. That deed in itself arose out of and formed the completion of a transaction embodied in a previous deed of the 9th of January, 1899. The plaintiffs in this case represent the transferees of the vendees under these two deeds and the defendant the vendor in each of these deeds. The vendor purports to convey certain property free of all encumbrances, and in each of them there is a covenant setting forth what is to happen in the event of its being found that the property is in fact encumbered, and in the event of the vendees being disturbed in possession or having to make any payment on account of some previously existing encumbrance. The matter is clearer in the earlier of the two deeds, but no doubt the point has to be decided with reference to the agreement as embodied

1) (1901) 2 Ch., 825. (2) (1916) 30 M. L. J., 575); 35 Indian Cases 254.

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at the end of the deed of the 4th of July, 1901, on page 8 R. of the book before us. We have only referred to the previous document in order to explain the nature of the transaction as throwing light on the intention of the parties and the footing on which they were dealing with one another. Unfortunately, in the deed of the 4th of July, 1901, there has been a clerical error on the part of the scribe in that very portion of the document which is most material for our purpose. We are not sure that this error is really vital to the decision of the question argued before us, but the error is there and it is as well that attention should be called to it. A certain word in the deed may have been intended to be written as "maqabal" or as "fazil." As the document stands it is actually written "faqabal," which is nonsense, but it must be intended to be read as one or other of these two words. Now on the one reading the expression is correctly translated in our paper book by the words "or if any excess amount is charged against them;" on the other reading, we may translate "or if they are held chargeable with any encumbrance." The latter of these two readings would be less favourable to the appellant's case and for the purposes of argument we may adopt the former. The covenant then is that, in the event of the vendees having to pay some excess amount, that is to say, some further charge over and above the sale consideration set forth in the deed, the estate of the vendor will be liable to make it good, together with damages and costs. Immediately before the words above set forth there is a recital that the property is conveyed to the vendees free from all debts and liabilities or claims. Then follows the agreement that if any portion of the property passes out of the possession of the vendees, or they fail to obtain possession, or finally, in the alternative, if any excess amount is charged against them, the other property of the vendor will be liable for damages. It subsequently transpired that there was a prior encumbrance on the property conveyed in the shape of a mortgage in favour of one Chatri Lal. A suit was brought on this mortgage in which the present plaintiffs, the vendees, were impleaded along with the original mortgagor. The claim was contested, but resulted finally in a decree in favour of Chatri Lal, and in order to save

the property from sale under that decree the present plaintiffs, the vendees under the deed of the 4th of July, 1901, had to pay up the sum now claimed by them, consisting of the mortgage money due to Chatri Lal along with interest and costs. In the court below this claim was resisted upon a variety of pleas, some of which are repeated in the memorandum of appeal now before us, but the appeal has been argued upon one ground only, namely, on the plea of limitation.

There was an issue on this point in the court below (issue No. 5), and the learned Subordinate Judge disposed of it very briefly, by pointing out that in his opinion the cause of action accrued to the plaintiffs in the month of May 1915, when they had to pay the money to Chatri Lal, and that this plaint had been filed with great promptitude in the month of July 1915. He held therefore that it was clearly within time. Curiously enough, in the memorandum of appeal before us this finding on the question of limitation is not in express terms challenged. We have been told, however, that there has been some error or oversight about the drafting of the memorandum of appeal and that the plea taken in the first paragraph was intended to read, " that the plaintiffs had no subsisting cause of action, " and so raised the question of limitation. At any rate we have heard the appellant on this point, and it was within our discretion to do so. The plea is based upon the contention that the agreement embodied in the last paragraph of the deed of the 4th of July, 1901, was simply a covenant of title, that there was a breach of this covenant the moment the deed itself was executed, that a cause of action accrued to the plaintiffs on that very date and that consequently the present suit is barred under the six years' rule of limitation. As subsidiary arguments on this point our attention has been drawn to the fact that the mortgage in favour of Chatri Lal was a registered document, of which it might be said that the plaintiffs had constructive notice, and that in any event they had actual notice of it when Chatri Lal instituted his suit, which was as long ago as the year 1902. The argument before us has proceeded upon lines which evidently were not followed in the court below. Our attention has been drawn to a number of rulings, of which the decision most in

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point is that in *Hari Tiwari* v. *Raghunath Tiwari* (1). What that case seems to us to lay down is that, if the plaintiffs in a suit like the present were bound to rely solely upon a covenant of title, whether express or implied, it might be held that limitation ran against them from the date of the execution of the deed; but in that suit itself a distinction was drawn, and the plaintiffs were held to be within time, because they were not suing upon a mere covenant of title, and it was held that their cause of action arose long subsequently when they were dispossessed of a portion of land then in question.

Similarly, in the present case, it seems to us that the plaintiffs are entitled to rely upon the words already set forth as a covenant of indemnity and to bring a suit upon them from the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. The decision of the court below on the issue of limitation therefore appears to be substantially correct on the ground on which it proceeds, although the point was not fully argued. The appeal, therefore, fails and we dismiss it with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

MUHAMMAD ALI KHAN v. RAJA RAM SINGH. *

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May, 4

Criminal Procedure Code, section 250—Compensation—Accused tried on two charges and acquitted on one, but convicted on the other.

Section 250 of the Code of Criminal Procedure is only applicable where the trying court discharges or acquits the accused altogether.

It cannot be made use of where the accused, being tried on two charges, is acquitted on one, but convicted on the other. *Mukti Bewa* v. *Jhotu Santra* (2) followed.

IN this case one Raja Ram Singh was tried at one trial by a magistrate of the first class on two charges framed under section 506 and section 500 of the Indian Penal Code. He was acquitted on the former and convicted on the latter charge. The complainant, Muhammad Ali Khan, was ordered to pay compensation to the extent of Rs. 25 to Raja Ram Singh on the ground that

* Criminal Revision, No. 138 of 1918, from an order of S S. Nehru, Magistrate, First Class, of Azamgarh, dated the 29th of October, 1917.

(1) (1888) I. L. R., 11 All., 27. (2) (1896) I. L. R., 24 Calc., 53.