

1925.

GAFUR
IMAN
v.
AMIR
ISAB.

proportion of the expenses so incurred, he might also give them notice that he would claim interest against them on that amount if they wished to redeem their shares. But if no such notice is given, it is difficult to see on what the claim for interest could be founded, or from what authority the Court could derive the power to exercise a discretion to allow interest.

We think, therefore, that we must allow the appeal to this extent, that defendant No. 3 must pay the plaintiff Rs. 66-10-8 as his share of the mortgage money with interest at six per cent. thereon from the date of suit till payment. Defendant No. 3 can have three months to pay the amount from the time the proceedings are returned to the trial Court.

No order as to costs of the appeal.

Decree varied.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Cuyajee.

1925.

February 10.

GANAPA PUTTA HEGDE (ORIGINAL DEFENDANT), APPELLANT v. HAM-
MAU SAIRA VALLAD ABDUL SAIB (ORIGINAL PLAINTIFF), RESPONDENT^o.

Indian Limitation Act (IX of 1908), Schedule I, Article 116—Claim for a sum certain—“Compensation”—Implied covenant of title—Transfer of Property Act (IV of 1882), section 55 (2).

The plaintiff, having been prevented by the true owners from taking possession of certain immoveable property purchased by him *bona fide* from one who had in fact no title thereto, sued his vendor, within six years of the date of the sale deed, for the recovery of the purchase money ;

Held, that, inasmuch as the vendor must be deemed, under section 55 (2) of the Transfer of Property Act, to have contracted that he had power to transfer the property, the suit was a suit for compensation for breach of contract, to which Article 116 of the Limitation Act was applicable, and was, therefore, within time.

* Second Appeal No. 640 of 1923.

1925.

GANAPA
PUTTA
v.
HAMMAD
SAIBA.

Arunachala v. Ramasami⁽¹⁾, referred to.

Per COYAJEE, J. :—"The expression 'compensation for the breach of a contract' used in that Article is not limited to a claim for unliquidated damages, but applies also to a claim for payment of a sum certain : *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*⁽²⁾. It is true that Article 116 does not in terms speak of a contract 'express or implied' and here we have an implied contract only. But I agree with the opinion expressed by Fawcett J., in *Multanmal v. Budhumal*⁽³⁾ that the terms of that Article are sufficiently wide to include a case of the present kind, and that the words 'express or implied' contained in Article 115 are also intended to be read into Article 116 "

SECOND appeal against the decision of K. B. Milne, District Judge at Karwar, confirming the decree passed by V. B. Halbhavi, Subordinate Judge at Honawar.

Suit to recover money.

Bommanna, Timmanna, Puttayya, Subbayya, sons of Bomma Hegde and Ganapa Manj Hegde were cousins. They were living separate. Ganapa died leaving a widow Venkamma as heir to his property. Puttayya and Subbayya died during the life-time of Venkamma. On Venkamma's death, Bommanna and Timmanna succeeded to her property as reversioners. On April 4, 1915, Puttayya's son, Ganapa (defendant) representing that he was entitled to half the property of Ganapa sold it to the Hammad Saiba (plaintiff) for Rs. 400. Out of the consideration for the sale Rs. 150 were paid to the defendant in cash and for the balance the plaintiff passed a mortgage of certain properties to the defendant. In recovering possession of the property the plaintiff was obstructed by Bommanna and Timmanna. On coming to know that these persons were the rightful owners of the property, the plaintiff purchased it from them and obtained possession. On April 4, 1921, the plaintiff sued the defendant, Puttayya's son, to recover Rs. 150 and to obtain a declaration that the mortgage bond was satisfied.

⁽¹⁾ (1914) 38 Mad. 1171.

⁽²⁾ (1916) 44 Cal 759.

⁽³⁾ (1920) 45 Bom. 955.

1925.

GANAPA
PUTTA
v.
HAMMAD
SAIBA.

The defendant contended that he did not make any representation to the plaintiff, that the plaintiff bought agreeing to take all risk and that the suit was barred by limitation.

The Subordinate Judge held that the defendant had no title to the land sold by him, that he was not induced to sell on the representation made by plaintiff, that the suit was in time under Article 116 of the Limitation Act, as it was a suit for compensation for breach of contract in writing registered. He, therefore, passed a decree for Rs. 150, the plaintiff giving up his claim for the declaration that the mortgage bond was satisfied because he failed to pay the necessary Court fees.

On appeal the District Judge held that the sale was void *ab initio*, that under section 52 (2) of the Transfer of Property Act there was an implied covenant of title in the sale deed and that, as it was registered, a suit for recovery of the purchase money fell under Article 116 of the Limitation Act, the starting point for limitation being the date of the sale : 38 Mad. 1171 and 23 Bom. L. R. 325. He, therefore, dismissed the appeal.

The defendant appealed to the High Court.

G. P. Murdeshwar, for the appellant.

S. S. Patkar, for the respondent.

MACLEOD, C. J.:—There were five cousins, Bommanna, Timmanna, Puttayya and Subbayya, sons of Bomma Hegde, and Ganapa Manj Hegde, living separate. Ganapa died leaving a widow, Venkamma, as heir to his property. Puttayya and Subbayya died during her life-time, so that on the death of Venkamma, Bommanna and Timmanna succeeded to her property as reversioners. Puttayya's son representing that he was entitled to half the property of Ganapa sold it to the plaintiff in this suit for Rs. 400 on April 4, 1915. Rs. 150 were paid in cash, and for the balance the plaintiff

passed a mortgage on certain of his properties. The plaintiff, when he was unable to get possession owing to the obstruction of Bommanna and Timmanna, purchased the land from them and obtained possession. On April 4, 1921, he sued Puttayya's son to recover the Rs. 150 and to obtain a declaration that the mortgage bond was satisfied. The defendant pleaded that he did not make any representation to the plaintiff, that the plaintiff bought agreeing to take all risks, and that the suit was not in time.

As the plaintiff had not paid the necessary Court fees with regard to the declaration sought for that the mortgage bond had been satisfied, he gave up his claim for the declaration.

The trial Judge held that the defendant had no title to the land sold by him, that he was not induced to sell on the representation alleged to have been made by the plaintiff, that the suit was filed in time, and passed a decree for Rs. 150 with costs and future interest at six per cent.

The defendant had contended that the suit was one for relief on the ground of fraud, and that as the plaintiff had become aware of the fraud, more than three years before the suit was filed, the suit was barred applying Article 95 of the 2nd Schedule of the Indian Limitation Act. The learned Judge considered that it was a suit for compensation for breach of a contract in writing registered, to which Article 116 was applicable. Though there was no express covenant in the deed to make compensation for want of title, such a covenant could be implied from the representation made by the defendant.

In appeal the District Judge held that the sale was void *ab initio*, that under section 55 (2) of the Transfer of Property Act there was an implied covenant of title

1925.

GANAPA
PUTTA
v.
HAMMAD
SAIBA.

1925.

GANAPA
PUTTA
v.
HAMMAD
SAIBA.

in the sale deed, and that, as it was registered, a suit for the recovery of the purchase money fell under Article 116, the starting point for limitation being the date of the sale as no possession had been obtained.

On the issue whether plaintiff agreed to take the risk of not getting possession the District Judge held that the defendant had not proved what he had alleged in his written statement. Accordingly the appeal was dismissed. In second appeal it was first contended that no appeal lay as the suit was of a Small Cause Court nature, the plaintiff having given up his claim for the declaration asked for in the plaint.

We do not think that this contention is sound. The suit as framed was not a suit of a Small Cause Court nature, and it did not attain that character because the plaintiff gave up his claim to the declaration.

The question whether this is a suit for compensation for breach of a contract in writing registered is more difficult. It has been argued on the authority of *Hanuman Kamat v. Hanuman Mandur*⁽¹⁾ that if a vendor without title sells to a purchaser and receives the purchase money a suit for the recovering of the purchase money falls under Article 62 if the purchaser does not obtain possession, and under Article 97 if he does obtain possession. The purchaser has bought a worthless piece of paper and consequently when endeavouring to recover the price paid he is not suing for compensation for breach of a contract. But it must be admitted that in the case referred to the question whether the suit could be considered as a suit for compensation for breach of a contract does not seem to have been considered. Their Lordships said at page 126 :

“If there never was any consideration, then the price paid by the appellant was money had and received to his account by Dowlut Mandur. But their Lordships are inclined to think that the sale was not necessarily void, but

⁽¹⁾ (1891) 19 Cal. 123.

was only voidable if objection were taken to it by the other members of the joint-family. If so, 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; and, therefore, the case appears to them to be within the enactments of Article 97."

In *Subbaroya v. Rajagopala*⁽¹⁾ A, who had a title to certain immoveable property voidable at the option of C, sold it to B and put B in possession thereof. C then brought a suit against A and B and got a decree and obtained possession thereof in execution. It was held that B's cause of action for the return of the purchase money arose not on the date of the sale but on the date of his dispossession, when alone there was a failure of consideration, and that the Article applicable was Article 97 of the Indian Limitation Act. The only question argued was at what date did the cause of action arise. On this question the Judge said a large number of cases were quoted which could be roughly classified under three heads: (a) where from the inception the vendor had no title to convey and the vendee had not been put into possession of the property, (b) where the sale was only voidable on the objection of third parties and possession was taken under a voidable sale, and (c) where though the title was known to be imperfect the contract was in part carried out by giving possession of the properties. In the first class of cases the starting point of limitation would be the date of the sale. Although section 55 (2) of the Transfer of Property Act was referred to, it does not appear to have been argued that Article 116 was applicable, the case was held to come within class (b) and Article 97 was applicable.

In *Arunachala v. Ramasami*⁽²⁾ the suit was filed in 1910 on a sale deed of 1904. It turned out at the trial

⁽¹⁾ (1914) 38 Mad. 887.

⁽²⁾ (1914) 38 Mad. 1171.

1925.

GANAPA
PUTTA
v.
HAMMAD
SAIBA.

1925

GANAPA
PUTTA
v.
HAMMAD
SAIDA.

that at the time of the sale the first defendant had no title to convey. The plaintiffs then pressed their claim to recover the consideration money, to which the defendant pleaded the bar of limitation. The District Judge held the claim came under Article 62 or 97. The High Court held that it came under Article 116 as a covenant for title was implied in the conveyance by section 55 (2) of the Transfer of Property Act. It does not appear from the report whether the plaintiffs had got possession of the property sold.

It may be taken, therefore, that the defendant covenanted that he had a good title to the property sold, and in return for the sale deed received a certain price. If the plaintiff can be said to be suing for compensation for breach of that covenant then Article 116 is applicable. Whether that article applies to suits for debts or sums certain due upon registered instruments was considered in *Lalchand Nanchand v. Narayan Hari*⁽¹⁾, and the Court held that there was a long series of cases in which that question had been decided in the affirmative, so that it accepted that body of authority. The Privy Council in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*⁽²⁾ accepted the interpretation so often and so long put upon the statute by the Courts of India, and thought that the decisions could not be disturbed. Therefore the word "compensation" in Article 116 need not be restricted to a claim for unliquidated damages, and can be held to include a claim for a sum certain as in this case. The appeal is dismissed with costs.

COYAJEE, J.:—I agree in holding that this second appeal is competent, but that it fails on the ground that the suit which has given rise to this appeal falls within Article 116 of the Indian Limitation Act. The plaintiff brought the suit for the recovery of his purchase-money. On April 4, 1915, the defendant

⁽¹⁾ (1913) 137 Bom. 656.

⁽²⁾ (1916) 44 Cal. 759 at p. 768.

executed the sale-deed in question in favour of the plaintiff. Admittedly, the vendor had no title to the land which he purported to convey; and the vendee had not been put in possession of the land. The sale is consequently void *ab initio*. The sale deed, however, was duly registered, and on the face of it a *prima facie* title was secured. For, it is enacted by section 55, sub-section (2) of the Transfer of Property Act—which applies to this case—that in the absence of a contract to the contrary, the seller shall be deemed to contract with the buyer that the interest which he professes to transfer to the buyer subsists and that he has power to transfer the same. Here, then, a covenant for title is implied, there being—according to the findings of the lower Courts—no contract to the contrary. The plaintiff's suit which is instituted within six years of the date of the sale is not barred by the law of limitation if Article 116 applies. In my opinion it is a suit for “compensation for the breach of a contract in writing registered” and is governed by that Article: *Arunachala v. Ramasami*⁽¹⁾. The expression “compensation for the breach of a contract,” used in that Article, is not limited to a claim for unliquidated damages, but applies also to a claim for payment of a sum certain: *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*⁽²⁾. It is true that Article 116 does not in terms speak of a contract “express or implied,” and here we have an implied contract only. But I agree with the opinion expressed by Fawcett J., in *Multanmal v. Budhumal*⁽³⁾, that the terms of that Article are sufficiently wide to include a case of the present kind, and that the words “express or implied,” contained in Article 115, are also intended to be read into Article 116. The starting point of limitation in a suit of this nature is the date of sale, and the plaintiff's

1925.

 GANAPA
 PUTTA
 v.
 HAMMAD
 SAIBA.
⁽¹⁾ (1914) 38 Mad. 1171.⁽²⁾ (1916) 44 Cal. 759 at p. 768.⁽³⁾ (1920) 45 Bom. 955 at p. 965.

1925.

claim to recover back his purchase-money was, therefore, made within the statutory period.

GANAPA
PUTTA
v.
HAMMAD
SAIDA.

Appeal dismissed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

1925.

February 10.

HANMANT SUBBAYA NAIK (ORIGINAL DEFENDANT), APPELLANT v.
KRISHNA MANJINATH YAJI (ORIGINAL PLAINTIFF), RESPONDENT*.

Hindu law—Widow—Alienation—Subsequent adoption—Death of adopted son—Second adoption—Such adopted son can question widow's alienation—Limitation.

A Hindu widow having alienated her husband's property adopted a son who died a minor. Later she adopted a second son, who questioned the alienation;

Held, that the second adopted son acquired by virtue of his adoption an inherent right to question the alienation by his adoptive mother before his adoption and that the fact that there had been a previously adopted son in no way affected his right.

* *Held*, also, that the second adopted son was in no way the representative of the first adopted son and, therefore, the cause of action accrued on the date of his adoption.

Gobindo Nath Roy v. Ram Kanay Chowdhry⁽¹⁾, considered.

THIS was an appeal against the decision of R. B. Milne, District Judge at Karwar, reversing the order passed by S. L. Kallyanpurkar, Additional Subordinate Judge at Honawar.

Suit to recover possession of property.

The suit property originally belonged to the plaintiff's adoptive father. After his death, his widow, Venkamma, gave the property on a Mulgeni lease to one Manjunath on April 25, 1903. On April 30, 1903, Venkamma adopted

* Appeal No. 1 of 1924 from Order.

⁽¹⁾ (1875) 24 W. R. 183.