

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kisch

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February, 24

ONKAR SINGH AND ANOTHER (PLAINTIFFS) v. KASHI PRASAD (DEFENDANT)*

Limitation Act (IX of 1908), article 33—Part of purchase price left with vendee for payment to a creditor of vendor—Vendee's failure to pay and consequent payment by vendor—Suit to recover from vendee the amount left with him and interest—Limitation—Terminus a quo.

A decree was sold for Rs.2,500 on the 1st of March, 1923, and the whole of the purchase money was left with the vendee for payment to a creditor who held a decree against the vendor. The vendee did not make the payment, and the vendor borrowed money from a third person on the 10th of December, 1926, and therewith discharged the decree of his creditor. The vendor then sued the vendee on the 9th of December, 1929, for recovery of the Rs.2,500 which had been left in deposit, together with interest thereon at 6 per cent. from the date of the sale. On the question of limitation, *held* that the suit was within time.

If a portion of the purchase money is left with a vendee for payment to a creditor of the vendor, and no time is fixed for payment, there is an implied agreement on the part of the vendee to pay the amount due to the creditor either forthwith or within a reasonable time. If the vendee commits a breach of this implied agreement and fails to pay, he is bound in law to indemnify the vendor for any damage sustained by the latter in consequence of the breach. The suit by a vendor in such cases, where he himself has had to pay the creditor, is not one for the return of the unpaid purchase money that the vendee failed to pay, but is one to enforce the implied contract of indemnity, the breach of which was committed by the vendee by failing to make the payment for which money had been left with him, and the suit comes within the purview of article 83 of the Limitation Act. The time for such a suit, which is one for damages, does not begin to run against the vendor till the damage has actually been suffered by him, i.e. till the date that he has made the payment to the creditor.

Raghubar Rai v. Jaij Raj (1), and *Ram Narain v. Nihal Singh* (2), distinguished.

*Second Appeal No. 1303 of 1931, from a decree of J. N. Dikshit, Additional Subordinate Judge of Agra, dated the 4th of May, 1931, reversing a decree of C. I. David, Munsif of Agra, dated the 8th of July, 1930.

(1) (1912) I. L. R., 34 All., 429.

(2) (1925) 87 Indian Cases, 804.

Messrs. *P. L. Banerji* and *Shabd Saran*, for the appellants.

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Messrs. *K. Verma* and *M. L. Chaturvedi*, for the respondent.

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IQBAL AHMAD and KISCH, JJ.:—This is a second appeal by the plaintiffs whose suit for recovery of Rs.2,500 principal and Rs.1,015-10 interest, in all for a sum of Rs.3,515-10 has been dismissed by the lower appellate court. The facts are admitted and are as follows. Jaswant Singh, the father of the plaintiffs, held a simple money decree against one Lal Hans. He sold the decree to Kashi Prasad, defendant-respondent, on the 1st of March, 1923, for a sum of Rs.2,500. The entire consideration was left with the defendant for payment to one Chiranji Lal, who held a decree against Jaswant Singh, the vendor. The defendant did not pay the amount left in deposit with him to Chiranji Lal, and Jaswant Singh borrowed money from a third person by executing a mortgage deed on the 10th of December, 1926, for discharging the decree of Chiranji Lal. Jaswant Singh died, and after his death the plaintiffs brought the suit giving rise to the present appeal, for recovery of the amount that was left in deposit with the defendant for payment to Chiranji Lal and which he had failed to pay. The plaintiffs claimed interest on the amount at the rate of 6 per cent. per annum from the date of the sale deed in favour of the defendant. The date of the cause of action alleged in the plaint was the 10th of December, 1926, the date on which the mortgage deed mentioned above was executed by Jaswant Singh. The suit was filed on the 9th of December, 1929.

The defendant resisted the suit *inter alia* on two grounds: (1) That the sale deed executed by Jaswant Singh in favour of the defendant was fictitious and without consideration, and was executed with a view to defraud certain creditors of Jaswant Singh; (2) that the suit was barred by limitation. Both the courts below

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held that the sale deed executed by Jaswant Singh was for consideration and that the plea of the defendant-respondent that it was fictitious and without consideration was without substance. The finding of the lower appellate court on the point is a finding on a question of fact and is binding on us in second appeal.

The courts below, however, have differed on the question of limitation. The trial court held that the suit was governed by article 61 of the first schedule to the Limitation Act (Act IX of 1908) and, as it was filed within three years from the date of the payment of the decretal amount to Chiranji Lal by Jaswant Singh, the suit was within time. The lower appellate court, on the other hand, without deciding which article of the first schedule to the Limitation Act was applicable, held that the suit was not a suit for damages but was "for recovery of sale money as stated in paragraph 6 of the plaint," and that time began to run against Jaswant Singh from the date of the execution of the sale deed in favour of the defendant, and that the suit was barred by limitation.

The learned Judge of the lower appellate court relied on the decisions of this Court in *Raghubar Rai v. Jaij Raj* (1) and *Ram Narain v. Nihal Singh* (2) in support of the conclusion arrived at by him that time for the recovery of the amount claimed in the present suit began to run against the plaintiffs from the date of the execution of the sale deed by Jaswant Singh, viz. from the 1st of March, 1923. It was held in *Raghubar Rai's* case that upon the failure of a vendee to pay money due by a vendor to a third party which the vendee agreed to pay and no time was fixed for payment, the breach is committed on the date when the sale deed is executed "and there is no 'continuing breach' within the meaning of section 23 of the Limitation Act nor 'successive-breaches' within the meaning of article 115." It was.

(1) (1912) I. L. R., 34 All., 429.

(2) (1925) 87 Indian Cases, 804.

further observed by the learned Judges in that case that one breach of a contract can furnish only one cause of action and no more and that "actual loss when it occurs is only one of the results of the breach and is not an act of the party who breaks a contract and can, therefore, create no second cause of action." It is to be noted, however, that the determination of the question, whether consequential damage that results to a vendor, who has himself to pay the amount that he left with the vendee to pay to a third party and which the vendee failed to pay, does or does not give a fresh cause of action to the vendor to recover damages, was not necessary for the decision in *Raghubar Rai's* case (1). In that case the suit was brought by the vendor before he had made the payment to the third party, for payment to whom some amount was left with the vendee, and it is clear, therefore, that the observation of the learned Judges that payment of money by a vendor to a third party which the vendee agreed to pay does not give a cause of action to the vendor was *obiter dictum*. Indeed the learned Judges themselves observed in the course of the judgment that "the point that the date on which actual damage was sustained gave the plaintiffs a second cause of action does not arise, inasmuch as the plaintiffs have not yet paid any money to the heirs of Sanchi Ram."

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In the case of *Ram Narain v. Nihal Singh* (2) also the suit was brought by the vendor before he had himself paid the amount that was left with the vendee for payment to one of his creditors, and it was held that, no time having been fixed in the sale deed for the payment of the amount, the vendee's failure to make the payment constituted a breach on his part on the date when the sale deed was executed, and limitation for a suit to recover damages from the vendee for the breach commenced from that date. In that case SULAIMAN, J., while noticing the case of *Raghubar Rai* (1) observed

(1) (1912) I. L. R., 34 All., 420.

(2) (1925) 87 Indian Cases, 804.

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that "the observations in that case suggesting that even if subsequently the plaintiffs have themselves to pay off the mortgage money and redeem the property, they may not have a fresh cause of action to recover from the defendants" were mere *obiter dicta*.

The two cases noted above are distinguishable from the case before us on the broad ground that in those cases the vendor had sued the vendee for the unpaid purchase money before making any payment to the person to whom the vendee had covenanted to pay the amount left with him. In the case before us the suit was brought by the plaintiffs appellants after Jaswant Singh, their predecessor in title, had actually paid the amount that was left with the defendant for payment to Chiranji Lal. It cannot be disputed that actual damage was suffered by the plaintiffs appellants on the date on which they, in consequence of the failure of the defendant to make payment to Chiranji Lal, had to pay the amount due to him. In the sale deed in favour of the defendant no time was fixed for payment to Chiranji Lal, and, therefore, it should be presumed that the parties to the transaction intended that the defendant should make payment to Chiranji Lal forthwith or within a reasonable time. If a portion of the purchase money is left with a vendee for payment to a creditor of the vendor, and no time is fixed for payment, there is an implied agreement on the part of the vendee to pay the amount due to the creditor either forthwith or within a reasonable time. If the vendee commits a breach of the implied agreement by failing to pay the amount left with him by the vendor for payment to the third party, he is bound in law to indemnify the vendor for any damage sustained by the vendor in consequence of the breach of agreement on his part. The suit by a vendor in such cases is not for the return of the unpaid purchase money that the vendee failed to pay, but is to enforce the implied contract of indemnity the breach of which was committed

by the vendee by failing to pay to the third party for whose payment the vendor had left a portion of the purchase money with the vendee, and the suit comes within the purview of article 83 of the first schedule to the Limitation Act. The time against the plaintiff in such a suit does not begin to run till he "is actually damaged". This was the view taken by this Court in *Kedar Nath v. Har Govind* (1) and *Sarju Misra v. Ghulam Husain* (2).

The distinction between a suit for recovery of unpaid purchase money and a suit for recovery of damages that result to a vendor, in consequence of the breach by the vendee of a covenant to pay the amount that was left with him by the vendor for payment to a third party, is obvious. In the former class of cases the vendor, irrespective of any damage being suffered by him, claims from the vendee the money that belongs to him and that was in deposit with the vendee and which the vendee failed to pay. If the sale is of immovable property and the vendor sues for the unpaid purchase money by enforcement of the statutory charge created in favour of a vendor by section 55 of the Transfer of Property Act, the period of limitation for such a suit is 12 years from the date of the sale deed. Even if the vendor claims a simple money decree for the amount against the vendee, the time begins to run against him from the date of the sale deed.

When, however, the suit by the vendor is for damages that the vendor has suffered by being himself compelled to pay the amount to a third party for whose payment a portion of the sale consideration was left with the vendee and which the vendee failed to pay, the time does not begin to run against the vendor till the damage has actually been suffered by him, i.e. till the date that he has made the payment. But it is to be remembered in this connection that the payment to the third party that

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(1) (1926) 24 A. L. J., 550.

(2) (1920) 63 Indian Cases, 87.

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can entitle the vendor to sue the vendee for damages must not be gratuitous and must be made by the vendor before the claim of the third party against the vendor has become unenforceable in law. For instance, if the vendor makes the payment to the third party after his claim against the vendor was time-barred, a suit for damages against the vendee cannot lie.

In the case before us, on the date on which Jaswant Singh made the payment to Chiranji Lal, Chiranji Lal's claim was enforceable at law, and, therefore, time began to run against the plaintiffs from the date of the payment. The suit was admittedly filed within three years of that date and was within time.

We hold, therefore, that the lower appellate court was wrong in holding that the suit was barred by limitation. Accordingly we allow this appeal, set aside the decree of the lower appellate court, and, modifying the decree of the trial court, decree the plaintiffs' suit with costs in all courts.

MISCELLANEOUS CIVIL

Before Mr. Justice Young and Mr. Justice Iqbal Ahmad

IN RE INDIAN STATES BANK, LTD.*

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February, 27

Companies Act (VII of 1913), section 196—Public examination of officers of company—Report of official liquidator—Specification of fraud—Sufficiency of material for prima facie case—Order made ex parte—Jurisdiction.

Section 196 of the Companies Act, on the face of it, gives jurisdiction to a court to make an order for public examination immediately the official liquidator has applied to the court stating that in his opinion a fraud has been committed by any director or other officer of the company. It is, however, under the same section the duty of the court to consider the application with respect to the information contained in it. While the court must consider judicially the application of

* Miscellaneous case No. 784 of 1931.