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JAMUNA PRASAD SHAH v. FAUJDAR SHAHNI.

DAS, J.

I would allow the appeal, set aside the judgments and the decrees passed by the Courts below and remand the case to the lower appellate Court with direction that it should remand the case to the Court of first instance. The plaintiff will have liberty now of tendering the documentary evidence which was filed by him on the 3rd February, 1925. It is understood that he will not be at liberty to tender in evidence any other documentary evidence. It will be open to the learned Subordinate Judge to consider the books of account; but how he will regard them it is not for us to say in this Court. It will also be open to the defendants second party to tender such evidence in rebuttal of the documentary evidence which may be tendered by the plaintiff as the defendants second party may be advised. Costs will abide the result and will be disposed of by the lower appellate Court.

FAZL ALI, J.—I agree.

Case remanded.

S. A. K.

APPELLATE CIVIL.

Before Adami and Chatterji, JJ.

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JAGANNATH MARWARI

v.

KALIDAS.*

Jan., 31.
Feb., 1, 5.

Limitation Act, 1908 (*Act IX of* 1908), *section* 24 *and Schedule* 1, *articles* 36, 115 *and* 120—*suit for damages for malfeasance or misfeasance—liability ex-delicto or ex-contractu—proper article applicable—section* 24, *scope of—terminus a quo.*

*Appeal from Appellate Decree no. 309 of 1926, from a decision of J. A. Saunders, Esq., I.C.S., District Judge of Manbhum, dated the 17th December, 1925, reversing a decision of Babu Brajendra Prasad, Subordinate Judge of Dhanbad, dated the 30th July, 1924.

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A suit for damages for malfeasance or misfeasance or for negligence not covered by any special article of the Limitation Act, 1908, falls under article 36 or 115, according as the liability is ex-delicto or excontractu.

Where, therefore, plaintiff brought a suit for damages for the subsidence of a tank belonging to him caused by the removal of pillars of coal in the coal mine belonging to the defendant,

Held, that the suit being one for damages for malfeasance based on an implied covenant that the surface owner has an inherent right of support from the owner of the underground mines, was governed by article 115.

Section 24, Limitation Act, 1908, provides:

"In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results."

Held, that the effect of the section is not to extend or restrict the period of limitation but to modify the time or date from which the cause of action arises and that, therefore, the section does not affect the applicability of article 115 even though the terminus a quo be the date of injury to plaintiff and not the malfeasance or misfeasance provided for in the article.

Appeal by the plaintiff.

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

S. P. Sen (with him *S. C. Mazumdar*), for the appellant.

S. N. Bose for the respondent.

5th Feb. 1929.

CHATTERJI, J.—The action which has given rise to this appeal is for the recovery of compensation for the subsidence of a tank purchased by the plaintiff from one Uchit Gorain. The subsidence has been caused by the removal of pillars of coal in the coal mine belonging to the defendant. The trial court decreed the suit while it was dismissed by the learned District Judge in appeal. He has held that the purchase by the plaintiff from Uchit Gorain was a speculative one, that a fictitious value was put in the

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sale deed and that the plaintiff has acquired no title by his purchase, because the tank was a part of Uchit Gorain's raiyati holding and consequently not saleable under section 46(2) of the Chota Nagpur Tenancy Act. He has further held that the suit is barred by limitation.

In appeal it is urged that the learned District Judge was wrong in considering that the consideration money was not, in fact, paid to the vendor, and that a view of invalidity of the sale has been taken by him by the admission of fresh evidence which should not have been taken, especially in view of the fact that this plea had not been taken by the defendant in the court below. It is further contended that the suit is governed by article 120 of the Limitation Act and even if the subsidence which caused damage had taken place in 1918 or in 1919, the suit instituted in December 1923 was in due time.

Exception is taken by the learned Counsel on behalf of the appellant to the following expression used by the learned District Judge:

"The defendants are in my opinion entitled to show that a fictitious value was put on the tank solely with a view to obtain a large sum of damages from them and that the consideration money was not in fact paid to the vendor. It is settled law that a stranger cannot question an assignment on the ground of inadequacy of price or on the ground of non-payment of consideration, but the learned Subordinate Judge considered that the value stated in the deed of sale must be considered to be binding on the parties to the sale deed and also on the defendant, who was only a trespasser."

The learned District Judge really meant to controvert this statement of the learned Subordinate Judge who allowed compensation of Rs. 2,000, because this was the price stated in the deed for the tank. In order to show that this price should not be accepted he showed the nature of the conversion, namely, that it was a speculative one and that a fictitious value was put and came to the conclusion that there was no reason why the defendant's valuation of Rs. 100 should not be accepted. There may have been some loose expression used by the learned District Judge but this has not at all affected the decision of the case,

The real question in the case is whether the suit is barred by limitation. According to the view taken by the appellate court the subsidence was complete in September, 1919, because he accepts the testimony of defendant's witness no. 1, who was the late manager of the colliery and who has retired at Benares after severing his connection with the company. If Article 120 of the Limitation Act would apply then this suit is not time-barred on the finding of fact by the learned District Judge. But it is urged by the learned advocate for the respondent that the suit is governed by Article 36 of the Limitation Act. In reply it is pointed out by Mr. S. P. Sen, appearing on behalf of the appellant, that this article cannot apply, because the plaintiff's right to sue accrues not from the date when the malfeasance or misfeasance takes place as provided for in this article, but from the date when specific injury was suffered; and reliance is placed on section 24 of the Limitation Act and on Lightwood on the Time Limit on Actions (1909 Edition) at pages 204 and 205. The argument really is this that inasmuch as the suit for compensation, though for malfeasance or misfeasance, arises out of injury to the plaintiff's tank, and Article 36 of the Limitation Act provides for a suit for compensation from the date when the malfeasance or misfeasance takes place, his is a case which is not provided for by any article of the Limitation Act and, therefore, the residuary Article 120 will be applicable. This argument is, in my opinion, based on the complete misapprehension of section 24 of the Limitation Act.

Section 3 provides that every suit instituted after the period of limitation as prescribed by the First Schedule subject to the provisions contained in sections 4 to 25 shall be dismissed. Section 6 extends the period of limitation for a suit in case of legal disability, thereby the article of the Limitation Act for a particular kind of suit is not altered, but the period counts from the cessation of legal disability.

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Similarly, in section 18, time reckons from the discovery of fraud not that a particular kind of suit is taken away from the appropriate article which would govern it. Similarly, section 24 merely affects the time from which the time would run. All that it says is that in a suit for compensation for an act not actionable without special damage, the period of limitation shall be computed from the time when the injury results. Therefore, the effect which this section causes in the operation of the statute of limitation is not to extend or to restrict any period of limitation, but to modify the date or time from which the cause of action arises. That is to say, if a suit is for compensation for any malfeasance or misfeasance independent of contract, and not otherwise provided for, the limitation will be two years, not from the date of the malfeasance or misfeasance, but from the time when the injury results.

The trial court held that the suit is governed by Article 36 of the Limitation Act. The appellate court has not mentioned the article specifically but has apparently proceeded on the same basis. The question will, however, arise whether the suit is governed by this article. It is no doubt a suit for compensation for a malfeasance or misfeasance, but is it one independent of contract? There is an implied covenant running with the land that the surface owner has an inherent right of support from the owner of the underground mines. In that view it may be stated that this is not a wrong independent of contract, and, therefore, Article 36 will not apply. If this article be not applicable then undoubtedly the suit will be governed by Article 115 which is the residuary article for actions ex contractu. When a suit for damages for malfeasance or misfeasance or for negligence is not covered by any special article, it must fall under Article 36 or 115, according as the liability is ex delicto or ex contractu. In any view the case cannot fall under Article 120. The view indicated in Lightwood that action may be brought

within six years of the damage cannot apply to India where a special Act of limitation provides for this class of cases. The period of limitation is three years under Article 115 from the time when injury was caused, namely, from September, 1919, and therefore, the suit is evidently barred by limitation.

A point was argued by the learned advocate for the respondent that what was purchased was a right to sue for compensation and that this cannot be transferred. Under section 6, clause (*e*), of the Transfer of Property Act, the prohibition is against the transfer of a mere right to sue. The word "mere" implies that the transferee acquires no interest in the subject of transfer other than the right to sue. But in the present case what has been purchased is the tank and along with it any covenant running with the land has passed to the plaintiff and by virtue thereof the plaintiff brings this action. It cannot, therefore, be stated that what has been purchased is a mere right to sue. The test to be applied is pointed out in *Glogg* v. *Bromley*(1), quoted with approval in *Jai Narain Pandey* v. *Kishun Dutt Missir*(2). "The question was whether the subject-matter of the assignment was, in the view of the Court, property with incidental remedy for its recovery or was a bare right to bring an action either at law or in equity." Applying that principle it cannot be asserted that what was assigned to the plaintiff was a bare right to bring a suit. I am unable to accept the contention put forward on behalf of the respondent in this respect.

In the view taken on the question of limitation it seems unnecessary to consider whether the decision of the learned District Judge on the point that the purchase was invalid by reason of section 46 of the Chota Nagpur Tenancy Act is sustainable or not. If really the tank purchased is a part and parcel of the raiyati holding of Uchit Gorain it is indisputable that the plaintiff has acquired no right. Sub-section 1 of section 46 provides that no transfer by a raiyat of his right in his holding or any portion thereof by

(1) (1912) 3 K. B. 474. (2) (1924) 5 Pat. L. T. 581.

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sale, shall be valid to any extent, and it is provided by sub-section 3 that no transfer in contravention of sub-section 1 shall be in any way recognised as valid by any civil court. The learned District Judge arrived at the finding that the tank is a part of the raiyati holding on the basis of the Record-of-rights and certain other papers connected with its preparation and produced before him at the appellate stage. The Record-of-rights came to be finally published after the decision of the trial court and under the authority of *Hill* v. *Sattan Singh*(1) this is an admissible piece of evidence as it came into existence subsequently to the filing of the appeal. But the learned Counsel complains that he should have been given an opportunity of adducing rebutting evidence. The plaintiff asserted in the plaint that Uchit Gorain had maurasi niskar right in the bandh (or the tank) in question. This allegation was not specifically traversed in the written statement nor was it mentioned that the property was not alienable as being the part of a raiyati jote. Therefore, the plaintiff may legitimately complain that he ought to be allowed an opportunity of meeting the case that was put forward in the court of appeal, and met with success. It is pointed out by the learned advocate on behalf of the respondent that the plaintiff himself, in a dispute between the settlement authorities, prayed for jalsasan right in the tank in dispute. But as provided in section 31 of the Evidence Act admissions are not conclusive evidence of the matters admitted. Then, though jalsasan right may, perhaps, be taken as a right belonging to a cultivating raiyat the plaintiff was not allowed an opportunity of meeting this kind of defence. Be that as it may, remand is unnecessary in the case, in view of our decision that the suit is barred by limitation.

In the result the appeal fails and is dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

(1) (1919) 4 Pat. L. J. 312.

APPELLATE CIVIL.

Before Adami and Chatterji, JJ.

BABUI SHAMSUNDER KUER

v.

RAMKHELAWAN SAH.*

1929.

Jan., 25, 28.
Feb., 5.

Evidence Act, 1872 (Act 1 of 1872), section 40 et seq—judgment not inter partes, admissibility of—document admitted without objection—absence of objection, whether makes irrelevant document admissible.

A judgment not inter partes is admissible in evidence, quantum valeat, if its existence is a relevant fact.

Ram Ranjan Chakarbati v. *Ram Narain Singh*(1), *Tepu Khan* v. *Rajani Mohun Das*(2), *Bhitto Kunwar* v. *Kesho Prasad Missir*(3), *Dinomoni Chaudharain* v. *Brajo Mohini Chaudharain*(4), *Gopi Sundari Dasi* v. *Kherod Gobind Choudhary*(5), *Mohammad Ehia* v. *Ganga Dayal Ojha*(6) and *Hitendra Singh* v. *Sir Rameshwar Singh Bahadur*(7), referred to.

Where in a suit the question was whether the plaintiff was the real owner or a mere benamidar of a certain property and the court relied on a judgment not inter partes as furnishing a motive for the alleged benami transaction,

Held, that the judgment was admissible in evidence under sections 11 and 13 of the Evidence Act, 1872.

An absence of objection to the admissibility of a document in the trial court will not make it admissible if it is per se irrelevant or inadmissible.

Appeal by the plaintiff.

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

*Second Appeals nos. 962 and 1029 of 1926, from a decision of Babu Shiva Pria Chattarji, officiating Subordinate Judge of Saran, dated the 16th March, 1926, reversing a decision of Babu Bhuban Mohan Lahiri, Munsif of Chapra, dated the 23rd December, 1924.

(1) (1895) I. L. R. 22 Cal. 533, P. C.
(2) (1898) I. L. R. 25 Cal. 523, F. B.
(3) (1896-97) 1 Cal. W. N. 265.
(4) (1902) I. L. R. 29 Cal. 187 (198).
(5) (1923-24) 28 Cal. W. N. 942.
(6) (1917) 40 Ind. Cas. 838.
(7) (1925) 6 Pat. L. T. 634 (651).

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Hasan Imam (with him *A. K. Mitra* and *Bhagwan Prasad*), for the appellant.

S. Sinha (with him *S. Saran*), for the respondents.

5 *Feb.* 1929

CHATTERJI, J.—These appeals arise out of suits for ejectment of the defendants from the lands in dispute and in the alternative for redemption of two mortgages. Five-annas four-pies share in the village Parsa (Tauzi no. 789) was owned by Bindeswari Prasad and his brother Hari Prasad, the husband of the plaintiff. Bindeswari Prasad executed two mortgage bonds—one dated 5th June, 1899, for a consideration of Rs. 99 in respect of 2 bighas 17 cottahs 17 dhurs of zerait (or bakasht) land in favour of defendant no. 1, Ram Khelawan; and the other dated 29th August, 1899, for Rs. 99 in respect of 1 bigha 13 cottahs and 7 dhurs of another piece of zerait (or bakasht) land in favour of one Babu Lal Sah who assigned his right as mortgagee to defendant no. 1. In execution of his mortgage decrees the defendant no. 1, purchased the mortgaged lands, measuring 4 bighas and odd, and took delivery of possession thereof in 1913. In the meantime the 5 annas 4 pies interest of the two brothers came to be sold for arrears of Government revenue in the year 1900 and purchased by one Iswar Sahai, who, 9 months later, appears to have executed a conveyance of it in favour of the plaintiff appellant.

The case of the plaintiff was that the mortgages executed by Bindeswari were not for any legal necessity and not binding upon the family and furthermore that she had not been impleaded in the mortgage suit brought by the defendant no. 1, and had consequently a right of redemption. The learned Munsif passed a decree in favour of the plaintiff, but in appeal the learned Subordinate Judge dismissed the suit on the ground that the plaintiff was the benamidar for the two brothers. The first part of the case, namely, that the mortgages were invalid,

has not been pressed before us in appeal. The finding that the purchase was made by Bindeswari and his brother in the name of the plaintiff is challenged in second appeal and it is urged by Mr. Hasan Imam on her behalf that the finding of fact of the first court of appeal is not binding, inasmuch as it is based on a certain judgment, Exhibit Q(1) which is not admissible in evidence. This will necessitate a consideration of the question as to what this judgment is and to what extent the learned Subordinate Judge relied on it.

The learned Subordinate Judge applied the different tests of benami transaction, namely, relationship, source of consideration, custody of the deed, possession and motive and came to a decisive finding that the purchase of the plaintiff was a benami one. In arriving at this conclusion he was guided mainly by the entry in the Record-of-Rights, an entry made in spite of dispute raised at the time. In support of her case the plaintiff relied upon Exhibit 7 to show that in 1916 she obtained a decree for redemption of a mortgage which had been executed by the brothers in favour of one Mangni Lall before the sale of the milkiat in question. The learned Subordinate Judge states that the judgment, Exhibit 7, must be considered along with the judgment, Exhibit Q(1) and that the value of Exhibit 7 is considerably minimized by the judgment, Exhibit Q(1). The latter judgment was passed in a damage suit brought by the two brothers against the said zarpeshgidar Mangni Lall after the revenue sale on the ground that the sale was brought about by the default of the zarpeshgidar in paying Government revenue. The suit was dismissed on the ground that the plaintiffs of that suit had themselves made the purchase in the name of the plaintiff and did not consequently suffer any damage. The point for determination will be whether the existence of this judgment is a relevant fact. The learned Subordinate Judge mentions, while discussing the motive for

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CHATTERJI, J.

the benami transaction, that it is to be found in the damage suit brought by the two brothers against their zarpeshgidar. Thereby he means that the benami purchase was made in the name of the plaintiff in order to enable the two brothers to sue the zarpeshgidar for damage.

Sections 40 to 43 of the Evidence Act deal with the subject of relevancy of judgments. Judgments, qua judgments or adjudications are admissible as res judicata under section 40, or as in rem under section 41 or as relating to matters of public nature under section 42 of the Evidence Act. Judgments other than those mentioned in sections 40, 41 and 42 may be relevant under section 43, if their existence is a fact in issue or is relevant under some other provisions of this Act. It is obvious that a judgment, merely because it is not inter partes, is not shut out. The Full Bench case of *Gajju Lal* v. *Fatteh Lal*(1) has been modified by the Privy Council in *Ram Ranjan Chakerbati* v. *Ram Narain Singh*(2),as held in the Full Bench case of *Tepu Khan* v. *Rajani Mohun Das*(3). As was observed by Maclean, C. J., in *Tepu Khan's* case(3), under certain circumstances and in certain cases, the judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit. This view will receive support from the cases of *Bhitto Kunwar* v. *Kesho Persad Missir*(4), *Dinomoni Chaudharain* v. *Brajo Mohini Chaudharain*(5), *Gopi Sundari Dasi* v. *Kherod Gobind Choudhury*(6) and *Mohammad Ehia* v. *Ganga Deyal Ojha*(7). In the last-mentioned case this Court has held that

(1) (1880) I. L. R. 6 Cal. 171, F. B.
(2) (1895) I. L. R. 22 Cal. 533, P. C.
(3) (1898) I. L. R. 25 Cal. 523, F. B.
(4) (1896-97) 1. Cal. W. N. 265.
(5) (1902) I. L. R. 29 Cal. 187 (198).
(6) (1923-24) 28 Cal. W. N. 942.
(7) (1917) 40 Ind. Cas. 838.

judgments, not between parties to the suit, containing a declaration that the right in dispute has been asserted and recognised in a Court of Law, are admissible in evidence under the provisions of section 13 of the Evidence Act. As pointed out in *Gopi Sundari's* case(1) a judgment like this, though not conclusive is admissible in evidence like any other fact to be weighed in the balance. The decision of Das, J. in *Hitendra Singh* v. *Sir Rameshwar Singh Bahadur*(2) is not inconsistent with the view that a judgment not inter partes is admissible in evidence under certain circumstances, because his Lordship specifically mentions that if the existence of a judgment is a fact in issue or is relevant under the other provisions of the Act, it is admissible.

Now the learned Subordinate Judge has referred to the judgment, Exhibit Q(1) as affording a motive for the benami transaction. Further he has referred to it as an item to be considered along with Exhibit 7 relied on by the plaintiff. Exhibit 7 affords an instance in which the plaintiff's right as owner was asserted while Exhibit Q(1) affords an instance where her position as a benamidar was successfully asserted. The judgment in question, to my mind, is admissible in evidence under sections 11 and 13 of the Evidence Act. The learned Subordinate Judge has specifically mentioned that it is not conclusive evidence, and uses it as modifying the effect of Exhibit 7. I am of opinion that the consideration of the judgment in the way done by the learned Subordinate Judge has been properly done and his finding of fact cannot be assailed on the ground of a reference made by him to Exhibit Q(1). It is significant that no ground was taken in the grounds of appeal as to the non-admissibility of Exhibit Q(1).

A point was raised by Mr. Sinha on behalf of the respondent that the question of inadmissibility of this judgment cannot be agitated by the appellant,

(1) (1923-24) 28 Cal. W. N. 942. (2) (1925) 6 Pat. L. J. 634 (651).

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inasmuch as this document was admitted in evidence in the lower court without any objection. This contention has no force because the absence of an objection will not make admissible a document which is per se irrelevant or inadmissible. The only effect is that no objection can be taken as to the mode of proof.

CHATTERJI, J.

In my opinion the case is concluded by the finding of fact arrived at by the learned Subordinate Judge on a careful consideration of all the facts and circumstances and there is no substance in the appeal which is, accordingly, dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Adami and Chatterji, JJ.

1929.

Feb., 5, 6.

LALCHAND THAKUR

v.

SEOGOBIND THAKUR.*

Hindu Law—suit against joint family—karta made defendant—members, whether effectively represented even if karta not described as such—karta not contesting the suit, whether necessarily implies carelessness.

In a suit against the joint Hindu family the karta may effectively represent the other members of the family even though he is not described as such in the records of the case.

*Appeal from Appellate Decree nos. 1684 of 1926 and 98 of 1927, from a decision of Babu Tulsi Das Mukharji, Subordinate Judge of Shahabad, dated the 13th September, 1926, confirming a decision of Babu Jugal Kishore Narayan, Munsif of Buxar, dated the 15th June, 1925.