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extinguished, I am afraid it would not help him in the least because the right of a person who is not a party to a suit cannot be said to be extinguished in a suit between other parties. I would therefore decree this appeal with costs.

VARMA, J.

Appeal allowed.

J. K.

APPELLATE CIVIL.

1938.

January, 26.

Before Wort and Varma, JJ.

KESHWAR SAO.

v.

GUNI SINGH.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, articles* 83 *and* 116—*suit for damages for loss occasioned by non-payment of consideration to third party as stipulated—limitation—proper article applicable—cause of action, when accrues—contract of indemnity—Contract Act*, 1872 (*Act IX of* 1872), *section* 124—*rule of common law.*

The plaintiffs executed an ijara deed in favour of the defendants, for a certain sum, who undertook to pay off previous mortgages in favour of third parties. The defendants did not pay and the mortgagees put the mortgaged properties to sale.

Held, that the plaintiffs had failed to make out a case of a contract of indemnity either express or implied within the meaning of section 124 or any other section of the Contract Act and that the ordinary rule of common law applied, and the plaintiffs were entitled to damages for breach of contract, and not any resulting or collateral damages occasioned thereby.

*Appeal from Appellate Decree no. 267 of 1936, from a decision of Rai Bahadur Shiba Priya Chatterjee, Additional District Judge of Patna, dated the 5th December, 1935, modifying a decision of Babu Brajendra Prasad, Subordinate Judge of Patna, dated the 20th February, 1935.

Consequently limitation ran from the time when the contract was broken and not from the time at which any damage was sustained by the plaintiff.

Held also that article 83 of the Limitation Act which relates to contracts of indemnity did not apply and the case was governed by article 116.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Wort, J.

Dr. Sir Sultan Ahmed (with him *Rai G. S. Prasad* and *Rai Paras Nath*), for the appellants.

Janak Kishore and *Girjanand Prasad*, for respondents nos. 1 to 3.

Mahabir Prasad and *K. N. Lal*, for respondents nos. 4 to 6.

WORT, J.—This is an appeal by the defendants second party in an action in which plaintiffs claimed to recover a sum of Rs. 2,200 by way of damages against either the defendants first party or the defendants second party. That was the alternative claim. The claim was made in these circumstances: Plaintiffs' father had executed certain mortgages between the years 1912-1917, three in number, in favour of certain parties, only one of whom need be mentioned, namely, the defendants first party in this action. They were the mortgagees, in the first of these three transactions. Later, in January, 1918, plaintiffs executed an ijara deed in favour of the defendants second party for a sum of Rs. 800 under which the defendants had undertaken to pay off two of the mortgages to which I have referred. It was not necessary to pay off the first mortgage. The position as regards that mortgage would be understood if I repeat what I have already stated that the first mortgage of 1912 was in favour of the defendants first party. Now in the plaint the plaintiffs claimed that the transaction of the 9th of January, 1918, was

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a farzi transaction being in the name of defendants second party but in fact being the transaction of defendants first party. The trial court came to the conclusion that the real ijaradar in the transaction of 1918 was defendants first party. No appeal was preferred by the plaintiffs against that decision. But there was a dispute in the court of appeal between the defendants first party and the defendants second party, and in spite of the fact that, as I have already stated, there had been no appeal by the plaintiffs, the judge in the court below came to the conclusion that the real persons behind the transaction of 1918 were the defendants second party. Now, in those circumstances, there having been a decree against defendants second party, they have appealed to this Court.

The first argument advanced on their behalf by Sir Sultan Ahmed is that in the circumstances of the case the Judge was not in a position, nor was he entitled, to make a decree in favour of the plaintiffs against the defendants second party. The reason stated is this: that throughout the plaint the case set out by the plaintiffs was a case against defendants first party. The essence of his claim can be stated in the words used in paragraph 4—

> "The plaintiffs executed an ijara deed dated, the 9th of January, 1918, for Rs. 800 in favour of defendants first party and got it registered; and the defendants first party got it executed advisedly in the farzi name of their friend and creature Keshwar Sao, defendant no. 4 second party.....".

But in the relief portion it is stated

> "If in the opinion of the court defendants first party be not proved to be the real ijaradar.....a decree for the amount due to your petitioners may be awarded against defendants second party."

It is not perhaps an ideal plaint, but it seems to me that so far as the plaintiffs are concerned, the argument that no court is entitled to give a relief to the plaintiffs against defendants second party is in my judgment unsustainable. As regards the other question depending upon the fact that the plaintiffs did not appeal, it seems to me that the powers of the

court were governed by Order XLI, rule 33, the provisions of which are sufficiently wide to enable the Judge in the court below to exercise the jurisdiction which he has exercised in giving judgment in favour of the plaintiffs against defendants second party.

The substantial question in this appeal is the question whether the action is barred by limitation. The Article which applies is undoubtedly Article 116 which gives the period of limitation running from a date on which limitation would begin to run against a suit brought on a similar contract not registered. Ordinarily that would mean that the matter is governed by the third column of Article 115 which deals with a contract, express or implied, not in writing registered, period of limitation to be from the date on which the contract is broken. But the contention in this case is that the period dates from the date upon which the plaintiffs suffered damage; in other words, that we have to read Article 116 with Article 83 which provides the period of limitation with regard to a contract of indemnity and the time in that case runs from the date when the plaintiffs are actually damnified which, in this case, according to the argument of Mr. Janak Kishore, was at the time the property was sold in execution of the decree in the action which was brought by reason of the default of the defendants to pay off the mortgages of 1916 and 1917. This is a contract, as I have already stated, to pay off those mortgages. There is no suggestion that there is any express provision in the ijara deed of 1918 to indemnify the plaintiffs, nor can it be stated, in my opinion, that there is any implied agreement here to indemnify the plaintiffs. Section 124 of the Contract Act defines a contract of indemnity as one by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. This is not a claim to enforce a contract but an action for breach of contract. Now, there are two branches to

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this question and two branches to the argument. The first is that apart from the point whether this was a contract of indemnity or not the plaintiffs were bound to wait until they had suffered damage and that therefore the period of limitation dated only from the date upon which the properties were sold in execution of the mortgage decree. There is no specific provision in the Contract Act with regard to that matter and therefore, in my opinion, the ordinary rule of common law would prevail which can be stated in the terms of Chitty on Contracts in these words: "The gist of an action for the violation of a contract is the breach of such contract, and not any resulting or collateral damage which may be occasioned thereby; and, consequently, the Limitation Act runs in such cases from the time when the contract is broken, and not from the time at which any damage arising therefrom is sustained by the plaintiff." There has been in the decisions of Indian High Courts with regard to this matter repeated reference to the case of *Battley* v. *Faulkner*(1) which decision is to the same effect as the words which I have read from Chitty on Contracts. The real difficulty about this matter arises by reason of two decisions of this Court, one *Ram Rachhya Singh Thakur* v. *Raghunath Prasad Misser*(2) and the other in the case of *Musammat Rajbansi Kuer* v. *Bishundeo Narayan Singh*(3). In the former case the question to be determined was whether (the circumstances being similar) time began to run from the date of the contract under which the payment was to be made or whether at some later date. It is true that the learned Judges there deciding the case came to the conclusion that the time ran from the time when the execution sale took place. But whether the time ran from the date when the action was brought under which or by reason of which the plaintiff had suffered damage or whether at the

(1) (1820) 3 B. & Ald. 288.
(2) (1929) I. L. R. 8 Pat. 860.
(3) (1930) I. L. R. 10 Pat. 451.

later date, either point of time was within the period of limitation. Therefore the case can be no authority for the point which we have to decide in this case. In a word the effect of that decision is nothing more than the question whether limitation ran from the date of the contract or whether it ran from the later date, and the decision, as I have already stated, was against the earlier date. As regards the decision in *Musammat Rajbansi Kuer's* case(1) on a casual perusal of that case it would appear to be in support of Mr. Janak Kishore's argument. But on a closer analysis of the facts it could be seen that the action there was not an action for compensation for breach of contract in the sense that expression has been used in the case before us, but an action for the return of a sum of money which was left in deposit with a purchaser for a purpose similar to the purpose for which the contract was entered into in the case before us. That is the explanation why throughout the case no mention is made of either of the Articles which we have to consider in this case. In my judgment it is not an authority for the proposition that time does not run until the property is sold in execution of the mortgage decree or, to put it in the words of Mr. Janak Kishore, until the plaintiffs are damnified. If the question is to be determined on the footing that this is a contract of indemnity, in my judgment the same result obtains and the matter can be disposed of by putting this question: Had the plaintiffs brought their action when they were joined as party to the mortgage action, could it have been said that the action was premature? It is true that at this stage it might be difficult to assess the damages. But the fact that a difficulty arose in the assessment of damages would not stand in the way of the plaintiffs nor be an obstacle to their bringing an action claiming indemnity against the defendants. I do not think that in this decision we can go beyond the facts of the present case that when they were joined as parties

(1) (1930) I. L. R. 10 Pat. 451.

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in the action there was a breach of contract or in the alternative they were damnified, and, therefore, limitation ran from that date. That being the position, it seems to me quite clear that the action is barred by limitation as not being within the period of six years under Article 116 of the Limitation Act—whether read with Article 115 or Article 83, as I have already stated, is immaterial.

Reference is made in the judgment of the court below to a decision of the learned Judges of the Calcutta High Court in *Daswant Singh* v. *Syed Shah Ramjan*(1). This decision seems, in his opinion, to have given him assistance in arriving at the conclusion to which he came in the case. But the decision of Mookerjee and Holmwood, JJ. is simply to the effect that Article 116 of Schedule II of the Limitation Act applies to a suit for compensation and the suit is in time if it is commenced within six years from the date when the contract is broken. In this connection I would also like to make an observation with regard to the case to which I have already referred, namely, the decision of Sir Jwala Prasad in *Musammat Rajbansi Kuer* v. *Bishundeo Narayan Singh*(2) in which the learned Judge appears to rely upon the decision of the Allahabad High Court in *Ram Ratan Lal* v. *Abdul Wahid Khan*(3) in which the learned Judges there say—"The cause of action in such a case does not arise until demand is made and ignored, or when person to whom the money is to be paid sues the person with whom the contract had been made and consequent loss and damage occurred."

The appeal, in my opinion, succeeds and the plaintiffs' action must be dismissed with costs throughout.

VARMA, J.—I agree.

Appeal allowed.

J. K.

(1) (1907) 6 Cal. L. J. 398.
(2) (1930) I. L. R. 10 Pat. 451.
(3) (1927) I. L. R. 49 All. 603.