APPELLATE CIVIL.

1933.

November, 22.

Before Courtney Terrell, C.J. and Kulwant Sahay, J.

LALJI SINGH

v.

RAMRUP SINGH.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Articles* 97, 115 *and* 116—*suit for damages for breach of contract—proper Article applicable—test—difference between Article* 97 *and Article* 116.

Articles 115 and 116 of the Limitation Act, 1908, apply to cases where compensation, that is to say damages, is asked for in respect of a breach of contract on the allegation that there was a good and valid contract and that the defendant has broken the terms of the contract. In such cases the basis of the suit is that the contract has been broken, is no longer in existence and damages are sought. Article 97, on the other hand, applies when the plaintiff says the contract is still good and subsisting and an event contemplated by the contracting parties has happened, that is to say, the possible future inability of the plaintiff to enjoy the property, and the plaintiff relies upon the express or implied contract on the part of the defendant that in the happening of such circumstances the defendant will pay back the money which he has already received.

The existence of a registered document is the item of difference between Article 115 and Article 116. The difference, however, between Article 116 and Article 97 has nothing whatever to do with the form of the contract. It has rather to do with the question of the date of the failure of consideration and it is quite immaterial, in discussing whether Article 97 or Article 116 applies, to ascertain whether the contract was effected by means of a registered instrument or not.

Appeal by the defendants.

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

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

G. P. Singh (for *G. Sharma*), for the respondent.

* Appeal from Appellate Decree no. 913 of 1930, from a decision of M. Najabat Husain, District Judge of Monghyr, dated the 26th June, 1929, reversing a decision of Babu Narendra Nath Chakraverti, Munsif of Monghyr, dated the 15th June, 1927.

1933.

LALJI SINGH v. RAMRUP SINGH.

COURTNEY TERRELL, C. J.—This is an appeal by the defendants from a decision of the District Judge of Monghyr allowing an appeal from the decision of the Munsif. The substantial question for decision is one of limitation and particularly as to whether Article 116 or Article 97 of the Limitation Act is applicable to the facts of the case.

The suit was to recover the nazarana paid by the plaintiffs to the defendants on the execution of a lease. The lease was dated the 9th February, 1922, and it was a grant by the defendants of a perpetual mukarrari lease of an area of 51 bighas of land. The plaintiffs were already in possession of 17 out of these 51 bighas by virtue of a lease to them by Khublal, a brother of the defendants, in 1915 and at the date of the lease their tenure under the lease from Khublal was about to expire. Therefore they wished under the lease to come into possession of a further area of 34 bighas. They allege that the defendants never in fact gave them possession in accordance with the terms of the patta of the extra amount of 34 bighas nor indeed of the 17 bighas when the lease from Khublal had expired. Proceedings were taken under section 145 of the Code of Criminal Procedure in which one Ram Sanehi claimed the land by virtue of a lease from Khublal and as a result of those proceedings the plaintiffs were excluded from entering into possession of the land in question and it was held that Ram Sanehi was in possession. Revision proceedings were taken to the High Court in respect of the order of the magistrate and the revision proceedings were finally decided in favour of Ram Sanehi on the 6th July, 1923. The decision of the magistrate, however, did not extend to the 17 bighas of which the plaintiffs were already in possession under their arrangement with Khublal. Therefore as to the 34 bighas the plaintiffs never got the benefit of their lease from the defendants.

This suit was begun on the 12th July, 1926, and the plaint was unfortunately extremely badly drafted and the difficulty of deciding this matter has in no

1933

LALJI SINGH v. RAMRUP SINGH.

COURTNEY TERRELL, C. J.

small measure been due to the bad drafting of the plaint and the ignorance of law of the person who drafted it. One paragraph of the plaint states that the cause of action arose on the 6th July, 1923, which was the date of the High Court decision which confirmed the order of the magistrate excluding the plaintiffs from possession of the 34 bighas but the statement that the cause of action arose on the 6th July, 1923, is a mere contention of law and is not an allegation of fact. The substantial allegation of fact in the plaint is contained in paragraph 5 and it is as follows:—

"That defendants nos. 1 and 2 and Hiya Lal Singh had executed the said perpetual patta, dated 9th February, 1922, in the month of Magh, 1328 Fasli, and at that time the bandobastdar, Jewa Lal Singh, was in possession of the 34 bighas of land and there were a few months more for the expiry of the term. Therefore the defendants did not at that very time put the plaintiffs in possession of the 34 bighas of land under the said patta and the 17 bighas of land settled previously with the plaintiffs under the said patta."

It is in fact an allegation that the defendants have broken their contract under the said patta to put the plaintiffs in possession of the land demised. It is perfectly true that the court is asked to order the return of the Rs. 1,500 that were paid as nazarana together with interest and that the measure of damages is alleged to be that sum and that no further damages are claimed. The suit is nevertheless a suit for damages for breach of contract. It is contended by the defendants that it is on the other hand a suit for the refund of money paid on the failure of the consideration for which the money was paid and, therefore, it is argued that Article 97 of the Limitation Act is properly applicable. The question of the principle which should be the criterion of the distinction between the applicability of Article 116 and the applicability of Article 97 has been the subject of dispute and argument in many cases. But as a result of a survey of these cases I venture to think that the principle is not difficult to find. On the very face of it Articles 115 and 116 apply to cases where compensation, that is to say damages, is asked for in

respect of a breach of contract. These sections apply when the plaintiff alleges that there was a good and valid contract and that the defendant has broken the terms of the contract. The contract is, therefore, at an end and the plaintiff seeks for compensation. Article 97, however, does not deal with such cases. The words of Article 97 are

"For money paid upon an existing consideration which afterwards fails",

that is to say, it deals with a case where the contract may have been a good and valid contract but where that which is to pass from one contracting party to the other can no longer, by reason of circumstances since the contract, pass to the other party and, therefore, the plaintiff calls upon the defendant to fulfil the term of his contract, either express or implied, that he will in such circumstances return anything which has been already paid on account of the contract. In the first case where Articles 115 and 116 apply the very basis of the suit is that the contract has been broken, is no longer in existence and damages are sought. Article 97 on the other hand applies when the plaintiff says the contract is still good and subsisting and an event contemplated by the contracting parties has happened, that is to say, the possible future inability of the plaintiff to enjoy the property, and the plaintiff relies upon the express or implied contract on the part of the defendant that in the happening of such circumstances the defendant will pay back the money which he has already received. In this case it is perfectly true that the plaintiffs have sought by way of damages for the recovery of the Rs. 1,500 paid on deposit with interest but that which gave them a right to call for that payment is the allegation that there was a contract to place the plaintiffs in possession; that it was a good and valid contract which the defendants had broken, (the contract to put them in possession), and therefore they are entitled to a return of the money. If the circumstances had been that the defendants had put the plaintiffs into possession of the property but that a subsequent event

1933.

LALJI SINGH v. RAMRUP SINGH.

COURTNEY TERRELL, C. J.

had happened, namely, the eviction of the plaintiffs by some one claiming under a superior title then that would truly have been a failure of the consideration happening after the contract and section 97 would have applied. The events which occurred subsequent to the contract in this case although alleged in the plaint have nothing really whatever to do with the cause of action and if the plaintiffs had alleged their facts as they might have done in three simple paragraphs the difficulty in which they find themselves in this appeal would possibly not have occurred.

I desire in conclusion to draw attention to one mistake which appears to have been made by the learned Munsif in the trial court who did consider the matter of limitation. The question of limitation was not really argued before the District Judge the case being decided upon other matters with which it is unnecessary to deal. It appears to have been argued, as indeed it was attempted to be argued before us, that the real difference between Article 116 and Article 97 was that in the former the contract in question was effected by means of a registered document. The existence of a registered document is the item of difference between Article 115 and Article 116. The difference, however, between Article 116 and Article 97 has nothing whatever to do with the form of the contract. It has rather to do with the question of the date of the failure of consideration and it is quite immaterial in discussing whether Article 97 or Article 116 applies to ascertain whether the contract was effected by means of a registered instrument or not.

In my opinion this appeal should fail. As I have said, the question of limitation was not raised before the learned District Judge. It was raised for the first time in this Court and it has no merit. It is unnecessary to enter into the other arguments that have been raised because they were not seriously pressed and nothing turns upon them. I would dismiss this appeal with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.