Privy Council Appeal No. 23 *of* 1917.
Bengal Appeal No. 8 *of* 1915.

Hukumchand Boid, since deceased (now represented by Juscurn Boid and another) - - - - - - *Appellant*

v.

Pirthichand Lal Chowdhury - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 3RD DECEMBER, 1918.

Present at the Hearing:

LORD BUCKMASTER.
LORD DUNEDIN.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

On the 14th May, 1904, a patni Taluk known as Lot Mirzapur was put up for sale for arrears of rent under the Bengal Patni Taluks Regulation 1819 at the instance of the Zemindar, Mussumat Bhagwanbati Chowdurain. The defendant—respondent, Pirthichand Lal Chowdhury, as her successor in title, is the present Zemindar. The defaulting patnidar was Chhatrapat Singh. Hukumchand Boid, now represented on this appeal by his heirs the plaintiffs—appellants, was the highest bidder, and the tenure was knocked down to him.

The purchaser paid in the entire amount of the purchase money, and on the 23rd of May, 1904, he received from the officer conducting the sale a certificate of payment under section 15 of the Regulation.

On the 28th May, 1904, the purchaser received the usual amaldustak or order for possession, but on the 30th of June following, a darpatnidar, being desirous of contesting the right of the Zemindar to make the sale, sued her for its reversal. Three similar suits for the same purpose were instituted by other darpatnidars in July and August. A decree for reversal of the sale was passed in each of these suits. That in the first, suit No. 248 of 1904, was passed in the Court of First Instance on the 24th of August, 1905. An appeal to the High Court was dismissed on the 3rd of August, 1906. The decrees in the other suits, Nos. 262, 273 and 277 of 1904, were passed on the 28th of August, 1906.

By the present suit the purchaser seeks to recover from the Zemindar the sum of Rs. 57,996 : 3 : 6, the aggregate of several sums of money being (a) the amount of rent arrears due and paid by the Collector to the Zemindar out of the purchase money, (b) the expenses of the sale appropriated by the Collector out of the purchase money, (c) the patni rents paid to the Zemindar subsequent to the sale and (d) interest on these several sums and on the balance of purchase money left in the hands of the Collector.

In the Court of First Instance this suit was dismissed as barred by limitation, and this decree was affirmed by the High Court on appeal. From this decision the present appeal has been preferred.

The principal point discussed has been the plea of limitation, and in the argument as well as throughout the earlier stages of the suit it has been assumed that this question is governed by Article 97 in the second schedule to the Limitation Act. That article prescribes the period of limitation for a suit there described as one "for money paid upon an existing consideration which afterwards fails."

If regard be had to the peculiar character of a sale under the Regulation it is manifest that the facts but imperfectly fit the phrase: they perhaps more nearly approach the formala of "money had and received by the defendant for the plaintiff's use," if read as a description and apart from the technical qualifications imported in English law and procedure.

But however that may be, their Lordships feel that in view of the course the suit has consistently taken and also of the attitude on both sides here that they ought to deal with the case on the assumption, made for the purpose of this present appeal alone, but without affirming its correctness, that the present suit is competent and that it comes within the terms of Article 97.

It is from this assumed basis that they will approach the case.

The period of limitation prescribed by Article 97 is three years, and the time from which the period begins to run is the date of the failure of consideration.

The suit was instituted on the 14th September, 1908, and it is alleged in the plaint that the cause of action arose "on 3rd August, 1906, the date of the appellate decree in connection with suit No. 248 of 1904, and subsequently on 28th August, the date of decree in the three suits Nos. 262, 273, and 277 of 1904."

These are the decrees already mentioned, and the case here made, is that it was the reversal of the sale that was the cause of action.

But by the decision in the first suit, No. 248 of 1904, the sale was reversed in its entirety and for all purposes irrespective of the decrees in the three later suits, so that if the reversal of the sale is the cause of action the only question is whether time began to run as the plaint alleges from the 3rd of August, 1906, the date of the appellate decree, or, as the defendant-respondent contends, from the 24th of August, 1905, the date of the original decree in suit No. 248 of 1904. Both Courts have held that the failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal.

To escape from this position and its consequence a new starting point was suggested in the course of the argument here: it was contended that the period of limitation began to run when possession was lost.

There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run, but that is not the case here. The quality of the possession acquired by the present purchaser excludes the idea that the starting point is to be sought in a disturbance of possession or in any event other than the challenge to the sale and the negation of the purchaser's title to the entirety of what he bought involved in the decree of the 24th August, 1905. If further support of this view be required it may be found in the express provision of section 14 of the Regulation which directs that in the suit for reversal itself the purchaser is to be indemnified against all loss.

Moreover, the argument suffers from the infirmity that necessarily attaches to a belated plea advanced for the first time when the stage for investigating the necessary facts had passed. It is enough then to say that the facts disclosed afford no ground for preferring any other event than the decree of the 24th August, 1905, as marking the time from which the period of limitation ought to run.

Their Lordships in arriving at this conclusion have not overlooked the authorities cited in argument.

When the facts in *Hanuman* v. *Hanuman* (L.R. 18 I.A. 158) are examined they lend no support to this contention. It is true that there the resistance to obtaining possession was regarded as the crucial date, but that was in circumstances bearing no real resemblance to the present, and nothing was decided which would sanction the view that the time for limitation could be postponed to a period later than the first decree in suit 248 of 1904.

The decision in I.L.R. 37 Bom. 538, though cited in argument does not call for serious consideration.

But then it has been contended that at any rate the claim, so far as it relates to the patni rents paid to the Zemindar subsequent to the sale, is not barred by limitation.

These rents were paid on the 17th November, 1904, and the 17th May, 1905, and if, as is suggested, they are governed by a different article it can only be the 62nd, which would be an equal bar to the suit.

Further than this, their Lordships think it was rightly decided by the High Court that no suit for this amount would lie.

These conclusions are sufficient for the determination of this appeal, but there is another branch of the case that calls for notice, not so much for the purpose of this appeal as for its general bearing on litigation under section 14 of the Regulation.

That section authorizes a suit against the Zemindar for the reversal of a sale under the Regulation, and then provides that "the purchaser shall be made a party in such suits and upon decree passing for reversal of the sale the Court shall be careful to indemnify him against all loss at the charge of the Zemindar or person at whose suit the sale may have been made."

There is no ambiguity in this provision: it is imperative and imposes on the Court without qualification the duty it indicates.

To discharge this duty a distinct issue should be framed as between the purchaser and the person chargeable under the section whether, in case the sale is reversed, the purchaser has suffered any and what loss against which he ought to be indemnified by that person. On that issue there ought to be a finding and a decision, and then any contest on this head would be finally closed subject to such right of appeal as there might be.

Though, in the judgment pronounced in suit No. 248 of 1904, there is a finding as to Hukumchand's benami character which would be conclusive against any right to indemnity, no decision as to this right is recorded, nor has it been possible to ascertain whether any such decision is embodied in the decree, for by an unexplained and regrettable omission it forms no part of the record. In the three other decrees the claim is apparently negatived, but there is no finding recorded in the judgment that could justify this decision.

And so the Courts in that series of suits failed to apply the provision of section 14 in a manner that would be conclusive as to the purchaser's right to be indemnified. How far the remedy provided by section 14 in a purchaser's favour excludes all other remedies, apart from any determination of an issue, is a question of some nicety. There is much to be said in favour of its exclusive character on the score of policy and convenience. No actual decision, however, one way or the other has been brought to their Lordships' notice, for though the language of the Chief Justice in I.L.R. 26 C. 829 seems to favour the view that the effect of the section is not to exclude all other remedies, to the actual facts of that case the provision of the

section could have had no application. This is brought out in the more guarded judgment of Banerji, J. Obviously, too, the remark in 31 W.R. 252 cannot be regarded as in any sense conclusive. It was conceded in argument that this suit appeared to be one of first impression, but in the absence of more complete information as to the *cursus curiæ* in India their Lordships will not say more than that the question will demand careful consideration should it hereafter arise. But they again desire to emphasize the point that if the Courts observe the duty cast on them by section 14 this difficulty never can arise. And they would only add this, that their decision of this appeal on other grounds is due to the particular course this litigation had taken, and must not be regarded as indicating an opinion that the suit is competent.

The result, then, is that in their Lordships' opinion, this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

HUKUMCHAND BOID, SINCE DECEASED (NOW REPRESENTED BY JUSCURN BOID AND ANOTHER)

v.

PIRTHICHAND LAL CHOWDHURY.

DELIVERED BY SIR LAWRENCE JENKINS.

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