

the sale-deed had not been registered, then I think the Article applicable to the suit would be Article 97. That Article is one which in many cases has been held to apply to such suits and it is one which specially provides for the case within the meaning of Article 115, so that the latter Article does not apply,—cf. *Johuri Mahton v. Thakoor Nath Lukce*<sup>(1)</sup>. That being so, we have only to consider when the failure of consideration arose, and I think there is ample authority for holding that, in a case like the present, limitation runs only from the date of the judgment of the first Court declaring that the plaintiffs' vendor had not a good title. Accordingly I agree that the appeal on the point of limitation should be allowed.

*Appeal allowed.*

R. R.

(1) (1880) 5 Cal. 830.

---

## APPELLATE CIVIL.

---

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.*

ESMAIL ALLARAKHIA CLAIMING UNDER THE PLAINTIFFS, APPELLANT *v.*  
DATTATRAYA RAMCHANDRA GANDHI CLAIMING UNDER THE PLAINTIFF  
NO. 1 AND OTHERS, RESPONDENTS\*.

1920.

September  
22.

---

*Sale—Suit to set aside sale—Suit decreed on plaintiff paying into Court certain amount—Mortgagee from plaintiff paying the money to save the suit from being dismissed—Assignment of plaintiff's interest—Mortgage paid off—Application by mortgagee to withdraw the money paid into Court—Mortgagee cannot be allowed to withdraw unless on an application by one of the parties.*

One Banubai for herself and as guardian of her son Banemiya and daughter Putlabai, sold the property in suit to one Mahomed. Banemiya and Putlabai brought a suit to set aside the sale and it was decreed that the plaintiffs should, on paying into Court a certain sum of money within six months, take

\* First Appeal No. 9 of 1919.

1920.

ISMAIL  
ALLARAKHIA  
v.  
DATTATRAYA  
RAM-  
CHANDRA.

into possession their shares of the property on partition and that in default of payment the suit should be dismissed. One Dattatraya, who was a mortgagee from Banemiya, paid the decretal amount into Court on the 22nd August 1918 to save the suit from being dismissed. On the 15th September 1916 Banemiya sold the remaining interest in the property to one Ismail. Subsequently, on the 3rd October 1918, Dattatraya's mortgage was redeemed and on the 4th October 1918 he applied to the Court to withdraw the amount. This application was opposed by Ismail. The Subordinate Judge made an order allowing Dattatraya to withdraw the money paid into Court,

*Held*, setting aside the order, that though the money was produced by Dattatraya, it was paid in to the credit of the proceedings and could only be dealt with on an application made in the regular course by one of the parties and that Ismail could be heard as he was the person in whose favour interest was created by the plaintiffs.

FIRST appeal against the order passed by R. B. Gogte, First Class Subordinate Judge at Thana.

The facts material for the purposes of this report are fully stated in the judgment of His Lordship the Chief Justice.

*Sir Thomas Strangman*, with *S. V. Bhandarkar* and Messrs. *Mulji & Thakordas*, for the appellant.

*Kanga*, with *J. R. Deshmukh*, for respondent No. 1.

*Bahadurji*, with *D. G. Dalvi*, for respondent No. 2.

MACLEOD, C. J.:—The facts which led up to the order now under appeal are somewhat complicated. The suit property belonged to one Ballabhai who died leaving as his heirs his widow Banubai, three sons and three daughters. Thereafter two sons and one daughter died. Banubai for herself and as guardian of her surviving children who were minors sold the property to one Panamchand Deeva and he in his turn sold it to one Mahomed Rahimtulla Jusub.

Banemiya son and Putlabai daughter of Ballabhai filed Suit No. 57 of 1914 in the Thana Court to set aside the sale by their mother so far as their shares were concerned. An appeal decree in that suit was passed by the High Court on the 26th February 1918 whereby it was

1920.

decreed that the plaintiffs should, on paying into Court a certain sum within six months, take into possession a 10/16th share of the property by partition. In default of payment the suit would be dismissed. On 31st July 1915, Banemiya had mortgaged his share to one Dattatraya R. Gandhi for Rs. 2,000 and as Banemiya delayed paying into Court the decretal amount Gandhi paid in Rs. 4,000 on the 22nd August 1918 to save the suit from being dismissed.

In the meantime Banemiya had been dealing with the share of himself and Putlabai.

On the 15th September 1916 he had sold five annas to Narayan, brother of Dattatraya. On the 3rd July 1918 Narayan transferred the five annas share to one Motilal Ratansi.

On the 10th June 1918, Banemiya contracted to sell to Ismail Allarakhia all his remaining interest in the property and agreed to obtain an assignment in his favour of the right, title and interest of the heirs of Putlabai who had died.

It is alleged by Ismail that Dattatraya and Narayan entered into an arrangement with him whereunder they were to be paid off and he was to be allowed to continue the execution proceedings in the Thana Court. But Banemiya declined to carry out the contract of 10th June 1918 and Ismail had to file a Suit No. 1233 of 1918 in the High Court of Bombay for specific performance.

On the 3rd October 1918, Dattatraya's mortgage was redeemed, and on the 4th October, he applied to the Thana Court for an order that the Rs. 4,000 deposited by him should be returned. This application was opposed by Ismail. He contended that as the condition in the decree of the High Court had been fulfilled the decree had become absolute. He was prepared either to pay

---

ESMAIL  
ALLARAKHIA  
v.  
DATTATRAYA  
RAM-  
CHANDRA.

1920.

ESMAIL  
ALLARAKHIA  
v.  
DATTATRAYA  
RAM-  
CHANDRA.

to Mahomed Rahimtulla the decretal amount or to pay Dattatraya the sum which had been deposited in the Court.

The learned Subordinate Judge made an order allowing Dattatraya to withdraw the money paid into Court. If that order were permitted to stand the result would be that the suit would be dismissed, as there would no longer be any money paid into Court within the six months, and any payment tendered by Ismail would be rejected as beyond time. It is quite true that when Dattatraya made his application Ismail had merely a contract to purchase from Banemiya and had therefore no legal interest in the property. But the mistake which I think was made by the lower Court was in admitting the application of Dattatraya who was not a party to the suit but only a mortgagee of Banemiya's interest. Though the Rs. 4,000 was produced by Dattatraya it was paid in to the credit of the plaintiffs in the suit and the only persons who would be allowed to make an application for its withdrawal would be Mahomed Rahimtulla or the plaintiffs if they no longer wished to redeem. Now if Banemiya had applied to withdraw the Rs. 4,000, clearly Ismail would have been interested in opposing the application, and no Court would allow Banemiya to withdraw the money and so put an end to the right to redeem, until it had been decided whether his contract to sell the equity of redemption could be enforced.

Since the order under appeal Ismail has obtained a decree for specific performance.

The fact that Dattatraya declined the very proper offer made by Ismail to pay him his money makes it appear as if Banemiya, Mahomed Rahimtulla, and Dattatraya were acting together in order to defeat any benefit which would accrue to Ismail under his contract of the 10th June 1918, and it is desirable to

point out for the future guidance of the Subordinate Courts that they are not concerned with the source from which money comes which is paid into Court under any order. Whether it comes from the pocket of a party or an outsider, it is money paid into credit of the proceedings, and can be dealt with only on an application made in the regular course by one of the parties. If there are any persons in whose favour any interest in the money so lying in Court has been created by any of the parties, they can then be heard.

I think the appeal must be allowed and the order granting Dattatraya leave to take back the money set aside with costs.

Appellant to be at liberty to deposit the amount previously brought into Court by Gandhi within eight days from the date when he has notice that the papers have been sent back to the lower Court, and such payment to be treated as made within the period of six months allowed by the decree, dated 26th February 1918.

FAWCETT, J. :—I agree. Under the decree the party who alone could make a proper payment was the plaintiff and the case is similar to the one in which the court has passed a preliminary decree for redemption under Order XXXIV, Rule 7, Civil Procedure Code. That rule recognises only a payment by the plaintiff, and any payment made in pursuance of such a decree would, whether it came from the pocket of a stranger or not, in the eyes of the Court, be merely a payment by the plaintiff. The case is entirely different from one like that provided for in section 83 of the Transfer of Property Act, where a payment into Court may be made not only by the mortgagor but by any other person entitled to institute a suit for redemption. Then having made such a payment, the plaintiff should

1920.

---

ESMAIL  
ALLAKHIA  
v.  
DATTATRAYA  
RAM-  
CHANDRA.

1920.

ESMAIL  
ALLARAKHIA  
v.  
DATTATRAYA  
RAM-  
CHANDRA.

not, I think, be allowed to withdraw it except for some good cause shown. There is all the more reason to object to a withdrawal by a stranger, or at any rate a person who has not the same rights as the plaintiff in regard to the enforcement of the decree in his favour.

The respondents have objected to the appeal being allowed on various technical grounds, such as that the appellant has no right to apply to the Court, because the case does not come under section 47 of the Civil Procedure Code. But it is to be remarked that the mortgagee, who made the deposit on behalf of the plaintiff, is in no better position, and the equitable rights that vest in the appellant under his contract with the plaintiff and subsequent decree for specific performance, are clearly superior to any that can be claimed by the mortgagee. The case is one to which an ordinary principle of equity should be applied, namely, that equity will not by reason merely of a technical defect suffer a wrong to be without a remedy. I think, therefore, that the appeal should be allowed.

*Appeal allowed.*

J. G. R.

---

## APPELLATE CIVIL.

---

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fanelett.*

1920.

October 1.

FRAMROZ DOSABHAI AND ANOTHER (ORIGINAL DEFENDANTS), APPLICANTS  
v. DALSUKHBHAI FULCHAND AND ANOTHER (ORIGINAL PLAINTIFFS),  
OPONENTS<sup>a</sup>.

*Presidency Small Cause Courts Act (XV of 1882), Chapter VII, section 48—  
Order made in proceedings under Chapter VII—Review—Power of the  
Court to review the order—Civil Procedure Code (Act V of 1908), sec-  
tions 8, 114 and Order XLVII.*

<sup>a</sup> Civil Application No. 115 of 1920 under Extraordinary Jurisdiction.