1873. *February* 20. *R. A. No.* 40 *of* 1871.

sale, the case before us is a much more simple one, and much of the argument before us is altogether beside the question.

Here the plaint is for certain jewels, which are materials used in religious worship, to the custody of which the alleged vendor is entitled and to the careful custody of which he is bound. That these articles are by all systems of law, and by the Hindu law almost more emphatically than by any other, absolutely "extra commercium," there exists no doubt, and on this simple ground I would affirm the decree of the Civil Judge and dismiss the appeal with costs.

Appeal dismissed.

Appellate Jurisdiction(a)

Special Appeal No. 310 *of* 1872.

VENKAPPA CHETTI and another.....*Special Appellants.*

AKKU.....*Special Respondent.*

Plaintiff sued for cancellation of the sale of certain lands, made to defendants in 1841. In 1843 defendants executed an agreement (A) to plaintiff, giving her a right of re-purchase. The language of the document was—"If you and your posterity pay in a lump the 175 Rupees, we will hand over the lands to you." Upon the question of limitation—*Held*, in Special Appeal, that the plaintiff's claim was barred, more than 12 years from the date of the cause of action (1843 at latest) having elapsed before suit.

1873. *March* 7. *S. A. No.* 310 *of* 1872.

THIS was a Special Appeal against the decision of R. Vasudéva Rau, the Additional Principal Sadr Amín of Mangalore, in Regular Appeal No. 569 of 1870, reversing the decree of the Court of the District Munsif of Mangalore in Original Suit No. 427 of 1867.

Plaintiff sued for the cancellation of a sale deed executed by herself and her brother to the ancestors of the defendants on the 18th June 1841, on the ground that she was entitled to re-purchase at any time, under the conditional agreement A, dated 14th February 1843.

(a) Present: Innes and Kernan, JJ.

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Plaintiff alleged that she sold the disputed land to the defendants' ancestor for rupees 700, under Exhibit I, and obtained from him the agreement A; that she, accordingly, tendered the sale amount before the Mangalore Munsif in 1867, which the defendants refused to accept, and that she has been enjoying the land as a tenant of the defendants. Hence the present suit for the cancellation and delivery of the sale deed, the land involved therein being assessed at rupees 27-13-7. The suit was valued at rupees 287-12-8.

The 1st, 3rd and 4th defendants denied the genuineness of Exhibit A, the conditional agreement.

The 2nd defendant was *ex parte*.

The District Munsif dismissed the plaintiff's claim

The plaintiff appealed.

The Principal Sadr Amín delivered the following judgment:—

"The point for decision in this case is, whether Exhibit A is genuine.

I think it is, and so differ from the Munsif, who admits that the execution of the deed is proved by the 1st, 2nd, 3rd and 4th witnesses for the plaintiff, but who does not believe them, only because he thinks the writing and the attesting signatures of the witnesses in Exhibit A differ from those of the said parties produced by the defendant. But I think the Munsif wrong for the following reasons:—The writing and signatures of Exhibit A ought not to have been compared with the other writings unless they are undisputed. Plaintiff does not admit the other writings produced. The admission of the witnesses 1 and 4 cannot place those documents beyond dispute, inasmuch as they may be said to have been tampered with, nor is it probable that if the plaintiff had forged the bond, he would not have taken care to make the bond appear as much above suspicion as possible. The defendants indirectly admit that a conditional agreement was passed with Exhibit I. The witnesses for the defendants clearly admit the fact by stating that a conditional agreement to re-purchase

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the land within five years was passed on a plain paper with Exhibit I, and, considering the fact of the sale deed I having been engrossed on a stamp, it is quite possible that the said agreement would have been renewed on a stamp. The sale endorsement of the stamp used for Exhibit A shows that the said stamp was bought by order of the vendees for the express purpose of engrossing Exhibit A. The land is still in the possession of the plaintiff. The registry still stands in her name. Under these circumstances, I believe the witnesses for the plaintiff, and find Exhibit A to be genuine.

I accordingly reverse the original decree, and give judgment for plaintiff, as sued for, with costs throughout. Defendants to bear their own costs."

Against this decree the 1st and 3rd defendants preferred a Special Appeal, upon the following grounds :—

I.—No time being specified in A for re-purchasing, the cause of action arose at the date of A itself, and therefore the suit is clearly barred by the Statute of Limitations as not having being brought within 12 years from that date.

II.—A is besides invalid, since there was no consideration whatever for its execution two years after the date of the sale.

III.—The plaintiff being in possession of the disputed lands, this suit, which is merely a declaratory one, is not maintainable.

IV.—The Principal Sadr Amín has given no finding as to the truth of the tender relied upon by the plaintiff.

Sanjiva Rau, for the special appellants, the 1st and 3rd defendants.

Nevins Pillai, for the special respondent, the plaintiff.

The Court delivered the following Judgments—

INNES, J. :—We reserved judgment in this case because a question was raised in Special Appeal as to the date from which the period allowed by the Statute of Limitation should be held to commence to run.

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The sale by plaintiff was in 1841. In 1843, according to the finding of the Principal Sadr Amín, by which we are bound, the defendant executed an agreement to plaintiff giving her a right of re-purchase. No objection has been taken to the agreement on the score of want of consideration, and if genuine, as it is found to be, and as we must therefore hold it, it may be, as suggested, the renewal of an agreement executed simultaneously with the deed of sale and therefore on sufficient consideration. But as no objection of this kind was taken to it, we need not discuss the question.

The language of the document is—"If you and your posterity pay in a lump the 175 Rupees, we will hand over the lands to you." It was contended in Special Appeal that the statutory period of 12 years would, on an agreement of this kind, run from the date of the agreement, because the terms were to give up the land 'on demand,' and the rule in such cases places the starting point of the statutory period at the date of the execution of the document. On the other side it was contended that, as the payment of the money was a condition precedent to the delivery of the land, the Statute will not begin to run until the plaintiff pays or is ready and willing to pay the money.

It has been held in regard to money obligations payable 'on demand' that the Statute runs from the date of the document, but the reason in these cases is that the words 'on demand' are not expressive of a condition, but of the obligation to pay immediately. They express in fact a *present debt*, and therefore a present cause of action, and the Statute, therefore, runs from the date of the document. But there is nothing in English law inconsistent with the rule of the Civil law, that the time runs from the date at which the right of action arises and at which the plaintiff has the power of instituting it. See Cod. VII, Tit. XXXIX, 7, § 4, and Von Savigny, Vol. V, Ch. IV, Sec. CCXL. In the present case it is urged in behalf of the plaintiff (special respondent) that the payment of the money being a condition precedent to the right of action, the period did not commence to run at

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the date of the document, but from the date of his expressing his readinesss to re-purchase. The effect of thus construing the document would be to give plaintiff and his posterity (for they are included in its terms) the right of re-purchasing at however distant a period. That this would be an extremely inconvenient construction, is readily apparent, and I think that such a construction is not necessary. The words seem to me simply to convey to plaintiff an immediate right of re-purchase; the language as to the payment of the money meaning no more than to express that the terms on which plaintiff was to have back the land were terms of paying money, *i. e.*, terms of purchase. In this view the right of action accrued at the date of the agreement and plaintiff's claim is barred. I would reverse the Principal Sadr Amín's decree and dismiss plaintiff's suit.

KERNAN, J.—In my judgment, the dealings between the plaintiff and her brother (deceased) and the defendants' ancestor, as evidenced by the Exhibits No. 1 (defendant) and A, were not had on the footing of a mortgage, or security transaction, but amounted merely to a purchase, absolute in the first instance, and a subsequent power to re-purchase given to plaintiff and her brother.

If this view is correct the plaintiff's right is barred by limitation, her suit not having been brought within 12 years from the cause of action having accrued. Now the instrument No. 1, dated the 14th Jesta 1841, is in terms one simply of absolute purchase. Then the instrument A, dated the 4th of February 1843, in the terms mentioned by Mr. Justice Innes, merely gives a power to the grantor in I to re-purchase on payment of the sum mentioned in I, as the purchase money.

It is alleged that an instrument contemporaneous with I was executed on unstamped paper, giving the grantor a power to re-purchase in 5 years, and that A was executed as a substitution for that unstamped instrument, but leaving the time for redeneption indefinite, and, for the purpose of this judgment, I assume that was so.

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It is not disputed that none of these instruments refer in terms to any loan, mortgage, or security, nor has it been alleged in the plaint in this suit that the original transaction was for a loan, or a mortgage, or for security in the nature of a mortgage.

In *Williams* v. *Owen*, 5, Myl. & Cr., 303; the question was, as in this case, whether the transaction, which in terms was one of a sale with a power of re-purchase, should be treated as a mortgage or a purchase with a power of re-purchase not executed according to the conditions.

Lord Cottenham there says, referring to the case of *Barrell* v. *Sabine*, 1, Vern., 268; the question always is "was the original transaction a *bonâ fide* sale, with a contract for re-purchase, or was it a mortgage under the form of a sale," and adds "Trying this case by the principle so long established, and settled by such high authority, what is there to shew that the transaction was in its origin a mortgage, and not a sale with a provision, under certain conditions, for a re-purchase?" If the transaction was a mortgage there must have been a debt, but how could Owen compel payment.

That judgment applies exactly to, and governs in principle this case. It has been argued that, as the annual value of the lands is alleged, and not denied, to be 170 Rupees per annum, subject only to quit rent of Rupees 27-13-7, and as the Wurg is still in the name of plaintiff's ancestors and plaintiff is in possession, admittedly, as tenant paying rent to defendant, all these facts shew the parties must have intended a mortgage. Now first, if they did so intend, they have not said so. Next I do not see any evidence that Rupees 700 was less than the value of the purchase, though it may have been at a rather depreciated price, which may have led the defendants to give plaintiff an opportunity of re-purchase. Then the fact that a period from 1841 until 1867 was allowed to pass without any tender of the Rupees 700, or other effort to re-purchase, is strong evidence to show that the purchase money was the fair value. The facts that the Wurg is still in the name of the plaintiff's ancestor and that plaintiff is tenant to the defendants, are both consistent with a purchase, as well as with a mortgage.

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I conclude, therefore, in the words of Lord Cottenham, "There is indeed the want of every circumstance which in other cases has been thought necessary to give a purchase the character of a mortgage, and no proof of any intention having existed that it should be so considered."

Our decision is quite consistent with I, Madras H. C. Rep., 460, and cases in the note, including that in 5, Moo. P. C., 72.

Holding these views, I agree with Mr. Justice Innes that plaintiff's claim is barred, 12 years from the cause of action (1843 at latest) having elapsed before suit. But, as the question of limitation was only raised in Special Appeal, and as defendants have failed in the main facts, I would direct that both parties should bear their own costs throughout.

Appellate Jurisdiction(a)

Referred Case No. 11 *of* 1873.

A Small Causes Court is precluded, by the provisions of Section 21 of the Small Causes Courts' Act, from entertaining a review of its own judgment under Section 376 of Act VIII of 1859.

1873. *March* 10. *R. C. No.* 11 *of* 1872.

THIS was a case referred for the opinion of the High Court by V. Sundararamáyya, the District Munsiff of Sholinghur, in Suit No. 642 of 1872.

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—The District Munsif refers for the decision of the High Court the question "Whether a Small Cause Court can entertain under Section 376 of Act VIII of 1859, a review of its own judgment ?"

Section 46 makes the Civil Procedure Code applicable whenever there is nothing which has gone before Section 46 which bars the applicability. Section 21, making all orders and decisions final, save on the special grounds mentioned in it, is a bar to importing, from the Civil Procedure Code, another process perturbing the finality.

(a) present: Holloway and Kindersley, JJ.