1933.

FIDA HUSSAIN v. SARFARAZ HUSSAIN.

ROWLAND, J.

of Jwala Prasad, J. in *Rameshwar Singh* v. *King-Emperor*(1) that no time limit was intended to be set. The legislature, it would seem, thought fit to rely on the discretion of appellate and revisional Courts not to exercise their powers under this section in cases where there has been undue or excessive delay in moving the Court for its use.

In the case before us, the complainant's application to be restored to possession was presented to the Honorary Magistrate only six days after the conviction had been affirmed on appeal, and there can be no question of withholding relief on the ground of excessive delay. The proper course, however, for the complainant was to move the appellate Court, and the proper course for the Honorary Magistrate was to reject or return the application directing complainant to move the appellate Court if so advised. The Additional District Magistrate had, I think, power to deal with the matter, and has done so correctly.

In the result, the application should, in my opinion, be dismissed.

AGARWALA, J.—I agree.

Rule discharged.

LETTERS PATENT.

1933.

July, 19.

Before Wort, A. C. J. and Kulwant Sahay, J.

MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH

v.

CHHAKAURI LALL.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Articles* 115 *and* 120—*compromise merged in decree, whether is "contract" within the meaning of Article* 115—*suit for compensation based on such compromise—proper article applicable.*

* Letters Patent Appeals no. 111 and 112 of 1932, from a decision of the Hon'ble Mr. Justice Agarwala, dated the 14th December, 1932.

(1) (1925) I. L. R. 4 Pat. 438.

1933.

MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH v. CHHAKAURI LALL.

The fact that a compromise between the parties to a suit has merged in a decree of the court none the less makes it a contract within the meaning of Article 115 of the Limitation Act, 1908, which prescribes a period of three years for a suit for " compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for ".

Where, therefore, a suit for compensation was based on a contract contained in a compromise which had merged in the decree of the court, *held*, that Article 115, and not Article 120, Limitation Act, 1908, was applicable.

Smith v. *Kinney, Official Trustee of Bengal*(1), followed.

Arunachalam Chettiar v. *B. Raja Rajeswara Sethupati*(2), distinguished.

Appeal by the defendants.

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

S. N. Ray and *G. P. Sahi*, for the appellants.

Nawal Kishore Prasad II, for the respondent.

WORT, A. C. J.—This is an appeal from a decision of my brother Agarwala in a case in which the plaintiff had claimed damages against the defendant for erecting a bandh across a certain river up to a height in excess of 104.31 feet which height had previously been agreed upon between the parties. The trial Court came to the conclusion that the plaintiff had made out a case, technically at any rate, of breach of contract and allowed him nominal damages to the extent of Re. 1. Against that decision there was an appeal to the learned District Judge and that Judge reversed the decision of the trial Court on the question of damages and allowed a sum of upwards of Rs. 500. Against that there was an appeal to this Court and that appeal was dismissed.

It is contended by Mr. Roy on behalf of the defendant appellant that the decision of Agarwala, J.

(1) (1923) 81 Ind. Cas. 299.
(2) (1924) 91 Ind. Cas. 338.

1933.

MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH v. CHHAKAURI LALL.

WORT, A. C. J.

is wrong in respect to several points. In order to appreciate those points it is necessary to state briefly the cases of the parties.

In 1909 a compromise was entered into, amongst other parties, between the plaintiff and the defendant in which it was agreed, as I have already stated, that this masonry bandh should be erected across the river Ramrekha to a height of 104.31 feet and there was an undertaking (as appears from the record of another case) in that compromise that the bandh should not exceed that height. The case of the plaintiff was that in breach of the compromise or agreement the defendant had erected the bandh or extended it to a greater height than 104.31 feet with the result that both in the years 1332 and 1334 his, the plaintiff's, land had been flooded and his paddy crops destroyed. Against that case the defendant contended that although it was proved that the plaintiff had suffered the damage alleged as regards his paddy crop, the net result of the flooding of the plaintiff's land was that the rabbi crop which the plaintiff reaped was a bumper one, to use the expression of the defendant, the net result being that the plaintiff had suffered no damage. It is one of the contentions of Mr. Ray on behalf of the defendant that the learned District Judge had not considered the evidence as regards this point. Mr. Ray contends that the learned Judge's decision on this matter was influenced by his opinion that the value of the rabbi crop could not be taken into consideration in estimating the damage which the plaintiff had incurred. The Judge's finding shortly on this point was that he was not satisfied on the defendant's evidence that the benefit which the defendant alleged had accrued to the plaintiff had been proved. There seems to be no reason, in my opinion, to support the contention of the learned Advocate on behalf of the appellant on this point. It is true that Mr. Allanson, the learned District Judge, seems to have been somewhat doubtful as to the legality of taking this question of the rabbi crop into consideration; but his finding

is perfectly clear that he was not satisfied by the defendant's evidence on that point. Had the learned District Judge decided the question on the footing that he could not take into consideration the value of the rabbi crop, then in my judgment the decision of the learned District Judge would have been wrong, because the fundamental principle of law, as was pointed out in the course of the argument, is that the plaintiff is bound to minimise his damage, and what results from that is that if it can be shown as a fact that damage has not accrued, then it is patently obvious that the plaintiff is not entitled to recover damages. But that discussion is unnecessary for the reason which I have pointed out, namely, the finding of fact of the learned District Judge on this point which was binding on Mr. Justice Agarwala as it is binding on this Court. Mr. Ray endeavoured in the course of the argument to put in evidence, which was clearly inadmissible, certain reports which were made by certain officers as to this land and in which it is stated that it was found that the whole of the land or the greater part of it was bhit land and not paddy land. That attempt on the part of Mr. Ray of course was bound to fail. The other substantial question—in fact the only point in the case—is the question of limitation. Agarwala, J., in confirming the judgment of the learned District Judge, has come to the conclusion that Article 120 of the Limitation Act applied, and not Article 36 or Article 115. Article 36 which provides a period of two years reads

"For compensation for any malfeasance, misfeasance or non-feasance independent of control and not herein specially provided for".

Article 115 provides a period of three years and this Article reads

"For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for".

Article 120 is a residuary Article and gives a period of six years and it is only by applying Article 120 that the plaintiff can succeed as regards the year 1332. It had better be said at once that the point as to

1933.

MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH v. CHHAKAURI LALL.

WORT, A. C. J.

limitation cannot apply to the year 1334 because whatever Article is applied the action is within the period provided. The point depends, therefore, on the question of whether either Article 36 or Article 115 is the Article applicable in this case.

It is contended by the learned Advocate on behalf of the respondent that this is not a case under Article 36 as that Article provides that misfeasance, malfeasance or non-feasance is independent of any control. Article 115 as construed by the Courts applies either to a case of express or implied contract and not a contract in writing registered, that is to say, it may be an express contract or an oral contract or a written contract so long as it is not registered and it also does apply to a case of implied contract. Assuming for the moment that the learned Advocate's argument is correct as regards Article 36, his argument as regards Article 115 is based on the decision of the Madras High Court in *Arunachalam Chettiar* v. *B. Raja Rajeswara Sethupati*(1) being a decision of the Officiating Chief Justice and Mr. Justice Iyengar. That was a case in which there had been a compromise and an action was brought on the decree of the Court; and it is contended that that decision lays down shortly that as the action was on the decree it could not be a case under Article 115: in other words, it was an action not on a contract. In my judgment there are two reasons for differentiating that case from the present case. One is that in any event in that case the Article could hardly apply because Article 115 applies to cases for compensation whereas the decision in the case to which I have referred was an action for a liquidated sum of money. But the more important feature in the case above referred to is the statement in the judgment at page 341 to this effect: "No doubt a compromise decree has got the features and characteristics both of a compromise and a decree and the question really is whether the suit is based on the declarations contained in a previous decree and should

(1) (1924) 91 Ind. Cas. 338.

therefore appropriately be called a suit upon a decree or a suit on the contract contained in the compromise." In other words, the learned Judges in that case were deciding on the particular facts of the case that the suit before them was a suit on a decree and not on a compromise. The short answer, it seems to me therefore, to be given to this case is that it depends upon the circumstances, and that being so, it must be held in this case that this was a suit, if anything at all, on the compromise which was entered into in 1909. But apart from the decision to which I have referred so far as this Court is concerned the matter has been finally laid at rest in the case of *Smith* v. *Kinney, Official Trustee of Bengal*(1), where the learned Chief Justice and Mr. Justice Foster of this Court had decided that the fact that the compromise merged in a decree, none the less makes it a contract within the meaning of Article 115 of the Limitation Act.

I need not at this stage go into an elaborate discussion of the question of whether the case was partly based on a contract and partly based on tort and therefore comes within Article 115 of the Limitation Act for the simple reason that in this case, as has been held in England for many years, it is not necessary to look at the pleadings but at the substance of the case and in looking at the substance of this case it is quite clear that the plaintiff was bound in any event to base his claim on the compromise of 1909 : in other words, had he been in the first place content with claiming his right under the general law as laid down in *Rylands* v. *Fletcher*(2) he would ultimately have to come back to the contract when the defendant in answer to his claim had pleaded that he was entitled to erect the bandh and that he had not erected it beyond the limits as laid down in the compromise of 1909. To put it in a sentence, the issue in the case would have been whether the contract had been complied with or whether it had been broken.

(1) (1923) 81 Ind. Cas. 299.
(2) (1868) L. R. 3 H. L. 330.

1933.

MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH v. CHHAKAURI LALL.

WORT, A. C. J.

There was yet another point that was agrued that this was a continuing breach of contract and that the learned Judge in the Court below was right in coming to the conclusion that the cause of action arose in December, 1924. The reason that the learned Judge gave was that paddy had been reaped in December of that year. In my judgment his decision on that point was wrong. The cause of action arose when the breach of contract or compromise occurred and damage was done to the plaintiff's paddy crop. That admittedly was in September, 1923, corresponding to Assin, 1332. There is no evidence and no issue on this point and it appears not to have been argued that the defendant continued in his breach after that month. In the absence of evidence to the contrary or a finding to the contrary it seems to me that the only conclusion that this Court can arrive at is that the breach of the compromise occurred in Assin, 1332, and that being so, the plaintiff's action for that year was clearly out of time having regard to the fact that Article 115 of the Limitation Act applies. In my judgment, therefore, the decision of the learned Judge in the Court below was wrong to the extent of allowing the plaintiff's claim for 1332. His action so far as that year was concerned will be dismissed but his claim for the year 1334 will be allowed.

There was an appeal in the Court below before Mr. Allanson, the District Judge, and there was also an appeal before Mr. Justice Agarwala by the defendant on the question of costs which were allowed by the trial Court. These appeals were dismissed with costs. In my judgment there should be no separate order for costs as regards these appeals.

The net result, therefore, is that the appeals are allowed as regards the year 1334 but dismissed as regards the year 1332 and the order for costs in those circumstances would be that the appellant in this Court will be entitled to costs, according to his success, throughout.

KULWANT SAHAY, J.—I agree.

Appeals allowed in part.