

disallowing the application for execution was correct though not on the ground mentioned in that order.

We would therefore dismiss this application but would make no order as to costs.

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PANDIT
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LAL

v.

PERCHA RAM

Application dismissed.

APPELLATE CIVIL

*Before Sir C. M. King, Knight, Chief Judge and Mr.
Justice E. M. Nanavutty*

BHAGWATI PRASAD AND OTHERS (PLAINTIFFS-APPELLANTS)
v. BADRI PRASAD AND OTHERS (DEFENDANTS-RESPONDENTS)*

1935
December, 6

Vendor and purchaser—Sale of share in a mahal—Possession with purchaser—Suit by third person for possession of part of share decreed—Breach of covenant of title—Suit by purchaser for refund of purchase money or for compensation—Vendee not dispossessed—Suit, if premature—Contract Act (IX of 1872), section 73, Applicability of—Breach of covenant of title—Compensation, when claimable—Transfer of Property Act (IV of 1882), section 55—Sale-deed of land—Term as to refund of money in case of dispossession—Construction of deed—Buyer cannot claim compensation unless dispossessed.

Where a person sells a share in a mahal and makes over its possession to the vendee, but a portion of the share out of it is decreed in favour of another person in another suit and the vendee thereupon sues for refund of half of the purchase money or, alternatively, for damages for breach of contract of sale, such suit is premature as mere passing of the decree cannot be held to constitute a cause of action, and the cause of action does not accrue until the vendee is dispossessed in execution of decree. *Lakhpat Kuar v. Durga Prasad* (1), and *Multanmal Jaya Ram v. Budhumal Keval Chand* (2), distinguished. *Juscurn Boid v. Pirthichand Lal* (3), *Hanuman Kamut v.*

*Second Civil Appeal No. 101 of 1934, against the decree of Pandit Brij Kishen Topa, Subordinate Judge, Malihabad at Lucknow, dated the 15th of December, 1933, upholding the decree of Saiyid Akhtar Ahsan, Munsif, Haveli, Lucknow, dated the 29th of April, 1933.

(1) (1929) I.L.R., 8 Pat., 432.

(2) (1920) I.L.R., 45 Bom., 955.

(3) (1918) L.R., 46 I.A., 52.

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Hanuman Mandar (1), and *Muhammad Siddiq v. Muhammad Nuh* (2), approved.

Compensation for breach of a covenant of title can only be claimed under section 73, Contract Act, when loss or damage has been caused. It is doubtful whether it can be held that the mere passing of the decree actually causes loss or damage before the decree has been executed. *V. M. Meerakanni Rowther v. A. V. Periya Karuppan* (3), referred to.

Where a sale-deed definitely provides that in case of any disturbance or dispute, the buyer can claim his money with interest from the seller from the date of dispossession, it is not the intention of the parties that the buyer can claim compensation unless and until he is dispossessed. *Kavi Rao v. Zabu* (4), approved.

Mr. *Kashi Prasad Srivastava*, for the appellants.

Messrs. *Hyder Husain, Bhagwati Nath Srivastava* and *Anant Prasad Nigam*, for the respondents.

KING, C.J. and NANAVUTTY, J.:—This is a plaintiffs' appeal arising out of a suit for refund of purchase money, or in the alternative for damages for breach of contract of sale.

One Rajjan Lal sold a four annas share out of a certain mahal to the father of the plaintiffs on the 30th of January, 1931. A partition was effected in the family of Rajjan Lal in November, 1931. On the 4th of April, 1932, two of the sons of Rajjan Lal brought a suit against Rajjan Lal and their brother Chhotey Lal and the plaintiffs for possession of two annas out of the four annas which had been sold to the plaintiffs' father. This suit was decreed on the 24th of October, 1932, with the result that defendants 1 and 2 of the present suit were found entitled to two annas of the property sold and were given a decree for possession. It was also held in that suit that the actual sale consideration was only Rs.1,620 and not Rs.2,500 as entered in the sale-deed.

On the 5th of December, 1932, the plaintiffs brought their present suit claiming refund of Rs.810 as half the

(1) (1891) L.R., 18 I.A., 158.

(2) (1930) I.L.R., 52 All., 604.

(3) (1934) I.L.R., 57 Mad., 1016.

(4) (1932) A.I.R., Nagpur, 5.

sale consideration, together with the costs of defending the suit brought by defendants 1 and 2, and interest.

One of the grounds of defence was that the suit was premature because the plaintiffs were still in possession of the property in suit, and therefore they had suffered no loss or damage. Both the Courts below have concurred in finding that the suit is premature as no cause of action had accrued before the institution of the suit.

It has been argued for the appellants that a cause of action accrued when the decree was passed in the Munsif's Court on the 24th of October, 1932, decreeing possession of two annas out of the property sold by Rajjan Lal in favour of defendants 1 and 2, who were the plaintiffs of that suit. It is argued that the effect of this decree was to cause a breach of the implied covenant of title contained in the plaintiffs' sale-deed, and that the passing of this decree constituted a sufficient cause of action for instituting the suit.

For the respondents it is argued that compensation can be only claimed for breach of contract under section 73 of the Indian Contract Act when any loss or damage has been occasioned by the breach. As the plaintiffs have not been dispossessed, no loss or damage can be said to have been sustained, and therefore no cause of action has accrued for a suit for damages.

Both parties have relied upon certain authorities, but in our opinion the authorities relied upon by the respondents and by the Courts below are more clear and decisive than those which have been cited for the appellants. For the appellants reliance has been placed mainly upon the ruling in *Multanmal Jaya Ram and another v. Budhumal Keval Chand and others* (1). In that case the plaintiffs in 1911 bought two lands under a registered sale-deed and went into possession. One of the lands was let to a tenant. The tenant claimed the land as his own and established his title to the land

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in 1913, and the decree was confirmed by the High Court in 1916. In 1917 the plaintiffs sued their vendors for cancellation of the sale of 1911 and to recover the consideration money together with certain amounts spent on improvements. It was held that a cause of action arose in 1913 when the tenant established his title in the trial Court. In that case the question did not arise whether the cause of action accrued on the passing of the decree or whether it did not accrue before the purchaser was dispossessed. Apparently in the circumstances of that case, the decree of 1913 was taken as equivalent to dispossessing the purchaser because the plaintiff in that suit was already in actual possession as a tenant. The reasoning of the case does not seem to support the view that if the purchaser retains possession then he can sue for recovery of his purchase money even before he has been dispossessed.

Two rulings of their Lordships of the Judicial Committee, namely *Juscurn Boid and another v. Pirthichand Lal* (1) and *Hanuman Kamut v. Hanuman Mandar and others* (2) have also been relied upon for the appellants for holding that the cause of action should be held to have accrued upon the passing of the Munsif's decree on the 24th of October, 1932. These rulings were considered by a Bench of the Allahabad High Court in the case of *Muhammad Siddiq v. Muhammad Nuh* (3). At page 610 the learned Judges referred to the Privy Council decisions and distinguished them. It is unnecessary for us to discuss the question at length as we respectfully agree with the views expressed by their Lordships in this ruling. Their Lordships held in a suit brought by a vendee who had purchased under a registered sale-deed from a vendor with a defective title and was subsequently dispossessed by the person with superior title, that Article 116 of the Limitation Act applied to a suit to recover damages for breach of the

(1) (1918) L.R., 46 I.A., 52.

(2) (1891) L.R., 18 I.A., 158.

(3) (1930) I.L.R., 52 All., 604.

implied covenant for title under section 55, sub-section (2) of the Transfer of Property Act. At page 615 their Lordships gave reasons for holding that the date of dispossession should form the starting of limitation for the suit, whether the suit is regarded as a suit for compensation for breach of contract, or whether it is regarded as a suit to which Article 97 would apply, to recover money paid upon an existing consideration which has afterwards failed. If the suit is regarded as governed by Article 116, then it was pointed out by their Lordships that no loss or damage can be said to have been caused by the mere passing of a decree for proprietary possession in favour of a third party. It appears to us that this view must be correct. It is possible that the decree for possession may never be executed. By reason of negligence or some other reason the decree-holder may fail to execute it until it has become barred by limitation. In such a case the purchaser may retain possession of the property sold to him and may not suffer any loss although his title has been found defective. Hence we do not think that the mere passing of the decree can be held to constitute a cause of action, and the cause of action does not accrue until the purchaser has been dispossessed in execution of the decree. If, on the other hand, the suit is regarded as governed by Article 97, it cannot be held that consideration has totally failed so long as the buyer remains in possession and is in a position to enjoy the profits. It has been found in the present case that the plaintiffs have not actually been recovering the rents since the decree was passed against them, and it is argued that it would be wrong for them to do so as their possession must be now regarded as the possession of a mere trespasser. We do not think that this view is correct. Unless and until the plaintiffs are ejected in execution of the decree against them, we think that they are legally entitled to remain in possession and to recover rents from the

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tenants. Their names still remain recorded in the *khewat*, and they have not been lawfully dispossessed.

The ruling in *Musammat Lakhpat Kuar v. Durga Prasad* (1), is distinguishable as no question of dispossession arose in that case. The case of *V. M. Meerakanni Rowther v. A. V. Periya Karuppan* (2), is in favour of the appellants, but the decision is by a single Judge, and the opinion relied upon is an *obiter dictum* which was not necessary for the decision of the appeal. Moreover the learned Judge relied upon English law for holding that the passing of the decree would constitute a cause of action for compensation for breach of the covenant of title. Under the law of contract in India compensation can only be claimed under section 73 of the Contract Act when loss or damage has been caused, and it is doubtful whether it could be held that the mere passing of the decree actually causes any loss or damage before the decree has been executed.

For the respondents reliance has been placed not only upon *Muhammad Siddiq v. Muhammad Nuh* (3), but also on a Full Bench decision in *Kavi Rao v. Zabu* (4). It appears to us that, apart from the terms of the sale-deed itself, the plaintiffs had not got any cause of action for the suit as they had not been dispossessed.

If we turn to the terms of the sale-deed, it is clear that the plaintiffs are not yet entitled to claim compensation. It was definitely provided in the sale-deed that in case of any disturbance or dispute the buyer could claim his money with interest from the seller from the date of dispossession. Evidently it was not the intention of the parties that the buyer could claim compensation unless and until he is dispossessed, and that contingency has not yet arisen.

We agree with the Courts below and dismiss the appeal with costs.

Appeal dismissed.

(1) (1929) I.L.R., 8 Pat., 432.

(3) (1930) I.L.R., 52 All., 504.

(2) (1934) I.L.R., 57 Mad., 1016.

(4) (1932) A.I.R., Nagpur, 2.