

can be no authority for the proposition that no final decree can be passed before the appeal is decided and, if passed, cannot be executed.

1929

KHAIR-UN-  
NISSA BIBI  
v.ODDH COM-  
MERCIAL  
BANK. LTD.

For the reasons stated above, I concur in the order dismissing the appeal with costs.

By THE COURT :—The appeal is dismissed with costs.

*Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.*

HANWANT RAI (DEFENDANT) v. CHANDI PRASAD AND OTHERS (PLAINTIFFS) AND UMAN DATTA AND OTHERS (DEFENDANTS).\*

1929

January. 31

*Act No. IV of 1882 (Transfer of Property Act), section 55 (2)—Implied covenant—Covenant running with the land—Indemnity clause—Vendees from pre-emptor of original vendee entitled to the benefit—Act No. IX of 1908. (Limitation Act), article 116—Applicability to implied covenant.*

On the 12th of February, 1912, *H* sold some zamindari property to *M* and others. By this sale-deed *H* agreed to indemnify the vendees if by any act of himself or by any claim of his children or the members of his family any defect arose in the property. *K* sued for pre-emption and on the 25th of January, 1913, obtained a decree and, thereafter, possession. On the 6th of August, 1916, *K* and his joint brothers sold half the pre-empted property to the plaintiffs Nos. 1, 2 and three others. No indemnity clause was inserted in this sale-deed. Subsequently the sons of *H* sued for cancellation of the sale-deed of 1912, and got a decree and obtained delivery of possession of the whole property on the 12th of March, 1921.

The present suit was filed, in 1925, for compensation for breach of contract, based on the indemnity clause contained in the earlier sale-deed of 1912, by the brothers and survivors of *K* and two of the five vendees.

\* First Appeal No. 96 of 1926, from a decree of Krishna Das, Additional Subordinate Judge of Azamgarh, dated the 21st of November, 1925.

1929

HANWANT  
RAI  
P.  
CHANDI  
PRASAD.

Held (1) that even if the vendees of *K* and his brothers could not succeed on the express covenant in the sale-deed of 1912, they were entitled to succeed on the implied covenant as to title which runs with the land, under section 55 (2) of the Transfer of Property Act;

(2) that article 116 of the Limitation Act applied and therefore the suit was within time;

(3) that the word "contract" used in article 116 of the Limitation Act should also include an implied contract.

*Gobind Dayal v. Inayat-ullah* (1), referred to; *Kundan Lal v. Bisheshar Dayal* (2) not followed; *Mul Kunwar v. Chat-tar Singh* (3), followed; *Janak Singh v. Walidad Khan* (4), not followed; *Nabin Chandra Ganguly v. Munshi Mander* (5), *Sigamani Pandithan v. Munibadra Nainar* (6), *Ganapa Puttu Hegde v. Hammad Saiba* (7), *Injad Ali v. Mohini Chandra Adhikari* (8), and *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* (9), followed.

Babu Peary Lal Banerji and Munshi Kamla Kant Varma, for the appellant.

Maulvi Iqbal Ahmad, Maulvi Mukhtar Ahmad and Mr. Abu Ali, for the respondents.

MUKERJI and NIAMAT-ULLAH, JJ.:—This is an appeal by one who was arrayed as the defendant No. 1 in the original suit. The suit arose under the following circumstances.

The appellant Hanwant Rai sold, on the 12th of February, 1912, a certain amount of property to Mulai and two others for the sum of Rs. 9,000. Kauleshar Rai, who has since died, brought a suit for pre-emption on the 7th of September, 1912, and obtained a decree, on condition of payment of the entire consideration money of Rs. 9,000 on the 25th of January, 1913.

(1) (1885) I. L. R., 7 All., 775.

(3) (1903) I. L. R., 30 All., 403.

(5) (1927) I. L. R., 6 Pat., 606.

(7) (1925) I. L. R., 49 Ben., 593.

(2) (1927) I. L. R., 50 All., 95.

(4) (1915) 13 A. L. J., 669.

(6) [1926] A. I. R., (Mad.), 255.

(8) [1924] A. I. R., (Cal.), 148.

(9) (1916) I. L. R., 44 Cal., 759.

1929

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HANWANT  
RAI  
v.  
CHANDI  
PRASAD.

He deposited the money that he was required to do under the decree and obtained delivery of possession. The appeal to the High Court was dismissed. Kauleshar and his joint brothers, who are plaintiffs Nos. 3 and 4 in this action, sold a half share in the property pre-empted to the plaintiffs Nos. 1 and 2 of the suit and three others, on the 6th of August, 1916. The sons of Hanwant Rai challenged the sale made by their father, by suit No. 79 of 1919, and, eventually, got a decree for possession from the court of first instance and also by the court of appeal. The decree directed that on condition of payment of Rs. 2,761-8-0, the plaintiffs, namely the sons of Hanwant Rai, would be entitled to recover possession. They deposited the money and obtained delivery of possession on the 12th of March, 1921.

Having thus been dispossessed of their property the present suit was instituted by the brothers and survivors of Kauleshar Rai and two of the five transferees. It has been found that the defendant No. 1, one of such transferees, has a small interest in the property mortgaged and that the other transferees, never having paid anything towards the sale consideration, did not obtain any interest in the property. The present suit was directed for the recovery of several sums of money, viz. Rs. 6,238-8-0, being the difference between the entire purchase money paid, viz. Rs. 9,000 and the sum of Rs. 2,761-8-0 paid by the sons as a condition precedent to their recovery of the property, for recovery of Rs. 1,400, being the costs incurred by the plaintiffs in defending the sons' suit, Rs. 566-8-0 being the costs paid by the plaintiffs to the sons under the decrees obtained by them and Rs. 4,336-14-6, interest on the sale consideration and other sums claimed.

The suit has been decreed in its entirety except for the sum of Rs. 1,400 which represented the amount of

1929  
 HANWANT  
 RAI  
 v.  
 CHANDI  
 PRASAD.

costs incurred by the plaintiffs in defending the sons' suit. The plaintiffs have not appealed, and as we have said, the present appeal is by Hanwant Rai alone.

Two points have been urged before us, namely, (1) the pre-emptor's vendees are not entitled to the benefit of the indemnity clause in the sale-deed executed by Hanwant Rai in favour of Mulai and others, and (2), the suit was barred by limitation.

We shall take up the first point first. The original sale-deed, namely the one executed by Hanwant in favour of Mulai and others, will be found printed at page 23 of the record. By this sale-deed, Hanwant Rai expressly agreed to indemnify the vendees in case by any act of himself or by any claim of his children or the members of his family, any defect arose in the property. It is conceded that Kauleshar Rai, having succeeded in his suit for pre-emption, was substituted for the original vendees, as the vendee. That this was the position of the pre-emptor is fully borne out by the Full Bench case of *Gobind Dayal v. Inayat Ullah* (1); vide the remarks of MAHMUD, J., at page 808. It is clear, therefore, that so far as Kauleshar's surviving brothers are concerned, there can be no doubt that the suit is maintainable on the indemnity clause contained in the sale-deed of the 12th of February, 1912. So far as the vendees are concerned, there are two positions. Either to them the benefit of the contract was transferred or it was not. If it was not transferred, the benefit of the contract remains entirely in Kauleshar's survivors. If they have lost the entire property which was obtained by pre-emption, they are entitled to recover the damages, irrespective of the fact that they have transferred half the property to other people. If to the vendees, the rights accruing under the indemnity clause have been assigned, they too are entitled to maintain the suit. Further it appears that

(1) (1885) I. L. R., 7 All., 775.

1929

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 HANWANT  
 RAI  
 v.  
 CHANDI  
 PRASAD.

under section 55, sub-section (2), of the Transfer of Property Act there is always an implied covenant as to title and this covenant runs with the land. If that be the case with respect to an implied contract, it seems to follow that an express contract of this nature must also run with the land. In any case, the vendees from Kauleshar Rai and his brothers are entitled to take the benefit of the implied contract contained in section 55, sub-section (2), of the Transfer of Property Act. In any view of the case, it is impossible to maintain on behalf of the defendant No. 1 that the suit is not maintainable by the vendees of Kauleshar Rai and his brothers.

We now come to the question of limitation. It is argued on behalf of Hanwant Rai that either article 62 or article 97 of the Limitation Act applies, and as the suit was brought more than three years after delivery of possession to the sons of Hanwant Rai, the suit is barred by time. Reliance has been placed on several cases and mainly on the case of *Kundan Lal v. Bisheshar Dayal* (1). This was a decision of a Bench of two learned Judges of this Court and the learned Judges thought that they had to choose between two cases decided in this Court. Those two cases were *Mul Kunwar v. Chattar Singh* (2) and *Janak Singh v. Walidad Khan* (3). In the case in I. L. R. 30 All., 402 it was expressly decided that in the circumstances of the present case article 116 of the Limitation Act applied. In the latter case in 13 A. L. J. at page 669, article 116 was not applied on the express ground that there was no covenant to which article 116 could be applied. Their Lordships analysed the document before them and expressly found that there were no covenants to which article 116 could apply. The earlier case of I.L.R. 30 All., 402, was not brought to the notice of the learned Judges. It was not necessary to do so. Their Lordships appear to have been fully

(1) (1927) I. L. R., 50 All., 95. (2) (1908) I. L. R., 30 All., 402.

(3) (1915) 13 A. L. J., 669.

1929

HANWANT  
RAI  
v.  
CHANDI  
PRASAD

alive to the contents of article 116 of the Limitation Act, but, as we have said, they expressly said that in the circumstances of that case there was nothing in the sale-deed to which article 116 could be applied. In the case under discussion in I. L. R., 50 All., one Calcutta case and a Madras case were also cited, but they were not discussed. In view of the fact that the case in I. L. R., 50 All. preferred to follow one of the cases to another of the cases decided in this Court, we think we are at liberty to accept the case in I. L. R., 30 All., 402, also a Bench decision, as a proper guide for us.

Considering the case apart from authority there can be little doubt that article 116 of the Limitation Act would be applicable. We shall presently show that that article has been applied not only in this Court, in the case of I. L. R. 30 All., but by several other High Courts in India and also by the Privy Council. Article 116 runs as follows: "Suit for compensation for the breach of a contract in writing registered: Period of limitation—six years: Time from which period runs—when period of limitation would begin to run against a suit brought on a similar contract not registered."

The contract in writing registered is that, in case the vendees lost the whole or any portion of the property on account of the claim made by the children of the vendor, they would be entitled to be indemnified. This is an express contract of indemnity. The cause of action would arise from the date of dispossession, a date which is within six years of the suit. Apart from authority, therefore, there can be no difficulty in the application of article 116. Even if it had been the case that there was no express covenant, the implied covenant mentioned in section 55 of the Transfer of Property Act would be applicable. The fact that the implied contract is not put into the document itself will not make any difference. A contract may be express or implied (see section 9 of

the Contract Act). In article 116 of the Limitation Act, the word used is "contract." This should include an implied contract also. We have to mention this aspect of the case because we have said that if the vendees from Kauleshar Rai and his brothers could not succeed on the express contract contained in the sale-deed of 1912, they were entitled to succeed on the implied covenant which runs with the land.

In *Nabin Chandra Ganguly v. Munshi Mander* (1), it was held that the implied contract mentioned in section 108 of the Transfer of Property Act (the case was of a lease) could be read within article 116 of the Limitation Act and a suit for compensation for breach of the covenant would be governed by the six years' rule of limitation. The same view was taken in *Sigamani Pandithan v. Munibadra Nainar* (2), following earlier Madras cases. The same view was taken in *Ganapa Putta Hegde v. Hammad Saiba* (3) and in *Injad Ali v. Mohini Chandra Adhikari* (4). In the case of *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* (5), the question arose whether, where rent was payable under a registered document, article 110 which applied expressly to a suit for recovery of arrears of rent applied or article 116 with the larger period of limitation. Their Lordships of the Privy Council held that article 116 applied to all cases in which the contract was in writing registered, although such cases may have been provided for in the earlier portion of the first schedule of the Limitation Act. This makes it entirely clear that a suit for compensation for breach of a contract that is in writing registered must be brought within article 116.

We are entirely satisfied both on principle and on authority that the suit is within time. The result is that the appeal fails and is hereby dismissed with costs.

1929

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 HANWANT  
 RAI  
 v.  
 CHANDI  
 PRASAD.

(1) (1927) I. L. R., 6 Pat., 606. (2) [1926] A. I. R., (Mad.), 255.

(3) (1925) I. L. R., 49 Bom., 596. (4) [1924] A. I. R., (Cal.), 148.

(5) (1916) I. L. R., 44 Cal., 759.