APPELLATE CIVIL.

Before Das and Sroope, JJ.

1927.

March, 31.

NABIN CHANDRA GANGULI

v.

MUNSHI MANDAR.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Articles* 62, 97 *and* 116—*Lease—possession not obtained by lessee—suit for refund of salami—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 108.

Where a lessor fails to put the lessee in possession of the property demised a suit by the latter for recovery of the salami paid for the lease is governed by Article 116 of the Limitation Act, 1908, if the lease is in writing registered.

Hanuman Kamat v. *Hanuman Mandur* (1), *Ardesir* v. *Vajesing* (2), and *Tuksiram* v. *Murlidhar Chaturbhuj Marwadi* (3), referred to.

Appeal by the defendant.

This appeal arose out of a suit instituted by the respondents in substance for recovery of a certain sum of money from the defendants first party. There was a claim as against the defendants second party in relation to certain lands which were the subject-matter of a lease by the defendants first party in favour of the plaintiff, but that claim failed and the plaintiff was satisfied with the decision of the court below on that point.

The case of the plaintiff was that on the 16th December, 1915, the defendants first party, who were then represented by the Court of Wards, demised certain lands to him and that at the time of the lease the plaintiff paid to the landlords Rs. 156-5-0 as

*Appeal from Appellate Decree no. 1282 of 1924, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Bhagalpur, dated the 16th June 1924, confirming a decision of Babu Krishna Sahai, Additional Subordinate Judge of Bhagalpur, dated the 31st January 1924.

(1) (1892) I. L. R. 19 Cal. 123 P. C. (2) (1901) I. L. R. 25 Bom. 593.
(3) (1902) I. L. R. 26 Bom. 750.

salami. By the lease he undertook to pay certain rent for the demised land. The plaintiff alleged that when he went to take possession of the demised land he was resisted by the defendants second party who were already in possession of those lands. He went on to assert that he called upon the Court of Wards to put him in possession of the demised lands but that the Court of Wards did not do so. The 11th paragraph of the plaint was as follows—

"That the plaintiff further begs to state that if by any reason he may not be entitled to get possession of the lands sued upon with mesne profits, then as he was not put to possession over the settled lands by defendants second party, he is therefore, under such circumstances, entitled to get the salami money Rs. 170-1-0 and Rs. 623-4-9 which he had paid in respect of the certificate with interest. As per account detailed below—Rs. 170-1-0 is the salami money and Rs. 623-4-9 is the certificate money and Rs. 240-11-0 is the interest, in all Rs. 1,034-3-9."

In respect of this demise the Court of Wards issued certificates for the recovery of rent from the plaintiff and in fact recovered Rs. 623-4-9 from him. On these allegations the plaintiff asked that he should be put in possession of the demised lands or that in the alternative he should have a decree for money as against the defendants first party. The court of first instance thought that the plaintiff was not entitled to be put in possession of the demised lands. But in the view which he took he gave the plaintiff a decree for money. The defendants first party appealed and the learned District Judge in the court below affirmed the decision of the court of first instance.

Ram Kishun Jha, for the appellant.

K. P. Jayaswal (with him *B. C. Sinha* and *K. P. Sukul*), for the respondents.

DAS, J.—(after stating the facts set out above, proceeded as follows):—

In this court it has been urged that the plaintiff's suit for recovery of the salami paid by him to the defendants first party is barred by limitation and so far as his claim for Rs. 623-4-9 is concerned he has no cause of action since that was realised by the landlord in due course of law.

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I will first deal with the question whether the plaintiff's suit for recovery of the salami is barred by limitation. The learned Advocate for the defendant-appellants contends that either Article 62 or Article 97 applies and that in either case the plaintiff's suit is barred by limitation and he relies upon the decision of the Judicial Committee in *Hanuman Kamat* v. *Hanuman Mandur* (1). In that case the facts were these—a member of a joint family in Mithila sold certain properties to the plaintiff; that sale failed on an objection made by the other co-sharer, but not before the purchase money had actually been paid. The plaintiff thereupon instituted a suit to recover the purchase money. The suit was admittedly beyond three years of the date when the purchase money was paid. The Judicial Committee took the view that even if the agreement for sale was not void from the beginning and was only voidable, the consideration failed at all events when the purchaser being opposed found himself unable to obtain possession. On these grounds the Judicial Committee took the view that Article 97 applies as the plaintiff had a right to sue to recover this purchase money upon a failure of consideration when he failed to obtain possession of the disputed property. They pointed out that if the agreement was void ab initio Article 62 would apply, but that whether Article 62 or Article 97 applies the suit was in either case barred by limitation.

Now, this case as well as the case of *Ardesir* v. *Vajesing* (2) was considered by Sir Lawrence Jenkins in *Tulsiram* v. *Murlidhar Chaturbhuj Marwadi* (3). At page 756 that learned and distinguished Judge says as follows—"There is but one remark that we would add before leaving the case: both in *Hanuman* v. *Hanuman* (1) and in *Ardesir* v. *Vajesing* (2) it apparently was assumed that a suit for money had and received, or on a consideration that failed, would

(1) (1892) I. L. R. 19 Cal. 123. (2) (1901) I. L. R. 21 Bom. 693.
(3) (1902) I. L. R. 26 Bom. 750.

lie even where a sale-deed had been executed, and effect was not given to the distinction drawn in *Clare* v. *Lamb* (1). But it has to be observed that the sale deed in *Hanuman's* case (2) was prior to the passing of the Transfer of Property Act, and that in *Adesir's* case (3) was passed at a time when that Act was not in force in this Presidency. We allude to these facts because we desire to guard ourselves against being taken to decide that where the Transfer of Property Act applies there may not be remedies to which a different period of limitation would be applicable". Now, this case is admittedly governed by the Transfer of Property Act and section 108 provides that in the absence of a contract or local usage to the countrary, the lessor is bound on the lessee's request to put him in possession of the property. The question then which I have to consider is whether an action for the breach of duty declared by the express provision of the Legislature as contained in section 108 of the Transfer of Property Act is regulated by section 62 or section 97 if the plaintiff sues to recover the money paid by him as salami. In my opinion it is quite impossible to maintain this view. It seems to me that an action for breach of duty declared by section 108 of the Transfer of Property Act is regulated by section 116 of the Limitation Act if the lease is in writing registered, the obligation being deemed to be embodied in the contract. In my opinion the view taken by the learned Judge in the court below is right and I must affirm his decision on this point.

The next question is whether the plaintiff's right to recover the money which the defendants first party compelled him to pay under process of law is barred by limitation by any provision of the law. Now, section 43 of the Bihar and Orissa Public Demands Recovery Act provides as follows—

" 43. The certificate debtor may, at any time within six months—

(*1*) from the service upon him of the notice required by section 7, or

(1) (1875) L. R. 10 C. P. 334.
(2) (1891) I. L. R. 19 Cal. 123; L. R. 18 I. A. 158.
(3) (1901) I. L. R. 25 Bom. 593.

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(2) if he files, in accordance with section 9 a petition denying liability—from the date of the determination of the petition, or

(3) if he appeals, in accordance with section 60, from an order passed under section 10—from the date of the decision of such appeal,

bring a suit in a Civil Court to have the certificate cancelled or modified, and for any other consequential relief to which he may be entitled."

Pausing here for a moment it is relevant to point out that the plaintiff does say in the 8th paragraph of the plaint that "he filed two objection petitions in respect of both the said certificate cases before the Subdivisional Officer of Madhaipura, but the said objection petitions were disallowed without taking evidence on the 27th May, 1921. Against the said order of rejection the plaintiff preferred an appeal before the Collector of Bhagalpur, but the said appeal was rejected on the 5th August, 1921, as against defendants first party". This suit having been instituted on the 28th September, 1921, the plaintiff clearly brings his case within the general rule as enunciated in section 43 of the Bihar and Orissa Public Demands Recovery Act.

I now pass on to the proviso upon which the learned Advocate for the appellants relies. The proviso is in these terms—

"Provided that no such suit shall be entertained—

(a) in any case, if the certificate-debtor has omitted to file, in accordance with section 9 a petition denying liability or to state in his petition denying liability the ground upon which he claims to have the certificate cancelled or modified, and cannot satisfy the court that there was good reason for the omission."

It is not necessary to cite clause (*b*) of the proviso. As I understand the argument of the learned Advocate for the appellants it is his contention that before the plaintiff can make out a case under the general rule he must establish that the proviso has no operation in his case. Now, in my opinion the contention is unsustainable. The onus of establishing that the case came within the proviso and not within the general law was upon the defendant. It was for him to establish that the general rule had no application but

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that the proviso applied. It is the common case that this has not been done by the defendants, for it appears that the actual objection petitions filed by the plaintiff in those proceedings have not been filed in this case. In my opinion the decision of the court below on this point is right. The appeal fails and must be dismissed with costs.

SCROOPE, J.—I agree.

Appeal dismissed.

CRIMINAL REFERENCE.

Before Ross and Wort, JJ.

GOKUL CHAMAR

v.

KING-EMPEROR.*

1927.

April, 7.

Evidence Act, 1872 (*Act I of* 1872), *section* 27—*confession to police—discovery of fact irrelevant to inquiry whether makes confession admissible.*

G, who was charged with having murdered *C* by administering poison to him, stated to the police officer investigating the case that he had administered to the deceased a drug in some gur and that he had applied some of the same drug to a sore on the leg of *H*. In pursuance of this statement the officer went to *H* and the latter produced some arsenic as the drug given him by the accused.

Held, that as the fact that the accused had applied arsenic to the leg of *H* was irrelevant to the present inquiry the fact deposed to as discovered in consequence of the information given by the accused was inadmissible.

The facts of the case material to this report are stated in the judgment of Ross, J.

S. K. Mitter, for the appellant.

Sultan Ahmed, Government Advocate, for the Crown.

*Death Reference no. 4 of 1927 and Criminal Appeal no. 88 of 1927. Reference made by G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, in his letter no. 1013-R., dated the 1st March, 1927, and appeal from a decision of G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 24th February 1927.