

PRIVY COUNCIL.

HANUMAN KAMAT (PLAINTIFF) v. HANUMAN MANDUR AND
OTHERS (DEFENDANTS).

P.C*
1891.
Nov. 11.

[On appeal from the High Court at Calcutta.]

*Limitation Act (XV of 1877), arts. 62 and 97—Money paid, suit to recover,
upon failure of consideration—Consideration, failure of.*

A sale, which a member of a joint-family (Mithila) had attempted to make, went off upon the objection made by other co-sharers, but not before the purchase-money had been paid. It might have been that the agreement for sale was not void from the beginning, but was only void upon objection being made; and if it was only voidable, the consideration did not fail at once, at the time of the receipt of the purchase-money, so as to render it money had and received, to the use of the payer within the meaning of article 62 of schedule II of Act XV of 1877. But it failed, at all events, when the purchaser being opposed found himself unable to obtain possession. He would have had a right to sue at that time to recover his purchase-money upon a failure of consideration. And, therefore, the case appeared to fall within article 97. It must fall either within that article or within article 62.

APPEAL from a decree (14th June 1887) of the High Court (1) affirming a decree (22nd March 1886) of the Subordinate Judge of Bhágalpur.

The plaintiff sued on 4th March 1885 to recover from the defendants, as joint-survivors, according to the Mithila law, agreeing on this point with the Mitakshara, of Dowlut Mandur, deceased in 1883. The claim was for Rs. 3,600 paid by the plaintiff to the last named on the 1st August 1879, as the price of a two-annas-and-a-half share in a mauza which the plaintiff had agreed to buy.

The question now was whether the claim was barred by time; with reference to when the consideration for this money had failed, possession not having been given; and the appellant

* *Present*: LORDS WATSON, HOBHOUSE, and MORRIS, SIR R. COUCH, and LORD SHAND.

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contended that the case was governed by article 97 of schedule II of Act XV of 1877; and not by Article 62, as has been held in the Court below.

Dowlut Mandur and his five sons, the latter now being the first five defendants, formed, together with the sons of the first three, a joint and undivided family, of which Dowlut was the karta or manager.

In that capacity he had obtained the mauza for the family; and after the sale of the 2½ annas share the Collector of the district rejected, on the 22nd December 1880, an application for mutation on the record of the share into the purchaser's name. This he did on the opposition made by the family to the transfer. On the 16th March 1881, Hanuman Kamat sued for possession, not asking, however, for a return of the purchase-money in case he should not be held entitled to have the sale completed. The first Court decreed the suit in his favour. But the District Court dismissed the suit on the 18th December 1882. The latter Court referred to *Sadabart Prasad Sahu v. Foolbash Koer* (1), as showing the inability of a member of a joint-family to encumber joint property without the consent of his co-sharers, and was of opinion that this case fell within the same principle.

This was affirmed, on the 5th March 1884, by the High Court, which added, with reference to the death of Dowlut Mandur in 1883, that it had not been shown that he had sued in order to pay off antecedent personal debts.

The present suit, for the recovery of the purchase-money and interest, was dismissed by the Subordinate Judge, who held that in the suit of 1881 the plaintiff should have demanded the return of the purchase-money, as one of his remedies. And that he was now barred by the 43rd section, Civil Procedure, 1882.

On the plaintiff's appeal to the High Court a Division Bench (WILSON and O'KINEALY, JJ.) reversed the above, holding that the 43rd section in no way applied. But they dismissed the suit on limitation, applying article 62. The purchase-money was money received to the plaintiff's use. The failure of the consideration was, in their opinion, a failure from the beginning, though this was

(1) 3 B. L. R., F. B., 31.

not manifest at the time. The judgment is reported in I. L. R., 15 Calc., 51.

Mr. R. V. Doyne, for the appellant, argued that not the 62nd, but the 97th article was applicable; and under the latter, the suit was within time. The date of the failure of the consideration was the date of the dismissal of Hanuman's suit for possession. Thus the suit was within three years. It was also submitted that Dowlut Mandur having died pending the appeal to the High Court in the suit for possession, the liability of his sons to pay a debt not incurred by him for any immoral purpose had arisen.

No one appeared for the respondents. Their Lordships' judgment was delivered by

SIR R. CHURCH.—On the 1st August 1879 one Dowlut Mandur, the father of the respondents, sold to the appellant $2\frac{1}{2}$ annas out of 8 annas of a certain property, and the consideration was then paid by the appellant. On the 1st April 1881, and after the death of Dowlut Mandur, the appellant filed a plaint, in which he stated that after the purchase he had applied to the Collector for registration of his name in respect of the $2\frac{1}{2}$ annas which had been so sold to him; that his application was opposed on the part of two of the members of the joint-family of which Dowlut Mandur was the head; and that in consequence of that opposition the Court rejected his petition for registration of his name on the 22nd December 1880; and treating that as giving him a cause of action for a suit to recover possession, he asked in the plaint that possession might be given to him. The Subordinate Judge of Bhágalpur decreed the suit; the District Judge dismissed it; and on appeal by the appellant to the High Court that Court dismissed the appeal. On the 4th March 1885 the appellant commenced a suit for the recovery of his purchase-money and interest. The Second Subordinate Judge of Bhágalpur dismissed this suit on the ground that it was barred by section 43 of the Civil Procedure Code. The High Court, on appeal from the Subordinate Judge, held the suit to be barred by the Law of Limitation, apparently under the 62nd Article of the second schedule to the Limitation Act. There are two articles in that schedule which it has been said may be applicable to the present case.

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The 62nd Article provides that, in a suit for money had and received, the period of limitation runs from the time of the money being received. The 97th Article applies to a suit to recover money upon an existing consideration which afterwards fails, and it is said that the period of limitation is to date from the time when the consideration failed. Their Lordships are of opinion that the case must fall either within Article 62 or Article 97. If there never was any consideration, then the price paid by the appellant was money had and received to his account by Dowlut Mandur. But their Lordships are inclined to think that the sale was not necessarily void, but was only voidable if objection were taken to it by the other members of the joint-family. If so, the consideration did not fail at once, but only from the time when the appellant endeavoured to obtain possession of the property, and being opposed, found himself unable to obtain possession. There was then, at all events, a failure of consideration, and he would have had a right to sue at that time, to recover back his purchase-money upon a failure of consideration; and, therefore, the case appears to them to be within the enactments of Article 97.

It appears to their Lordships unnecessary to give any opinion upon the other question which was decided by the High Court and the Subordinate Court, the High Court differing from the latter, namely, whether the appellant ought, in his suit brought in 1881, to have included a claim to recover back the purchase-money. It may be a question of some difficulty in a case of this kind as to what is the effect of section 43 of the Civil Procedure Code. Their Lordships consider it is unnecessary for them to give any opinion upon that, and they abstain from doing so. Upon the question of limitation they are of opinion that the decree of the High Court ought to be affirmed, and the appeal dismissed; and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellant: Messrs. T. L. Wilson & Co.