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RAMCHANDRA PADHI v. KING-EMPEROR.

MACPHERSON, J.

Sambalpur. As under that notification all appeals lie to that Court, it is clearly the Court to which appeals ordinarily lie within the meaning of section 195(3), particularly in view of the proviso, and, therefore, the superior Court which is empowered under section 476B to make the complaint which the subordinate Court of the Munsif might have made.

The contention being unfounded and no other point being urged the appeal fails and is dismissed. We make no order as to costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Das and James, JJ.

MUSSAMMAT LAKHPAT KUER

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v.

DURGA PRASAD.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Article* 116—*refund of purchase-money, suit for—limitation, terminus a quo—covenant of title—knowledge of the infirmity of vendor's title, whether material—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 55(2).

Every conveyance imports a covenant of title under section 55(2), Transfer of Property Act, 1882, and this is so irrespective of the question whether the buyer has or has not notice of the infirmity of the title of the seller.

A suit for refund of the purchase-money paid under a registered instrument, on the ground that consideration for

*Appeal from Appellate Decree no. 372 of 1927, from a decision of H. Ll. L. Allanson, Esq., I.C.S., District Judge of Gaya, dated the 24th November, 1926, confirming a decision of Babu Akhury Nityanand Singh, Subordinate Judge of Gaya, dated the 23rd April, 1926.

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the sale had failed, is governed by Article 116 of the 1st Schedule to the Limitation Act, 1908, and time begins to run only when it is found that there is no good title in the vendor.

Tricomdas Cooverji Bhoja v. *Gopinath Jiu Thakur*(1), *Multanmal Jayaram* v. *Budhumal Kevalchand*(2), and *Subbaroya Reddiar* v. *Rajagopala Reddiar*(3), followed.

Appeal by the defendant.

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

S. N. Roy, for the appellant.

S. M. Mullick and *Sarjoo Prosad*, (for *Kailaspati*, for the respondent.

DAS, J.—In this suit the plaintiffs claim to recover the sum of Rs. 4,200 from the defendant or in the alternative for such damages as the Court may think proper to award to them. The suit succeeded in the Courts below and the defendant appeals to this Court.

Shortly stated the facts are as follows: On the 18th February, 1911, the defendant sold a certain property to the plaintiff for the sum of Rs. 4,200. The defendant was the widow of one Bhagmal Sahu and professed to transfer the property in question to the plaintiff in her right as the widow of her deceased husband. It appears that Bhagmal had a step-brother Ram Charan Sahu and on the 22nd November 1917 Ram Charan sold the property in question to one Chakauri Singh. It is obvious that Ram Charan claimed a title to the property by right of survivorship to the exclusion of the widow Mussammat Lakhpat Kuer. In 1919 Chakauri instituted a suit, being suit no. 18 of 1919, as against the present plaintiffs and the defendant for recovery of possession of the property in question. Mussammat Lakhpat entered appearance

(1) (1917) I. L. R. 44 Cal. 759, P. C.
(2) (1921) I. L. R. 45 Bom. 955.
(3) (1915) I. L. R. 38 Mad. 887.

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of the suit and filed a written statement which was rejected on the ground that it had been filed too late. The suit was however contested by the present plaintiffs. On the 14th July, 1919, the Court of first instance decreed the suit of Chakauri both as against the present plaintiffs and the present defendant. The present defendant Mussammat Lakhpat was apparently satisfied with the decree pronounced by the Court of first instance, but the present plaintiffs presented an appeal to this Court. The appeal did not proceed to a hearing because the parties, namely the present plaintiffs and Chakauri, compromised the dispute between them. The present plaintiffs paid Rs. 6,800 to Chakauri and obtained a good title to the disputed property. The present suit was instituted on the 7th March, 1925, by the plaintiffs for recovery of the sum of Rs. 4,200 which was the sum which they had paid to Mussammat Lakhpat on the conveyance of the 18th February, 1911.

There is no question that the plaintiffs are entitled to some sort of decree against the defendant if their suit be within time. It was contended that the present suit does not lie because the plaintiffs were aware of the infirmity of the title of the defendant. But that question does not arise in view of the fact that the conveyance imports a covenant for title under section 55, clause (*2*), of the Transfer of Property Act. That clause provides as follows:

> The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same.

and then follows a proviso with which we are not concerned in this litigation. It will be noticed that the covenant which section 55, clause (*2*), imports has nothing to do with the question whether the buyer has or has not notice of the infirmity of the title of the seller. The question whether the plaintiffs had or had not knowledge of the infirmity of the title of Mussammat Lakhpat is therefore irrelevant.

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But then arises the question whether the suit is within time. It has been contended before us that if the suit be regarded as a suit for damages for breach of covenant under section 55, clause (2), then time began to run from the date of the conveyance, namely, the 18th February, 1911, and the suit must fail on the ground that it is barred by limitation. But that if the suit be regarded as a suit for a refund of the purchase-money then Article 97 would apply and time must run from the 14th July, 1919, when the consideration must be deemed to have failed and that even on this view the suit must be dismissed as barred by limitation. Now the suit is in substance a suit for refund of the purchase-money; but the plaintiffs have alternatively asked for a decree

"If the plaintiffs be not deemed entitled to recover the consideration money, a decree for the amount in claim may, by way of damages, be awarded to the plaintiffs against defendant no. 1."

But in the view which I take it is immaterial to consider whether the suit is a suit for refund of the purchase-money or a suit for damages for breach of the covenant under section 55, clause (2), of the Transfer of Property Act. In *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*(1) it was pointed out by the Judicial Committee that to a suit for royalties due under a registered lease of certain land with the right to dig coal, Article 116 of the Limitation Act for compensation for breach of a contract in writing registered' and providing a six years period of limitation, and not Article 110 for 'a suit for arrears of rent' and giving only three years, must be held to be applicable. It will be noticed that the suit which was before the Privy Council was a suit which directly came within Article 110 of the Limitation Act. It was undoubtedly a suit for arrears of rent and Article 110 clearly applied giving only three years for the commencement of the suit. But the Judicial

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Committee pointed out that if Article 116 does apply to a case then it is quite immaterial to consider whether the case does not fall under some other provision of the Limitation Act. It will be useful to cite the following passage from the judgment of the Judicial Committee which appears to me to be directly in point: " Both these Acts draw, as the Act of 1859 had drawn, a broad distinction between unregistered and registered instruments much to the advantage of the latter. The question eventually arose whether a suit for rent on a registered contract in writing came under the longer or the shorter period. On the one hand it has been contended that the provision as to rent is plain and unambiguous, and ought to be applied, and that in any case 'compensation for the breach of a contract' points rather to a claim for unliquidated damages than to a claim for payment of a sum certain. On the other it has been pointed out that 'compensation' is used in the Indian Contract Act in a very wide sense, and that the omission from Article 116 of the words, which occur in Article 115, and not herein specially provided for', is critical," and then their Lordships proceed to make these observations: " Article 116 is such a special provision, and is not limited, and therefore, especially in view of the distinction long established by these Acts in favour of registered instruments, it must prevail. There is a series of Indian decisions on the point, several of them in suits for rent, though most of them are in suits on bonds ", and then their Lordships proceed to discuss the decisions of the Indian Courts. I regard the decision of the Judicial Committee as establishing that where the suit is in substance a suit based on a registered document and where such a suit can be regarded as a suit for compensation for breach of a contract then Article 116 must apply although such a suit may fail under some other provision of the Indian Limitation Act.

But then arises the interesting question what is the starting point from which limitation would begin

to run? Mr. S. N. Rai appearing on behalf of the appellant contends that limitation would begin to run from the date of the contract, namely, the 18th February 1911. Mr. S. M. Mullick contends that limitation would run from the 14th July 1919 when the claim of Chakauri was established as against the parties to this litigation. In my opinion the decision of Macleod, C.J., in *Multanmal Jayaram* v. *Budhumal Kevalchand*(1) is conclusive of this question. The facts were as follows: In 1911 the plaintiffs 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 in 1913; 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 the amount spent by them in improving the land and the costs incurred by them in defending the suit brought by the tenant. The trial Court held that the consideration for the sale failed in 1913 when the tenant established his claim in a Court of law and that the suit was barred by Article 97 of the Limitation Act. On plaintiffs' appeal it was held by the Bombay High Court that Article 116 applied and that time began to run from the date when the tenant established his title to the land in 1913. The learned Chief Justice in deciding the case prominently referred to a decision of the Madras High Court in *Subbaroya Reddiar* v. *Rajagopala Reddiar*(2). That was a suit by purchasers to recover the amount paid by them to the defendants or their predecessors for a certain property on the ground that the consideration for the sale failed when the plaintiffs were deprived of possession. In deciding the case the learned Judge in the Madras High Court said as follows: "In the present case, the conveyance was prima facie unimpeachable, and I do not think the construction to

(1) (1921) I. L. R. 45 Bom. 955. (2) (1915) I. L. R. 38 Mad. 897.

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which the release of Gnanammal lent itself in the eye of law, can be said to amount to a knowledge of the defect of title. On the second question as to when the cause of action for damages arose, a very large number of cases were quoted before me. These cases can roughly speaking be classified under three heads: (*a*) where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property, (*b*) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale, and (*c*) where though the title is known to be imperfect, the contract is in part carried out by giving possession of the properties." Now stopping here for a moment it will be noticed that the present case falls under head (*b*) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale. It was contended before us that the sale was not voidable but void ab initio since it has been found that Mussammat Lakhpat had no title whatever to convey. But this point was very completely dealt with in the judgment of the High Court, where it was pointed out that a transaction cannot be regarded as void ab initio where both the parties consider that the vendor has a good title to convey. This being so, as between the parties to this litigation it cannot be regarded that the sale was void ab initio and there is no doubt that possession was taken under the voidable sale. Now proceeding the learned Judge continued to say as follows: "In the second class of cases the cause of action can arise only when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified." The learned Chief Justice of the Bombay High Court adopted the reasoning of this case and held that in the case before him time began to run only when the tenant established his claim as against the vendor and the vendee. This case in my judgment applies to the facts of this case. It must

herefore be held that time began to run from the 14th July, 1919, and as the suit has been brought within six years from that date the suit is well within time

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I would dismiss this appeal with costs

JAMES J.—I agree

Appeal dismissed

S. A. K.

LETTERS PATENT

Before Terrell C.J. and Jwala Prasad J.

SOURENDRA MOHAN SINGH

v.

KUNJBIHARI LAL MANDER*

1928.

Dec. 5.

Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 85, 167 and 171—occupancy holding—non-transferability presumption as to—decree for rent—landlord purchasing holding, whether bound to annul incumbrance—incumbrancer whether is subsequent mortgagee—landlord purchaser whether can be redeemed

Non-transferability being the ordinary incident of an occupancy holding, it will be presumed that the holding is not transferable until it is shown that it is transferable by custom or consent given by the landlord.

Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha(1) followed.

A landlord who has purchased a non-transferable occupancy holding in execution of his decree for rent can, as landlord, ignore a mortgage of the holding without formally annulling the incumbrance under section 167, Bengal Tenancy Act, 1885.

The holder of an incumbrance from the tenant of a non-transferable occupancy holding cannot, by reason of the

*Letters, Patent Appeal no. 3 of 1928, against a decision of Ross, J., dated the 22nd February, 1928, modifying a decision of W. H. Boyce, Esq., I.C.S., District Judge of Bhagalpur, dated the 4th June, 1924, which modified a decision of Babu Radha Krishna Prasad Munsif of Madhipura, dated the 27th September, 1923.

(1) (1915) I. L. R. 42 Cal. 365.