APPELLATE CIVIL.

Before Mr. Justice Broadway, Acting Chief Justice and Mr. Justice Bhide.

MUSSAMMAT GOPAL DEVI (DEFENDANT) Appellant
versus
DHANNA MAL AND ANOTHER (PLAINTIFFS) Respondents.

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June 23.

Civil Appeal No. 1469 of 1923.

Indian Limitation Act, IX of 1908, article 97—Starting point of limitation—date of failure.

The present plaintiff purchased a portion of some property sold to his vendor by two widows in 1888. The purchase was made in 1898 during the pendency of a suit by reversioners for a declaration that the sale by the widows should not affect their reversionary rights and in the sale deed it was stipulated that if any claimant came forward or the property went out of the possession of the vendee, the vendor would be liable to refund the purchase money. At the same time a separate agreement was entered into hypothecating certain property to safeguard the vendee against the consequences of the suit by the reversioners or any other suit. The reversioners' suit was finally decreed in their favour by the Privy Council on 11th May 1909. The last surviving widow died in 1919, and the reversioners then sued the present plaintiff for possession of the land purchased by him and obtained a decree and possession under it in 1921. The plaintiff then instituted the present suit against his vendor's legal representatives for recovery of the purchase money on the basis of his sale-deed and the contemporaneous agreement. It was contended that the suit was barred by limitation under article 97 of the Limitation Act, the starting point being the date of the Privy Council judgment of 1909.

Held, that the suit is within time as limitation did not commence to run till the vendee-plaintiffs were actually dispossessed in the year 1921.

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Bassu Kuar v. *Dhum Singh* (1), *Amma Bibi* v. *Udit Narain Misra* (2), *Juscurn Boid* v. *Pirthichand Lal Choudhury* (3), and *Tapasi Mal* v. *Jhandoo* (4), distinguished.

Sankara Variar v. *Ummer* (5), and *Vangali Venkanna* v. *Polamarasetti Chinna Appalaswami* (6), referred to, also *Gaya Din* v. *Jhumman Lal* (7), and *Shib Dayal* v. *Meharban* (8).

First appeal from the decree of Diwan *Som Nath, Senior Subordinate Judge, Delhi, dated the 19th March 1923, directing the defendant to pay to the plaintiff the sum of Rs. 18,891, etc.*

KISHAN DAYAL and JAGAN NATH, AGGARWAL, for Appellant.

SARDHA RAM and MAYA DAS, for Respondents

JUDGMENT.

BHIDE J.

BHIDE J.—The material facts of this case may be briefly stated as follows for the purposes of this appeal :—*Mussammat* Sarsuti and *Mussammat* Puran Devi, two widows, sold some property known as Katra Choban in Delhi City to Shambu Nath and two other persons on the 1st July 1888. Shambu Nath subsequently purchased the shares of the latter and became sole owner. On the 14th June, 1897, two reversioners named Jai Narain and Rup Narain instituted a suit for a declaration to the effect that the sale by the widows should not affect their reversionary rights. The case went up to the Privy Council and was eventually decreed on the 11th May 1909. During the pendency of the suit by Jai Narain and Rup Narain, Shambu Nath sold a portion of the property to Dhanna Mal and Sanwal Das, the present plaintiffs, for Rs. 18,560 on the 14th February 1898. In the

(1) (1888) I.L.R. 11 All. 47 (P.C.).
(2) (1909) I.L.R. 31 All. 68 (P.C.).
(3) (1919) I.L.R. 46 Cal. 670 (P.C.).
(4) (1921) 62 I. C. 953.
(5) (1923) I.L.R. 46 Mad. 40.
(6) (1925) 48 Mad. L. J. 217.
(7) (1915) I.L.R. 37 All. 400 (F.B.).
(8) (1923) I.L.R. 45 All. 27 (F.B.).

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sale deed it was stipulated that if any other claimant came forward or the property went out of possession of the vendees, the vendor would be liable to refund the purchase money with damages. On the same date a separate agreement was executed by Shambu Nath in favour of the vendees, in which the suit by Jai Narain and Rup Narain was specifically mentioned, and to safeguard the vendees against the consequences of that or any other suit certain other property was hypothecated. *Mussammat* Sarsuti, the last surviving widow, died on the 9th January 1919. On the 3rd May 1919, Rup Narain instituted a suit for possession of the property sold by Shambu Nath to the plaintiffs. On the 30th July 1921, this suit was decreed on payment of Rs. 38,144 as compensation. Rup Narain deposited the amount and obtained possession of the property on the 13th August 1921. The present suit was then instituted by the plaintiffs against *Mussammat* Gopal Devi, widow of Shambu Nath, on the 30th November, 1921, on the basis of the stipulation as regards quiet possession and enjoyment in the sale-deed and the agreement referred to above, for recovery of the purchase money, arrears of rent and damages amounting in all to Rs. 20,119-14-0. The defendant put forward various pleas including limitation and acquiescence. The learned Senior Subordinate Judge who tried the case, held the suit to be within time and granted the plaintiffs a decree for Rs. 18,891. Future interest at six *per cent. per annum* from the date of suit till realization was also allowed on the purchase money, *i.e.*, Rs. 18,560. From this decision the defendant has appealed.

The main point argued in the case was that of limitation. It was urged for the appellant that the suit was governed by article 97 of the first sche-

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dule of the Indian Limitation Act and that the starting point for limitation was the date of the Privy Council Judgment of 1909 in the suit by the reversioners Jai Narain and Rup Narain, inasmuch as that judgment negatived the vendees' title and thus resulted in 'failure of consideration.' It was further contended that even if loss of possession furnished a fresh cause of action subsequently, the earlier cause of action must prevail, inasmuch as limitation, once it has begun to run, cannot be subsequently interrupted. *Gaya Din* v. *Jhumman Lal* (1) and *Shib Dayal* v. *Meharban* (2) were relied upon in support of the latter contention.

The present suit, as already stated, is based on the covenant as regards quiet possession and enjoyment embodied in the sale-deed and also on the terms of the agreement which was executed along with the sale-deed with special reference to the suit by Jai Narain and Rup Narain. This agreement was really in the nature of an indemnity-bond and provided that if the whole or part of the property went out of the possession of the vendees on a suit being brought by anybody or if the vendees were impleaded in any suit as defendant and had to pay the value of the property, the vendor was to be liable to them for repayment of the value of the property together with costs of the suit. There can be no doubt that, according to the terms of both the documents, the vendees were entitled to a refund of the purchase money in the event of loss of possession. This fact was not disputed on behalf of the appellant, but it was contended as regards the indemnity bond that it was to enure only for a limited period, namely, up to the date of the

(1) (1915) I.L.R. 37 All. 400 (F.B.) (2) (1923) I.L.R. 45 All. 27 (F.B.).

decision of the Privy Council judgment of 1909, and that it was null and void after that date. This interpretation of the document, however, leads to an obviously absurd position. The material portion of the indemnity bond bearing on this point is as follows :— "*aur ba'd faisla muqaddama mazkura bala badalat akhiri vih zamanat nama babat zar zamanat kaladam wa be asar samjha jawega aur man muqir wapas lunga*" (and after the decision of the above mentioned suit by the final Court, this bond with regard to the security money shall be considered null and void and ineffectual, and I will take it back). The words "above mentioned suit" occurring in the above passage are ambiguous; for there are, at least, three different suits mentioned in the preceding portion of the document, namely, first, the suit of Jai Narain and Rup Narain which was pending; secondly, a suit resulting in dispossession of the vendees from the property; and thirdly, a suit requiring them to repay the purchase money, a second time to another person. The intention of the parties evidently was to safeguard the vendees against the consequence of an adverse decision in these suits. Whichever suit may be taken to be referred to by the word "above mentioned suit," it seems obvious that the object of the indemnity bond would have been frustrated altogether if the bond ceased to be in force as soon as the suit was finally decided; for dispossession or double payment, for which the vendees were to be indemnified according to the terms of the bond, would in the ordinary course take place after and not before the final decision of the suit. It seems to me that the intention of the parties was that the indemnity bond should become null and void if the suits referred to above were finally decided in favour of the vendor, but the

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intention has not been properly expressed owing to bad drafting. The interpretation sought by the appellant to be placed upon the terms of the document would defeat its object altogether, and I think it must be rejected on that account.

However, even if the interpretation of the appellant is accepted for the sake of argument and it is held that the indemnity bond ceased to have any effect after the Privy Council decision of the year 1909, the plaintiffs can still fall back upon the covenant of quiet possession included in the sale-deed itself. The indemnity bond only furnished an additional security to the vendees but in no way abrogated or modified the terms of the sale-deed which were quite general and independent of the security bond. According to the terms of the sale-deed, the vendor undertook to refund the purchase money "*If by chance* any one comes forward as a claimant or objector in respect of the property sold, or if the whole or a part thereof goes out of the possession of the vendees on action being brought by anybody." Now, the first part is obviously inapplicable to the suit of the reversioners, Jai Narain and Rup Narain, which was actually pending at the time. The second part is, however, quite general and would apply to dispossession resulting from that suit or any other suit. The vendees were not dispossessed till 1921 and if limitation is reckoned from the date of dispossession the suit would admittedly be within time.

It was, however, contended on behalf of the appellant that the Privy Council judgment of 1909 in any case resulted in negation of the plaintiffs' title and, in consequence, failure of consideration and that there arose thus a cause of action for which limitation period is prescribed by article 97 of the first schedule

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of the Indian Limitation Act. The following rulings were cited in support of this contention:—*Bassu Kuar* v. *Dhum Singh* (1), *Amma Bibi* v. *Udit Narain Misra* (2), *Juscurn Boid* v. *Pirthichand Lal Choudhury* (3) and *Tapasi Mal* v. *Jhandoo* (4). Now, in the first place, it cannot be properly said that the vendees' title was negatived or that the consideration failed entirely on the date of the Privy Council decision. The suit decided by the Privy Council was merely for a declaration. The alienation was declared to be voidable at the option of the reversioners or the death of the widows. The last surviving widow did not die till the year 1919 and the vendees were certainly entitled to retain possession of the property till then. The property had, moreover, been improved and the reversioners could not have recovered possession without paying heavy compensation. There was thus a possibility of the reversioners not being able to take advantage at all of the declaratory decree. It was also likely that the vendor who had guaranteed quiet possession and enjoyment to the vendees might have come to terms with the reversioners. It is thus clear that the chances of the vendees losing possession of the property were remote and uncertain when the declaratory suit was decided by the Privy Council in the year 1909. Possession was certainly an important element of the consideration for the sale and this portion of the consideration did not fail till the year 1921. The learned counsel for the appellant has relied upon *Bassu Kuar* v. *Dhum Singh* (1) and *Amma Bibi* v. *Udit Narain Misra* (2), but the facts of these cases were quite different because no question of possession was in-

(1) (1888) I.L.R. 11 All. 47 (P.C.). (3) ((1919) I.L.R. 46 Cal. 670 (P.C.).
(2) (1909) I.L.R. 31 All. 68 (P.C.). (4) (1921) 62 I. C. 953.

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volved therein. In both these cases, there was only an agreement to sell and when specific performance on the basis of the agreement was refused by Courts, failure of consideration was held to have taken place In *Juscurn Boid* v. *Pirthichand Lal Choudhury* (1) which has also been relied upon, the decision proceeded on the special facts of the case which were somewhat peculiar. The suit was one for recovery of purchase money on the sale of a 'patni taluq' being set aside under the Bengal Patni Taluq Regulation of 1819. Owing to the particular course which litigation had taken in that case, the applicability of article 97 of the first schedule of the Limitation Act was assumed for the purposes of the appeal but without affirming its correctness. The argument that the starting point of limitation should be taken as loss of possession was advanced, but the plea was treated as belated. Their Lordships, however, distinctly recognised that "there may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run," (*ibid* at page 679). Their Lordships thus do not appear to have laid down any general rule governing cases of this description, and the ruling *Juscurn Boid* v. *Pirthichand Lal Choudhury* (1) has been distinguished on this ground by the Madras High Court and held to be inapplicable where a vendee has been put in physical possession and subsequently dispossessed, *vide Sankara Variar* v. *Ummer* (2) and *Vangali Venkanna* v. *Polamarasetti Chinna Appalaswami* (3).

Some stress has also been laid on *Tapasi Mal* v. *Jhandoo* (4), a single Bench ruling of this Court, which *primâ facie* seems to be in the appellant's

(1) (1919) I.L.R. 46 Cal. 670 (P.C.).
(2) (1923) I.L.R. 46 Mad. 40.
(3) (1925) 48 Mad. L. J. 217.
(4) (1921) 62 I. C. 953.

favour. The facts are, however, to some extent distinguishable as the vendees themselves had in that case sued for a declaration that they were owners of certain land belonging to a minor which had been sold to them and the suit had been dismissed on the ground that the sale was void. In the present case, the vendees were not even parties to the suit decided by the Privy Council and the sale was not void but only voidable at the option of the reversioners on the death of the two widows who had effected the sale. The single Bench decision purports to follow *Juscura Boid* v. *Pirthichand Lal Choudhury* (1) but does not discuss it in detail, and the reservation that their Lordships make in respect of the circumstances in which limitation may run from loss of possession has not been noticed. The case, moreover, has not been published in any authorised report, and with all respect for the view of the learned Judge who decided the case, I do not think it can be accepted as an authority in the circumstances of the present case. I would accordingly hold that limitation did not commence to run till the vendees were actually dispossessed in the year 1921 and from the date of dispossession the suit is admittedly within time, as already noted.

The other grounds of appeal were not much pressed.

It was urged that the plaintiffs had already realized large profits from the property during the period they have been in possession and that their silence after the Privy Council decision should be held to amount to acquiescence disentitling them to any relief. This contention has obviously no force. The vendees had paid a substantial sum for the pro-

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perty and were clearly entitled to its profits so long, at any rate, as they were entitled to retain possession. But for the suit of the reversioners they might have enjoyed the profits of the property in perpetuity. Their silence after the Privy Council decision also cannot be construed as tantamount to acquiescence. They were not only not bound to take any action immediately after that decision but could not have in fact even sued for any relief until they were actually dispossessed.

Lastly, it was urged that the plaintiffs should not have been, at any rate, allowed any interest; but the lower Court has allowed interest at the moderate rate of 6 *per cent. per annum* on the purchase money only from the date of the suit up to realisation and this seems reasonable enough in the circumstances.

On the above findings I would dismiss the appeal with costs.

BROADWAY A. C. J.

BROADWAY A. C. J.—I concur.

A. N. C.

Appeal dismissed.