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APPELLATE CIVIL.

Before Harrison and Tek Chand JJ.

1931
Feb. 10.

CHANAN MAL (PLAINTIFF) Appellant

versus

MAHARAJ AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 2038 of 1926.

Indian Limitation Act, IX of 1908, Article 97—Terminus a quo—*Date of failure of consideration—Article 116—Stipulation in registered deed of redemption.*

On the 29th November 1920 (the plaintiff, as successor-in-interest of the mortgagor) paid the amount due on the mortgage to the sons of the deceased mortgagee, who executed a registered "deed of redemption" in plaintiff's favour stipulating (*inter alia*) that in the event of their failure to put the plaintiff in possession they would recoup him. Shortly afterwards the sister's sons of *S.* notified plaintiff that they were in possession of the mortgaged property as donees from the mortgagee. Thereupon the plaintiff brought a suit for possession impleading the sons and the sister's sons of the mortgagee as defendants. This suit was dismissed on 12th October 1922, on the ground that the payment to the sons of the mortgagee was not valid, as the mortgagee had gifted the mortgagee-rights to his sister's sons in his lifetime. On 3rd October 1925 the plaintiff sued the sons of the mortgagee for recovery of the amount paid to them in November 1920, but was met with the plea that the suit was time-barred under article 62 of the Limitation Act. The learned District Judge upheld the plea and dismissed the suit.

Held, that the suit was one for recovery of money paid upon an existing consideration which afterwards failed, and was governed by Article 97 of the Act, under which the plaintiff could sue within three years from the date of the failure of the consideration and that as this happened on the

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12th October 1922, when the plaintiff's suit for recovery of possession was dismissed, the suit was within time.

Hanuman Kamat v. *Hanuman Mandur* (1), distinguished.

Held further, that as the defendants had clearly stipulated that in the event of their failure to put the plaintiff in possession they would recoup him, and this stipulation was an integral part of the transaction embodied in the registered deed of redemption, its breach gave the plaintiff six years to sue for compensation under Article 116; and the suit was within time, even if Article 97 did not exist on the Statute Book.

Second appeal from the decree of Mr. F. W. Skemp, District Judge, Gurdaspur, at Dalhousie, dated the 18th June 1926, reversing that of Lala *Iqbal Rai, Subordinate Judge, 3rd Class, Batala, dated the 22nd March 1926, and dismissing the plaintiff's suit.*

J. L. KAPUR and BADRI DAS, for Appellant.

JAGAN NATH AGGARWAL, for Respondents.

TEK CHAND J.

TEK CHAND J.—On the 12th of February 1879 Lehna and Des Raj, father and uncle of Chanan Mal, plaintiff, mortgaged a house to one Sahib Dial for Rs. 270 agreeing to pay simple interest at 9 *per cent. per annum*. Sahib Dial, mortgagee, has since died and Maharaj and Guro, defendants, are his sons. On the 29th of November 1920 the defendants received Rs. 900 in cash from the plaintiff and executed a registered "deed of redemption" in his favour agreeing to deliver possession of the house forthwith. In this deed the defendants further stipulated that if any difficulty was experienced by the plaintiff in obtaining possession they would take necessary steps in this behalf, either by filing a suit or otherwise, and in the event of failure they admitted their liability to recoup

(1) (1892) I. L. R. 19 Cal. 123 (P. C.).

him. Possession, however, was not delivered and on the 7th December 1920, about a week after the execution of this deed, Ram Lal and Ganda Mal, who are the sister's sons of Sahib Dial, served a notice on the plaintiff informing him that they, as donees from Sahib Dial, were in possession of the house in question and that they did not recognise as valid the "deed of redemption" executed by the defendants in his favour. On this the plaintiff brought a suit for possession of the house, impleading the sons of Sahib Dial (present defendants) as well as his nephews, Ram Lal and Ganda Mal, as defendants. In this suit the trial Court held that the present defendants were not the successors-in-interest of the mortgagee, that the payment of Rs. 900 to them by the plaintiff was not valid and that the plaintiff could redeem only, if and when he paid another sum of Rs 900 to the nephews of Sahib Dial. This decision was given on 12th October 1922. The present defendants appealed to the District Judge but were unsuccessful. A second appeal by them to the High Court also failed on the 14th of July 1925.

On the 3rd of October 1925 the plaintiff instituted the present suit against the sons of Sahib Dial for recovery of Rs. 2,000 made up of Rs. 900 paid by him to the defendants at the time of the execution of the "deed of redemption," interest on this sum, and expenses incurred in the previous litigation. The defendants pleaded *inter alia* that the suit was barred by limitation under Article 62 of the Indian Limitation Act. The learned Subordinate Judge overruled the plea, holding that Article 116 applied under which the plaintiff could sue within six years from the date of the deed. On the merits, he found the plaintiff entitled to Rs. 1,323-8-0 and passed a decree for that sum with

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proportionate costs. On appeal the learned District Judge has held that Article 62 was applicable, and he has accordingly dismissed the suit as time-barred.

After examining the pleadings and hearing both counsel, I am of opinion that the suit is really one for recovery of money paid upon an existing consideration which afterwards failed, and is governed by Article 97, under which the plaintiff could sue within three years from the date of the failure of the consideration. The facts given above clearly show that in this case there was an existing consideration and that it failed on the 12th October 1922, when the trial Court refused to recognise the payment by the plaintiff to the defendants as a valid discharge of the mortgage, holding that the defendants had no right to redeem the mortgage, as the original mortgagee Sahib Dial had gifted the mortgagee-rights to his nephews Ram Lal and Ganda Mal.

Mr. Jagan Nath for the respondents has relied upon *Hanuman Kamat* v. *Hanuman Mandur* (1) to which reference had also been made in the judgment of the learned District Judge. That case is, however, clearly distinguishable as there an alienation had been made by the Manager of a joint Hindu family without necessity, and under the law that alienation was voidable at the option of the junior members of the family. On these facts it was held that the consideration for the transaction failed as soon as this option was exercised, and time could not start afresh on the failure of the suit by the alienee for recovery of possession. In the present case, there is no question of the contract having become void on the exercise of an option by any of the parties. Here the defendants had undertaken

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to put the plaintiff in possession and, if necessary, to secure possession to him by filing a suit. It was, however, discovered that third parties were actually in possession and it was not until the refusal by the Court to deliver possession to the plaintiff without payment of another sum of Rs. 900 that the consideration really failed. Article 97, therefore, applies, and the suit having been brought within three years from that date is within time.

Apart from this, we have in this case the important fact that the defendants had clearly stipulated that in the event of their failure to put the plaintiff in possession they would recoup him. This stipulation was an integral part of the transaction embodied in the registered " deed of redemption " and its breach gave the plaintiff six years to sue for compensation under Article 116. This being so, the suit would be within time, even if Article 97 did not exist on the Statute Book In my opinion, the finding of the learned District Judge on the plea of limitation is erroneous and must be set aside. No other point was argued before us.

I would accept the appeal, set aside the judgment and decree of the District Judge and restore that of the trial Court with costs throughout.

HARRISON J.

HARRISON J.—I agree.

N. F. E.

Appeal accepted.