

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Rao.

1913.

March 4.

NARSING SHIVBAKAS MARWADI (ORIGINAL DEFENDANT), APPELLANT, v. PACHU RAMBAKAS MARWADI (ORIGINAL PLAINTIFF), RESPONDENT.*

Limitation Act (IX of 1908), Schedule I, articles 97, 62—Failure of consideration—Sale of land—Purchaser stepping into possession—Loss of possession at the suit of a third party, the real owner—Suit to recover purchase money from vendor—Limitation.

In 1903, the defendant sold certain land to the plaintiff under the *bona fide* belief that he was entitled to do so and placed the plaintiff in possession. In 1909, the true owner of the land recovered possession thereof from the plaintiff. In a suit by the plaintiff to recover the purchase money from the defendant, the Court of first instance held that the suit was barred by limitation under Article 62 of the First Schedule to the Limitation Act (IX of 1908), for the purchase money paid to the defendant was money had and received to the plaintiff's use. On appeal it was held that the claim was within time, under Article 97 of the Act.

On appeal by the defendant :—

Held, that the suit was governed by Article 97, inasmuch as possession given under the purchase to the plaintiff was an existing consideration as long as it lasted.

Hanuman Kamat v. Hanuman Mandur⁽¹⁾, followed.

APPEAL from order passed by N. B. Majumdar, First Class Subordinate Judge with appellate powers at Dhulia, reversing the decree passed by H. A. Mohile, Subordinate Judge at Bhusaval, and remanding the suit.

Suit to recover money.

In 1903, the plaintiff purchased the land in dispute from the defendant and went into possession of the same.

The defendant had purchased the land in 1901 from one Fulchand, who was only a mortgagee of the land; though this fact was not known to the defendant.

* Appeal No. 44 of 1912 from order.

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The mortgagor sued in 1908 to redeem the land and obtained a decree in 1909. He recovered possession of the land from the plaintiff on the 24th April 1909.

The plaintiff sued the defendant on the 5th November 1909 to recover the amount of his purchase money with interest.

The defendant contended *inter alia* that at the time of the purchase he was under the belief that the land belonged to Fulchand; and that the plaintiff's claim was barred by limitation.

The Subordinate Judge held that the suit was governed by Article 62 of the First Schedule to the Limitation Act; and that the claim was barred by limitation, inasmuch as the plaintiff did not sue within three years of the date of his purchase.

On appeal, the lower appellate Court held that Article 97 of the First Schedule to the Limitation Act applied to the case and that the claim was not barred. The decree was therefore reversed and the suit remanded to the Court of first instance for trial on merits.

The defendant appealed to the High Court.

S. S. Patkar, for the appellant:—The contract here was void *ab initio* and there was thus a failure of consideration at once. The plaintiff ought to have sued within three years from July 1903, when the defendant received Rs. 500 from the plaintiff. See *Hanuman Kamat v. Hanuman Mandur*⁽¹⁾, *Ardesir v. Vajesing*⁽²⁾ and *Venkatanarasimhulu v. Peramma*⁽³⁾.

M. V. Bhat, for the respondent:—The cases cited by the other side do not apply; for, in the present case the plaintiff was put into possession of the property and he retained it till 1909. The case falls clearly within the

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(2) (1901) 25 Bom. 593.

(1894) 18 Mad. 173.

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purview of Article 97 of the First Schedule to the Limitation Act, and time runs from loss of possession.

BEAMAN, J.:—The defendant in this suit purchased the immoveable property from one Fulchand who afterwards turned out to be a mere mortgagee. The defendant, believing himself in good faith to have the title to sell, sold it to the plaintiff in 1903, and the plaintiff thereupon, received possession and retained it until 1909. The true owner, the mortgagor, then redeemed and recovered possession from the plaintiff. The plaintiff now sues the defendant for the purchase money and interest as money paid upon a consideration which has since failed.

In the first Court the learned Judge held that the suit was governed by Article 62 of Schedule I of the Limitation Act. In his opinion the purchase-money paid to the defendant was money had and received to the plaintiff's use and therefore the plaintiff would be obliged to bring the suit to recover within three years from date of such receipt.

On appeal the learned Judge of the first appeal Court held that the suit was governed by Article 97, and the only question which we have to answer here is whether possession given under a purchase is an existing consideration as long as it lasts. In our opinion this question can admit of only one answer. In the case of purchased property the whole consideration contemplated is the property. That being given into the possession of the purchaser so long as it remains, he had all the consideration that he is by law entitled to. Whether that consideration be actually lawful or unlawful it makes no difference; for, it ought to be clear that it is only where the possession which is the consideration turns out to be unlawful that the question can ever be raised in a practical form. This view is in agreement, we think, with the principle underlying the cases which

have been cited on behalf of the appellant. It is true that in the Privy Council case of *Hanuman Kamat v. Hanuman Mandur*⁽¹⁾ their Lordships laid down the very useful principle that speaking generally the test to be applied is, when there was any difficulty in determining whether a case fell under Article 97 or Article 62, whether the contract was void *ab initio* or merely voidable. But their Lordships, we think, were not considering a case in which possession had actually been given, although the contract subsequently turned out to have been void *ab initio*. In such a case the promisee has received the only consideration he has stipulated for. In all cases of that kind it appears to us that it is only when the promisee is deprived of that consideration and the true character of the contract thus becomes revealed that he has any ground for complaint. And that is the proper time from which to compute the period of limitation. This is the principle distinctly underlying the provisions of Article 97. We think that both in terms and in spirit it does and was intended to cover cases of this kind. In our opinion, therefore, the order appealed against was right and ought to be confirmed. This appeal must, therefore, now be dismissed with all costs.

Order confirmed.

R. R.

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