1902.

JUGMO-HANDAS v. NUSSER-WANJI.

exact measure can be applied, but as a substantial matter of business the adoption of the settlement rates enables us to give the plaintiff fair compensation for the loss he has suffered. Therefore I would vary the decree of Crowe, J., by suqstituting for Rs. 8,542-8-0 a sum to be ascertained on the footing of the actual value in February being Rs. 21-8-0 and other months Rs. 23.

We do not disturb the order of costs in the lower Court. Each party to bear his own costs of the appeal.

CHANDAVARKAR, J. :—I concur.

Decree varied.

Attorneys for the appellant (defendant)—*Messrs. Ardesir, Hormasji and Dinsha.*

Attorneys for the respondent (plaintiff)—*Messrs. Crawford, Brown & Co.*

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Aston.

1902. *August* 4.

TULSIRAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* MURLIDHAR CHATURBHUJ MARWADI (ORIGINAL PLAINTIFF), RESPONDENT.*

Vendor and purchaser—Sale of property—No title in vendor to part of property sold—Suit by purchaser for damages—Failure of consideration—Cause of action—Limitation Act (XV of 1877), schedule II, articles 83 and 97—Covenant for quiet enjoyment.

On the 22nd November, 1880, the first and second defendants for themselves and for the third defendant sold a certain house to the plaintiff's father. The sale deed, which was duly registered, contained the following clause: "We (vendors) are in enjoyment of the house as its owners, and if any one were to obstruct you in the enjoyment of the house we would remove the obstruction so as to put you to no trouble." In the year 1892 the plaintiff brought a suit to recover possession of the house. Both the lower Courts awarded the claim, but

* Second Appeal No. 24 of 1902.

1902.

TULSIRAM v. MURLIDHAR.

on the 26th August, 1896, the High Court, in second appeal, varied the decree, holding that the one-third share of the house which belonged to the third defendant did not pass by the sale, and the plaintiff was awarded only two-thirds of the house, of which he was put in possession. On the 24th August, 1899, the plaintiff brought the present suit, claiming *inter alia* from defendants 1 and 2 to recover Rs. 225 as damages sustained by him by reason of his being deprived of the one-third share of the house.

Held, that the claim for damages was a claim to recover money upon an existing consideration that had failed and that it fell under article 97, schedule II of the Limitation Act (XV of 1877), and not article 83, and was therefore time-barred, not having been brought within three years from the failure of consideration. The clause in the sale-deed was not a contract of indemnity. It was at most a covenant for title and quiet enjoyment. The failure of consideration took place when the plaintiff endeavoured to obtain possession of the property and being opposed found himself unable to obtain it.

Bassu Kuar v. *Dhum Singh*(1) distinguished.

SECOND appeal from the decision of Ráo Bahádur C. D. Kavishankar, First Class Subordinate Judge of Násik with Appellate Powers, confirming the decree of Ráo Sáheb G. K. Gokhale, Second Class Subordinate Judge of Pimpalgaon.

Suit by purchaser against a vendor for damages, the vendor having sold property to part of which he was found to have no title.

On the 22nd November, 1880, the first and second defendants for themselves and the third defendant (their cousin) sold the house in suit to the plaintiff's father Chaturbhuj for Rs. 300 and executed a sale-deed of that date which was duly registered. They, however, did not give possession and Chaturbhuj accordingly in 1892 filed a suit (No. 1014 of 1892) against them and obtained a decree for possession of the house, which was confirmed on appeal.

The defendants, however, filed a second appeal in the High Court, and on the 26th August, 1896, the High Court varied the decree by ordering that the plaintiff should recover only two-thirds of the house, holding that the one-third share belonging to defendant 3 had not passed by the sale.

The plaintiff was put into possession of his two-thirds, but he alleged that subsequently he was ousted by the defendants, and

(1) (1888) 11 All. 47

1902.

TULSIRAM v. MURLIDHAR.

accordingly on the 24th August, 1899, (*i.e.*, within three years of the High Court's decree) he brought this suit, in which he claimed to recover the two-thirds which had been awarded to him, and as against the first and second defendants he claimed damages for their failure to give him the remaining one-third share which they had sold to him under the deed of 22nd November, 1880. The damages were laid at Rs. 225.

The sale-deed of 1880 contained the following clause:

We (vendors) are in enjoyment of the house as its owners, and if any one were to obstruct you in your enjoyment of the house we would remove the obstruction so as to put you to no trouble.

The defendants pleaded that the plaintiff had never been put into possession of any part of the house, and contended that the present suit was barred by sections 13 and 244 of the Civil Procedure Code (XIV of 1882).

The Subordinate Judge held that the plaintiff's claim as to the two-thirds share of the house was barred by section 244 of the Civil Procedure Code, but he allowed the claim for damages against defendants 1 and 2 and passed a decree against them for Rs. 225.

The defendants appealed, but the decree of the lower Court was confirmed.

The defendants then filed this second appeal to the High Court and also applied (No. 70 of 1902) for stay of execution of the lower Court's decree.

Shivram V. Bhandarkar for the appellants (defendants) :— The plaintiff's claim for damages is really a claim to recover the money which he paid for the one-third share of the house, of which he did not get possession. Defendants 1 and 2 had no right to sell that portion of the house and the sale of it was void *ab initio*. If so, the plaintiff's cause of action arose at the date of the deed in 1880 and this suit is barred by limitation under article 62 of the Limitation Act (XV of 1877). If the sale was voidable and not void, then this suit is one for the recovery of money paid for a consideration which has failed. The failure of consideration took place when the defendants refused to give up possession. The suit in that case falls under article 97 of the Limitation Act and is barred, as it was filed more than three

years after the refusal: *Hanuman* v. *Hanuman*.[1] Even if article 116 of the Limitation Act applies, the suit is barred.

Chintamani A. Rele for the respondent (plaintiff):—The suit is not barred by limitation. It is based on the indemnity clause in the deed and the cause of action did not arise until the decision of the High Court in 1896. Article 83 of the Limitation Act applies. The plaintiff sued in 1892 (No. 1014 of 1892) for possession of the whole house to which he believed he was entitled. That suit was in time (article 144) and both the lower Courts passed a decree in his favour. It was not until the High Court varied that decree on the 26th August, 1896, and deprived the plaintiff of part of the house which he had paid for, that he had a claim for damages against the first and second defendants. This present suit to enforce that claim was filed on the 24th August, 1899, within three years from the High Court's decree and is therefore in time: *Pepin* v. *Chunder Seekur*.[2] See also section 65 of the Contract Act (IX of 1872); *Bassu Kuar* v. *Dhum Singh*.[3] The sale to the plaintiff was voidable only and not void *ab initio* and article 62 of the Limitation Act does not apply: *Hanuman* v. *Hanuman*[1]; *Ardesir* v. *Vajesing*.[4] In *Hanuman* v. *Hanuman* the sale was held entirely invalid, but here it was held only partly invalid and it was not possible for the plaintiff to know of the defect until the High Court's decree.

Bhandarkar in reply:—The clause in the sale-deed is not an indemnity clause. It is only a covenant for quiet enjoyment. Therefore article 83 of the Limitation Act does not apply: *Ardesir* v. *Vajesing*.[4] Section 65 of the Contract Act does not apply to a transfer of property.

JENKINS, C.J.:—On the 22nd November, 1880, the first and second defendants passed in favour of the plaintiff's father Chaturbhuj a sale-deed of a house at Vinchur for Rs. 300. The deed was duly registered, but in consequence of obstruction Chaturbhuj was compelled to file Suit No. 1014 of 1892 to recover possession of the house. In the two lower Courts a decree was

(1) (1891) 18 Ind. Ap. 158; 19 Cal. 123.
(2) (1880) 5 Cal. 811.
(3) (1888) 11 All. 47.
(4) (1901) 25 Bom. 593.

1902.

TULSIDAM v. MURLIDHAR.

passed in the plaintiff's favour, but in the High Court this decree was varied on the ground that defendant 3 had a one-third share in the house which was not bound by the sale-deed. Ultimately the plaintiff was put into possession of a portion assigned to him in respect of his share, but he alleges wrongful possession was afterwards taken of that portion, and he accordingly has brought this suit to recover possession of two-thirds of the house, claiming at the same time against the first and second defendants Rs. 225 as damages on account of his being deprived of one-third of the house.

We now are only concerned with the plaintiff's claim for damages, and as to that claim his allegation is that defendant 3, at the instigation of defendants Nos. 1 and 2, obstructed him in taking possession of the house, and that this led to the institution of Suit No. 1014 of 1892. Both the lower Courts have awarded the damages claimed, and from this the defendant's appeal urging (among others) the point that the Courts have wrongly overruled their plea of limitation.

The sale-deed contains a clause in these terms :

> We are in enjoyment of the house as its owners, and if any one were to obstruct you in your enjoyment of the house we would remove the obstruction so as to put you to no trouble.

For the plaintiff it is contended that this provision is a contract of indemnity, and that the case is accordingly governed by article 83. But in our opinion the provision does not bear this construction ; it at most is but a covenant for title and a covenant for quiet enjoyment. But a covenant for title of this class is broken upon the execution of the assurance which contains it; so that the statute of limitation immediately begins to run in favour of the covenantor, and this although the covenantee be in ignorance of the breach. (See Dart on Vendors and Purchasers, Chapter XIV, section 5, and the cases there cited.) And according to the decision in *Ardesir* v. *Vajesing*,[1] by which we are bound, no suit can be based on the covenant for quiet enjoyment inasmuch as the plaintiff never got possession.

Under these circumstances, it has been argued that the claim is either for money had and received, or to recover money upon

(1) (1901) 25 Bom. 593.

an existing consideration that failed. The view most favourable to the plaintiff would be to treat the sale as voidable and not void, so far as Ramlal's (defendant 3's) share is concerned, and thus to deal with the suit as one to recover money upon an existing consideration that failed. Such a suit is, for the purposes of limitation, governed by article 97 in the second schedule to the Limitation Act, as we have to determine when the consideration failed. Mr. Rele's industry has enabled him to discover the decision of the Privy Council in *Bassu Kuar* v. *Dhum Singh*,[1] and he vouches that case as authority for the proposition that time did not begin to run until the decree of the High Court in the former suit within the prescribed period of three years from the commencement of this suit. There may be expressions in their Lordships' judgments which seem to favour the plaintiff's contention, but the circumstances of the case differ so materially from those with which we are now concerned that those expressions are no guide to us. We say this with the greater confidence by reason of their Lordships' decision in the later case of *Hanuman Kamat* v. *Hanuman Mandur*,[2] which is substantially undistinguishable from the present. There a suit for possession failed on the ground that the vendor being a member of a joint family, his conveyance did not operate to create a title to the property of the family that would prevail against a repudiation of the transaction by other sharers. Thereupon the purchaser sued to recover his purchase-money and interest, but failed in his endeavour on the ground that his suit was too late. There their Lordships treated the suit as one brought on existing consideration that failed, and they held that limitation commenced to run from the time when the plaintiff "endeavoured to obtain possession of the property, and being opposed, found himself unable to obtain possession." To appreciate the full force of this finding it must be noted that in the prior suit for possession the first Court had decided in the plaintiff's favour, and it was not until the decree of the District Court on the 18th of December, 1882, that the plaintiff's claim to possession was overthrown. The suit for damages was commenced within three years from this date, and this fact was pressed in argument, but

(1) 1888) 11 All. 47. (2) (1891) 18 I. A. 158 ; 19 Cal. 123.

1902.

TULSIRAM v. MUKUNDHAR.

was met with the remark "was not your cause of action complete when you failed to get possession?" And to the question thus put by one of their Lordships the answer is given in the judgment: "The consideration did not fail at once, but only from the time when the appellant endeavoured to obtain possession of the property, and being opposed, found himself unable to obtain possession. There was then at all events a failure of consideration, and he would have had a right to sue at that time, to recover back his purchase-money upon a failure of consideration." It is true that the previous decision of their Lordships in *Bassu Kuar's case*(1) was not cited, but it may be assumed that this was because that decision was not considered relevant, rather than because it was overlooked; for not only were two of their Lordships parties to the earlier decision, but Mr. Doyne who argued against the bar of limitation in the second case had been counsel for the successful appellant in *Bassu Kuar's* case. We think we are clearly bound by *Hanuman's case*,(2) and though in *Venkatanarasimhulu* v. *Peramma*(3) and *Venkatarama Ayyar* v. *Venkata Subrahmanian*(4) the learned Judges, professing to follow *Hanuman's case*, date the period of limitation from the time when it was found in the prior suit that the title was defective, we are unable to find in those cases anything that would enable us to say that on the facts of this case the starting point for limitation is not the same as in *Hanuman's case*. Therefore we hold the suit barred by limitation.

There is but one remark that we would add before leaving the case: both in *Hanuman* v. *Hanuman* and in *Ardesir* v. *Vojesing*(5) it apparently was assumed that a suit for money had and received, or on a consideration that failed, would lie even where a sale-deed had been executed, and effect was not given to the distinction drawn in *Clare* v. *Lamb*.(6) But it has to be observed that the sale-deed in *Hanuman's case* was prior to the passing of the Transfer of Property Act, and that in *Ardesir's case* was passed at a time when that Act was not in force in this Presidency. We allude to these facts because we desire to guard ourselves

(1) (1888) 11 All. 47.
(2) (1891) 19 Cal. 123.
(3) (1894) 18 Mad. 173.
(4) (1900) 24 Mad. 27.
(5) (1901) 25 Bom. 593.
(6) (1875) L. R. 10 C. P. 334.

1902.

TULSIRAM v. MURLIDHAR.

against being taken to decide that where the Transfer of Property Act applies, there may not be remedies to which a different period of limitation would be applicable. No point of this kind has been made in the argument before us, or could be made, for the sale-deed here is dated the 22nd November, 1880. The result is that we must reverse the decree and dismiss the suit with costs throughout, including the costs of Civil Application No. 70 of 1902.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Batty.

1902.
July 21.

NARANDAS PARBHUDAS AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* PARSHOTTAM VALU AND ANOTHER (ORIGINAL DEFENDANTS).*

Tálukdár—Gujarát Tálukdárs' Act (Bombay Act VI of 1888), section 2 (a)—Purchaser from "Tálukdár"—Definition.

The term "Tálukdár" as defined by section 2 (*a*) of the Gujarát Tálukdárs' Act (Bombay Act VI of 1888) does not include a purchaser of a Tálukdár's share sold in execution of a decree passed against him.

APPEAL from the decision of Ráo Bahádur Chandulal Mathuradas, First Class Subordinate Judge of Ahmedabad.

On 11th August, 1862, Parshottam (defendant No. 1), a Ghanchi by caste, purchased the share of Joramiya, the original Tálukdár, in the village of Kotda in the Dhandhuka Táluka, at an auction sale in execution of a decree passed against the said Tálukdár. At the date of the sale the land was in mortgage and the mortgagee was in possession. The purchaser Parshottam (defendant No. 1) had eventually to file a suit (No. 355 of 1879) to recover possession of the property. He obtained a decree, and in execution he got possession of the land on the 16th February, 1885.

In 1893 he applied to the Tálukdári Settlement Officer, under sections 10 and 11 of the Gujarát Tálukdárs' Act (Bombay Act VI

* First Appeal No. 73 of 1901.