

(1908) 05 AHC CK 0006
In the Allahabad High Court

Chattar Singh

APPELLANT

Vs

Mul Kunwar and Others and Musammat Naugi

RESPONDENT

Date of Decision : 22-05-1908

Acts Referred:

Citation : (1908) ILR (All) 402

Hon'ble Judges : John Stanley, C.J.; Banerji, J

Bench : Division Bench

Judgement

John Stanley, C.J. and Banerji, J.—The suit which has given rise to this appeal was brought under the following circumstances: Two brothers, Dip Chand and Lajja Ram, owned certain property. Dip Chand died in 1876 leaving him surviving his sons Kanhaiya Lal and Makhan Lal and a widow Musammat Naugi. The names of these persons were entered in the revenue records in regard to his half share of the property. Lajja Ram died in 1885. His share devolved on his nephews Makhan Lal and Kanhaiya Lal. Makhan Lal died leaving a minor son, " Ghanshiam Das, and a widow, Musammat Mul Kunwar. On the 16th of September 1898 Mul Kunwar sold one-half of the property to the plaintiff. On the 10th of January 1899 Kanhaiya Lal sold the other half. The plaintiff applied for the entry of his name in respect of the entire village, but his application was rejected on the 16th of August 1899 as regards the share which was recorded in the name of Musammat Naugi, the widow of Dip Chand. The plaintiff then sued for a declaration of his right and for possession against Naugi, but that suit was dismissed on the 23rd of November 1900. On the 9th of July 1904 he brought the present suit against Musaumat Mul Kunwar and her minor son Ghanshiam Das as the principal defendants, and he claimed the following reliefs (1) that possession be awarded over the property, (2) that if possession be not awarded a proportionate part of the consideration for the sale with interest be awarded to him, and in case the first relief was granted, that he might be awarded further damages.

2. The Court of first instance granted the second prayer in the plaint, and the decree of that Court has been affirmed by the lower appellate Court.

3. The defendants have preferred this appeal, and the first contention raised on their behalf is that the claim is barred by limitation. We may observe that this plea was not set up in either of the Courts below. The contention is that the suit is one for money paid on an existing consideration which has failed, and that therefore article 97 of Schedule II of the Limitation Act applies, and, as the suit was brought after three years from the date on which the plaintiffs' suit against Musammat Naugi was dismissed, this claim is time-barred. We do not think this contention is right. The claim is upon a covenant contained in the sale deed, that covenant being to the effect that in the event of a claim being advanced by a co-sharer, or in the event of the purchaser losing any part of the property in any other way, he would be entitled to a refund of the consideration and to damages. Now this is clearly a suit on that covenant and for the breach of it, namely, the failure of the defendants to put the plaintiff into possession of the share of the property sold which was recorded in the name of Musammat Naugi. The claim therefore was clearly one governed by article 116 of schedule II, as the sale deed was a registered instrument.

4. The next contention is that under the covenant the plaintiff was not entitled to any refund, as he was aware of the title set up by Musammat Naugi at the time of his purchase. This contention, also has in our judgment no force. The parties were probably aware of the fact that a part of the property was entered in the name of Musammat Naugi, and it was apparently for that reason that the purchaser took the covenant from the vendor to which we have referred above, which is an absolute covenant.

5. For these reasons we think the Courts below were right and we dismiss the appeal with costs.

*This case was followed in F.A.F.O. No. 88 of 1908, Ram Jaggi Rai v. Kauleshar Rai, decided on the 22nd June 1908, the judgment in which is printed below :-

AIKMAN and KARAMAT HUSAIN, JJ.-The plaintiff, who is respondent here, purchased certain landed property from the defendants. The sale deed set out that the property was unincumbered. It contained a covenant that if the vendee should be dispossessed of any portion of it the vendors would repay a proportionate amount of the sale price with interest at 2 per cent. In consequence of a decree obtained by a prior incumbrancer the plaintiff was dispossessed of a portion of the property on the 8th of April 1904. On the 14th of July 1907 he filed the suit in which this appeal arises, to recover from the defendants the proportionate value of the share of the property of which he had been dispossessed together with interest. The Court of first instance dismissed the suit, holding that it fell within article 97 of schedule II of the Limitation Act, which provides a period of three years for a suit to recover money paid upon an existing consideration which afterwards fails, the time from which the period begins to run being the date of failure. The plaintiff appealed. The learned Subordinate Judge allowed the appeal and remanded the case u/s 662 of the CPC for decision on the merits. Against that order of remand the present appeal has

been preferred. The learned Subordinate Judge was of opinion that the suit fell within article 116 of the second schedule, which allows six years for a suit for compensation for the breach of a contract in writing and registered. We are clearly of opinion that the suit does fall within that article and that the view taken by the learned Subordinate Judge is right, The cases cited by the learned counsel for the appellants, namely, Ram Chandar Singh v. Tohfa Bharti (ILR 26 All. 519) and Hanuman Kamat v. Hanuman Mandur (I.L.R. 19 Cal. 123) are clearly distinguishable. In the case Tulshi Ram v. Murlidhar Chaturbhuj Marwadi (I.L.R. 26 Bom. 750) it was argued for the appellant, whose suit had been dismissed as barred by limitation, that even if Article 116 applied, the suit was time barred. The learned Judges did not touch on this plea at all. The decision of the Court below is in accordance with a recent decision of this Court (as yet unreported) in Second Appeal No. 296 of 1907 disposed of on the 22nd of May last. It was there held that a similar suit to the present "was clearly one governed by Article 116 of schedule II, as the sale deed was a registered instrument." For the above reasons we are of opinion that the appeal fails, and it is dismissed with costs.