1881

HIMALAYA BANK v. HURST.

decree, Hurst presented a petition to be declared an insolvent, and the amount of her judgment-debt was scheduled in the list of creditors. Ultimately an order was passed declaring Hurst an insolvent, and it would therefore seem that her judgment-debt under s. 351 of the Civil Procedure Code became a decree of the Court of the District Judge. This, however, is not important in view of the construction we feel ourselves constrained to place upon s. 295 of the Code. In our opinion, the Small Cause Court Judge in his more limited jurisdiction on the one hand, and in his larger jurisdiction of Subordinate Judge on the other, fills two distinctly different judicial characters. The sale in execution of the decree of the Bank was directed by him as Judge of the Small Cause Court. The applications made to him by Mrs. Hammond and Mr. Hunter for execution of their decrees were in his character of Subordinate Judge. It is obvious, therefore, that the terms of s. 295 had not been satisfied. The assets have been realized by sale by the Small Cause Court. Prior to their realization Mrs. Hammond and Hunter had not applied to the Court that afterwards received such assets for execution of decrees for money against Hurst; but on the contrary their applications for execution were to the Subordinate Judge's Court. They were not therefore entitled to come in and ask the Small Cause Court Judge to allow them to share in the proceeds acquired by the sale in execution of that Court's decree, on the strength of the two decrees of the Subordinate Judge's Court. This being the view we entertain, the reference must be answered accordingly.

APPELLATE CIVIL.

1881
April 30.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KISHEN LAL AND OTHERS (PLAINTIFFS) *v.* KINLOCK (DEFENDANT).*

Vendor and Purchaser—Agreement by purchaser to refund purchase-money in case land sold proved deficient in quantity—Suit for refund—Suit for compensation for breach of contract—Act XV of 1877 *(Limitation Act), sch.* ii, *No.* 65.

The vendor of certain land agreed in the conveyance, which was registered, that, in case the land actually conveyed proved to be less than that purporting to

* Second Appeal, No. 768 of 1880, from a decree of R. G. Currie, Esq., Judge of Aligarh, dated the 23rd April, 1880, modifying a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 16th December, 1879.

be conveyed, he should make a refund to the purchaser of the purchase-money in proportion to the value of the quantity of land deficient. The land actually conveyed having proved to be less than that purporting to be conveyed, and the vendor having failed to make a refund of the purchase-money in proportion to the value of the quantity of land deficient, the purchaser sued the vendor for the value of the quantity of land deficient. *Held* by SPANKIE, J., that the suit was one of the nature described in No. 65, sch. ii of Act XV of 1877, to which, the agreement being in writing registered, the limitation provided by No. 116, sch. ii of that Act was applicable. *Held* by OLDFIELD, J., that No. 116, sch. ii of Act XV of 1877, was applicable to the suit.

ON the 8th June, 1873, the defendant in this suit, Kinlock, conveyed to one Kanhaiya Lal and one Hardai Kuar 352 bighas 13 biswas of land situate in a village called Shampur in consideration of Rs. 7,300. The conveyance, after reciting that the purchase-money had been calculated on a rental of Rs. 827-12-0, stated (i) that, in case the vendees found, when making collections, that the rent-roll did not yield that amount, the vendor should refund to the vendees a sum of money proportionate to the deficiency; (ii) that, should there be found any deficiency in the quantity of land sold, the vendor should hold himself responsible for the value of the deficiency, costs of litigation, and interest at twelve per cent; and (iii) that, in case the vendor failed to fulfil these conditions, the vendees should be at liberty to realize their purchase-money in respect of the quantity of land deficient and any deficiency in the rent-roll by a suit against the vendor. On the 22nd April, 1877, Kanhaiya Lal and Hardai Kuar conveyed the property which they had purchased from the defendant and all their rights as against him to Jiwa Ram, the father of the plaintiffs in this suit. On the 7th June, 1879, the plaintiffs brought the present suit against the defendant. In this suit, alleging, *inter alia*, that the quantity of land conveyed by the defendant to Kanhaiya Lal and Hardai Kuar had been found to be, not 352 bighas 13 biswas, but 288 bighas, 6 biswas, and 10 biswansis, and that the rental amounted, not to Rs. 827-12-0, but to Rs. 733-8-0, they claimed from the defendant, under his conveyance to their vendors of the 8th June, 1873, *inter alia*, the value of the deficiency in the quantity of land. The defendant contended, *inter alia*, that the original vendees of the land became aware of the deficiency in the quantity of land in 1281 fasli (Sept. 1873—Sept. 1874) and did not claim any thing

1881

SHEN LAL v. KINLOCK.

on account of the same, and the suit was barred by limitation. The Court of first instance held that the suit was within time, and finding that there was a deficiency in the quantity of land of 33 bighas, 16 biswas, and 10 biswansis, gave the plaintiffs a decree in respect of such deficiency. The lower appellate Court held on appeal by the defendant that the suit was barred by limitation under No. 96, sch. ii of Act XV of 1877.

On second appeal by the plaintiffs it was contended on their behalf that No. 96, sch. ii of Act XV of 1877, was not applicable to the suit, but No. 120.

Munshi *Sukh Ram* and Babu *Jogindro Nath Chaudhri*, for the appellants.

Messrs *Conlan* and *Ross*, for the respondent.

The following judgments were delivered by the Court:

SPANKIE, J.—(After stating the facts of the case, the decisions of the lower Courts, and the grounds of appeal, continued) :—The first plea must be allowed. The suit cannot be regarded as one for relief on the ground of mistake, nor has there been any misrepresentation within the meaning of any one of the clauses of s. 18 of the Indian Contract Act of 1872. The three contingencies set forth in the contract of sale were foreseen or anticipated by both parties, and with regard to two of them, deficiency of rental and deficiency in the quantity of land, provision was made for a refund or abatement of the purchase-money in proportion to the loss that might be discovered. There is no question here of voiding a contract at the option of one of the parties on the ground that his consent was obtained by misrepresentation, nor is there any demand on the part of a party whose consent was caused by misrepresentation that a contract shall be performed, and that he shall be put in the position in which he would have been if the representations had been true. Nor is it the case of a party who finds that his vendor had not the entirety of the estate which he professes to sell, and who refuses to accept at a proportionate abatement the quantity of land which the vendor really owns and has to sell. Nor again is the plaintiff here, after discovery of the deficiency in the quantity of land

sold, exercising any election and offering to take his vendor's interest in the estate, subject to a proportionate reduction in the amount of sale-consideration. But the parties have provided for a deficiency either suspected or known to both of them to be likely to happen, and it is one of the conditions of the sale-contract that, if it ever happened, there will be a refund of a proportionate amount of the purchase-money. There is no pretence of any consent to the contract of sale induced by misrepresentation. In their plaint they sue to recover the money claimed by enforcing the conditions of the contract, and in their third ground of appeal they take exception to the Judge's ruling that they are asking for relief on the ground of mistake, and again assert that they seek to enforce the condition of the contract. But if the plaintiffs are not seeking relief on the ground of mistake, what are they asking for, and what is the limitation applicable to the suit? According to the statement of plaintiffs themselves they claim to enforce the conditions of the contract of sale of 1873, by virtue of the sale to them in 1877 by the original vendees of the estates covered by that deed, and by the assignment of the rights of all kinds secured by the instrument. Their cause of action is the right to sue for the money claimed in consequence of defendant's refusal to carry out his part of the contract. The refund of the purchase-money on the happening of the contingencies provided for in the deed of sale must be regarded as compensation for the deficiency. The sale to the purchaser is maintained, but when it appears that there is a deficiency in rental or quantity of land sold, he is entitled to satisfaction and an equivalent for the deficiency. The terms of the deed may call it a refund of purchase-money, or a proportionate reduction in the amount, or an abatement, of the purchase-money, but it is in fact compensation; and by the deed itself, if there prove to be a deficiency in the quantity of land, not only is a proportionate amount of the purchase-money, *i.e.*, the value of the land deficient, to be paid to the vendees, but they are to have any costs of Court and interest at 12 per cent. It would seem then that the claim here is one brought into Court because the defendant refuses to fulfil the conditions of the contract and to make good to the plaintiffs the loss they have sustained. Had the defendant paid the value of the and that is deficient, or refunded to the purchaser on account of

1881

ISHEN LAL v. KINLOCK.

purchase-money proportionate to decrease in the rental, there would have been no need of this suit. The plaintiffs are compelled to sue because defendant has broken the promise which is the agreement in the conditions of sale. Under these circumstances art. 65, sch. ii of Act XV of 1877, appears to be applicable,—"For compensation for breach of a promise to do any thing at a specified time, or upon the happening of a specified contingency." I had been disposed to regard the suit as one for money paid upon an existing consideration which afterwards fails, but on reflection I think that art. 97 of the schedule would not apply. It is true that the purchaser undertakes to pay Rs. 5,000, for all the lands included in the sale-deed, and for this sum the vendor engages to deliver the land to the vendee, and the latter is unable to put the former into possession of all that he proposes to sell. But still the consideration cannot be said to have failed in regard to the subject matter of the contract itself. The provision made for compensation should there be any deficiency and the maintenance of the contract itself precludes the assumption that there has been a failure of consideration. In this case the vendee could not have repudiated the sale, as he had accepted the promise of the vendor to make good by a money compensation any deficiency as to the quantity of the land sold. When he receives the compensation promised, the consideration has not failed. The vendor retains the purchase-money and the vendee retains the land. The consideration would fail if the deficiency in the rental and quantity was so large that the vendor had nothing at all left to sell. After full consideration it appears to me that art. 65 applies. The agreement is made up of several promises and every promise is in itself an agreement, and with regard to a deficiency in the rental it is provided that, if it is discovered at the time of making collections from the tenants, "then the vendor should refund to the vendee so much out of the purchase-money as would be proportionate to the decrease." In regard to a deficiency in the quantity of land the provision is:—"Should there arise any deficiency or defect in the quantity sold, the vendor shall stand responsible for the same: that in case of there being deficiency in the share sold the vendor shall pay to the vendees the value thereof, with the costs of Court and interest of one per cent." But if art. 65 applies, the limitation begins to run when the specified time

1881

KISHEN LA
v.
KINLOCK

arrives, or the contingency happens, and the ordinary limitation would be three years. But the promise is recorded in writing registered, and the limitation is extended by art. 116 to six years. This is settled by the Full Bench decision of this Court in the case of *Husain Ali Khan* v. *Hafiz Ali Khan* (1). This being so, the suit cannot be said to be barred by limitation, and the plaintiffs were entitled to have it tried on the merits, the suit having been instituted within six years of the date of the execution of the original deed of sale, and therefore of the discovery of the deficiency.

OLDFIELD, J.—I concur in holding that art. 116, sch. ii of the Limitation Act is applicable to this suit, and that the suit is not barred by limitation.

CIVIL JURISDICTION.

1881
April 4.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

BENARSI DAS (PLAINTIFF) *v.* BHIKHARI DAS (DEFENDANT).*

Promise to pay balance found due on accounts stated in instalments—Promissory Note —Note of agreement in account-book—Evidence of terms of agreement—Act I of 1872 *(Evidence Act), s.* 91*—Relinquishment of part of claim—Act X. of* 1877 *(Civil Procedure Code), s.* 43.

In 1876 accounts were stated between *B* and *D*, and a balance of Rs. 800 was found to be due from *D* to *B*. *D* gave *B* an instrument whereby he agreed to pay the amount of such balance in four annual instalments of Rs. 200. *B* at the same time noted in his account-book that such balance was "payable in four instalments of Rs. 200 yearly." In July, 1879, *B* sued *D* upon such instrument for the balance of the first instalment. The Court trying this suit refused to receive such instrument in evidence on the ground that it was a promissory note and as such was improperly stamped. Thereupon *B* applied for and obtained permission to withdraw from the suit with liberty to bring a fresh one for the original debt. In October, 1879, *B* again sued *D*, claiming the balance of the first and second instalments, basing his claim upon the note made by him in his account-book. He obtained a decree in this suit for the amount claimed by him. In 1880 *B* again sued *D*, claiming the amount of the third instalment, again basing his claim upon such note.

Held by SPANKIE, J., that the suit last-mentioned was barred by the provisions of s. 43 of Act X of 1877, inasmuch as *B* should in the second suit

* Application, No. 85B. of 1880, for revision under s. 622 of Act *X* of 1877 of a decree of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 23rd August, 1880.

(1) I. L. R., 3 All. 600.