

APPELLATE CIVIL.

1921

Oct. 19.

Before Mr. Justice Broadway and Mr. Justice Abdul Qadir.

ABDUL AZIZ KHAN, ETC. (PLAINTIFFS) —

Appellants,

versus

MUHAMMAD BAKHSH, ETC. (DEFENDANTS),
ABDULLAH KHAN AND ANOTHER (PLAINTIFFS)

Respondents.

Civil Appeal No. 3101 of 1918.

*Indian Limitation Act, IX of 1908, articles 83, 113 and 116—
Limitation—suit upon a covenant in a registered deed of sale to recover
excess money paid for redemption of a mortgage on the property sold.*

One S. B., on 25th May 1899, sold certain immovable property. The sale deed was registered, the consideration money being Rs. 3,900, out of which Rs. 2,000 was to be paid by the vendees to a mortgagee, and in the event of the mortgage money being in excess of Rs. 2,000 S. B. was to be liable for such excess. The vendees were forced to sue the mortgagee for redemption, and obtained a decree on 21st July 1911 on payment of Rs. 3,176-9-0. This payment was made on the 5th December 1911 and on 20th July 1916 the vendees brought the present suit against the heirs of S. B. (who had since died) for recovery of Rs. 1,176-9-0 and Rs. 333-7-0 costs of the redemption suit.

Held, that the combined effect of article 116 read with article 83 of the Limitation Act gave the period of 6 years for the suit, time running from the date when the plaintiffs were actually damaged, *i.e.*, the 5th December 1911, when the payment was actually made by the plaintiffs, and that the suit was therefore within time.

Srinivasa Raghava v. Rangasami (1), and *Ram Borai Singh v. Mohendra Prasad Singh* (2), followed.

Raghubar Dial v. Madan Mohan (3), not followed.

Hari Tiwari v. Raghunath Tiwari (4), distinguished.

Sheo Narain v. Beni Madho (5), *Kuldip Dube v. Mahaul Dube* (6), *Bhatahari Saha v. Behary Lal* (7), and 27 Mad. L. J. notes 46 (8), referred to.

(1) (1908) I. L. R. 31 Mad. 452.

(2) (1912) 16 Indian Cases 73.

(3) (1893) L. L. R. 16 All. 3.

(4) (1886) L. L. R. 11 All. 27.

(5) (1901) I. L. R. 23 All. 285.

(6) (1911) I. L. R. 31 All. 43.

(7) (1906) I. L. R. 33 Cal. 381.

(8) (1914) 27 Mad. L. J. notes 46.

Second appeal from the decree of J. Goldstream, Esquire, District Judge, Multan, dated the 28th March 1918, affirming that of Mirza Nawazish Ali, Junior Subordinate Judge, Multan, dated the 31st October 1917, dismissing the suit.

NAND LAL, for Appellants.
BENI PARSHAD, for Respondents.

The judgment of Court was delivered by—

BROADWAY, J.—The facts of the case giving rise to this appeal are contained in the judgments of the Courts below and need not be here repeated. Briefly, one Sher Bakhsh sold certain immovable property to Abdul Aziz Khan and others on the 25th May 1909. The sale deed was duly registered, the consideration money being Rs. 3,900. One Thakar Das had certain mortgagee rights in the property sold, and the sale deed contained a covenant that the mortgagee was to be paid Rs. 2,000 by the vendees, that in the event of the mortgage money being in excess of this Rs. 2,000 Sher Bakhsh would be liable for such excess, and that the vendees could recover the same from Sher Bakhsh's property and person.

The vendees were forced to sue Thakar Das for redemption and obtained a decree on the 21st July 1911, they being compelled to pay Rs. 3,176-9-0. This payment was made on the 5th December 1911, and on the 20th July 1916 the vendees brought the present suit against the heirs of Sher Bakhsh (who is dead) for the recovery of a sum of Rs. 1,176-9-0 plus Rs. 383-7-0 costs of that redemption suit, or a total of Rs. 1,560. The trial Court dismissed the suit as barred by limitation, holding that Article 83 of the Limitation Act was applicable. Reliance was placed on 27 Mad. L. J. notes 46 (1). On appeal the learned District Judge maintained the dismissal of the suit on the ground of limitation, but held that Article 113 was applicable. Against this decision the present appeal has been filed by the plaintiff-appellants on whose behalf we have heard Mr. Nand Lal, while Mr. B. P. Khosla has addressed us on behalf of the respondents.

The learned District Judge relied on *Hari Tiwari v. Raghunath Tiwari* (2). We are, however, unable

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to see that that case affords any assistance in the present one, and Mr. Khosla for the respondents conceded that Article 113 was not applicable. Mr. Nand Lal urged that the proper Article was Article 116 which provides a period of six years and which would bring his suit within time. In the alternative he contended that Article 61 of the Punjab Limitation Act, which also provides a period of six years, covered his case. Mr. Khosla contended that Article 83 was the correct one, and that the suit was barred. After hearing counsel and considering the cases cited by them at the Bar we are of opinion that the present suit falls within the purview of Article 116 read with Article 83. We shall not, therefore, discuss the question of the applicability or otherwise of Article 61.

Article 83 provides a period of three years for suits upon any contract to indemnify. Both the learned counsel agree that the present suit is one for compensation for the breach of a contract to indemnify. Mr. Nand Lal relies on *Srinivasa Raghava v. Rangasami* (1) which ruling is directly in point. There the facts were that A and B exchanged lands under a registered deed which contained a clause to the effect that there was no dispute in respect of the said lands, and that if disputes should so arise, the respective party should be answerable to the extent of his private property. A was deprived of some of the lands he got by the exchange, and he sued B on the aforesaid covenant, for the value of the lands of which he was dispossessed. The suit was brought more than six years after the exchange and more than three, but less than six years after the date of deprivation. It was held that the suit was not a suit for specific performance, but a suit for compensation for breach of a contract in writing registered, and, for purposes of limitation, fell within Article 116 and not 113 of schedule II of the Limitation Act. The facts of that case are very similar to the facts in the case before us. In both cases there was a special contract to indemnify the party as and when the deprivation took place, and the combined effect of Article 116 read with Article 83 of the Limitation Act gave the period of six years for the suit, time

running from the date when the plaintiff was actually damnified. The payment was made by the plaintiffs in this case on the 5th December 1911 and the suit was, therefore, within time. We are supported in this view by the remarks of their Lordships of the Calcutta High Court in a case reported as *Ram Bora Singh v. Mohendra Prosad Singh* (1). Mr. Khosla contended that Article 116 qualified Article 115 only and in support of his contention referred us to *Raghubar Dial v. Madan Mohan* (2). The *obiter* in that decision no doubt leads colour to his contention. The correctness of that ruling, however, has been questioned in *Sheo Narain v. Beni Madho* (3) and *Kuldip Dube v. Mahaul Dube* (4), while the decision was certainly not followed in *Bhajahari Saha v. Behary Lal* (5). In our opinion a suit for compensation for the breach of a contract to indemnify falls within the purview of Article 83 of the Limitation Act and when such a contract is in writing registered, Article 116 becomes applicable and by virtue of it the period is extended to six years. In this view of the case the present suit was within time.

We accordingly accept the appeal and return the case to the District Judge for decision on the merits. Stamp on appeal will be refunded and costs of this Court will follow the event. We would note that the facts of the case referred to as 27 Mad. L. J. notes 46 (6) are not ascertainable from the brief report, and it does not appear whether the applicability of Article 116 was considered.

Appeal accepted. Case remanded.

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(1) (1912) 16 Indian Cases, 73.

(4) (1911) I. L. R. 31 All 43.

(2) (1898) I.L.R. 16 All. 9.

(5) (1906) I.L.R. 33 Cal. 881.

(3) (1901) I.L.R. 23 All. 285.

(6) (1914) 27 Mad. L. J. Notes 46