

(1929) 03 PAT CK 0002
In the Patna High Court

Ram Rachhya Singh Thakur and Others	APPELLANT
Vs	
Raghunath Prasad Misser and Others	RESPONDENT

Date of Decision : 11-03-1929

Acts Referred:

Contract Act, 1872 — Section 73
Limitation Act, 1963 — Article 111, 115, 116

Citation : AIR 1930 Patna 46

Hon'ble Judges : Fazl Ali, J; Das, J

Bench : Full Bench

Judgement

Fazl Ali, J.—In this suit the plaintiffs claimed to recover a certain sum of money from defendant 1 under the following circumstances: The plaintiff Ram Rachhaya and one Sheonandan are brothers and the other plaintiffs are relations and cosharers of plaintiff 1 and Sheonandan. They owed money to various persons and amongst others to one Palakdhari.

2. On 16th December they sold certain properties to defendant 1 Raghunath Prasad Missir and kept a certain sum of money with him to pay off the creditors. This sum included a sum of Rs. 245 9-0, which was to have been paid to Palakdhari being due to him on the basis of a mortgage bond, dated 8th July 1905. It appears that defendant 1 paid off all the creditors except Palakdhari. In 1916 Palakdhari brought a suit to enforce his mortgage against Sheonandan and his sons. On 24th November 1916, he obtained a decree and the decretal money was paid off by Sheonandan partly on 21st February 1918, and partly on 15th March 1928. In 1921 Sheonandan brought a suit against defendant 1 to recover from him the amount which had been paid by him (Sheonandan) in satisfaction of the decree obtained by Palakdhari.

3. The plaintiffs then appeared and stated that they were entitled to half the amount claimed by Sheonandan and prayed that they might be made co-plaintiffs in that suit. Defendant 1 filed a written statement in which he appears to have stated among other things that Sheonandan was entitled to half the

amount only, the plaintiffs being entitled to the remaining half. Subsequently the suit was dismissed for the default of Sheonandan and although the plaintiffs in the present suit wanted to proceed as co-plaintiffs for their share of the amount claimed in that suit, the Court observed that the cause of action alleged by them was not the same as that alleged by Sheonandan and accordingly dismissed the entire suit for the default of Sheonandan. On 16th February 1924, the present suit was brought by Ram Raohhaya one of the plaintiffs, and the remaining plaintiffs, who were originally impleaded as defendants second party, subsequently became co-plaintiffs on payment of the necessary court-fee. The suit was resisted by defendant 1 Raghunath on various grounds, the chief grounds being that the plaintiffs had no cause of action and the suit was barred by limitation.

4. It may be mentioned here that the suit was originally decreed by the Munsif in favour of the plaintiffs and then on appeal it was remanded by the learned District Judge for a determination of the question as to whether the plaintiff-respondent had a right to sue, the point raised being that the decretal money due to Palakdhari having been paid off admittedly by Sheonandan and not by the plaintiffs they had not suffered any loss and that they were not entitled to bring the suit. The Munsif held that the plaintiffs had the right to sue and passed a modified decree. Defendant 1 appealed once more to the District Judge who allowed his appeal holding (1) that the defendant had no cause of action in so far as the payment by Sheonandan went and although they were entitled to sue for a breach of contract, they were entitled to no relief as they had suffered no damage and (2) that the suit was barred by limitation.

5. The learned District Judge pointed out that on the plaintiffs' own case the parties had separated in 1917, and consequently any loss that was suffered by the payment of the mortgage money to Palakdhari was prima facie suffered by Sheonandan alone. It may be mentioned here that the plaintiffs' case was that owing to a private arrangement between them and Sheonandan, they had undertaken to pay the entire decretal amount due to one Indardeo Narain, while Sheonandan had undertaken to pay off Palakdhari's dues.

6. Now, the learned District Judge concedes that there was evidence to show that the plaintiffs alone had paid off the dues of Indardeo Narain, but in his opinion the plaintiffs had totally failed to prove either that there was any such arrangement as they alleged between themselves and Sheonandan or that the payment to Indardeo Narain had been made by virtue of such an arrangement. The learned District Judge thus held that the plaintiffs having failed to prove that they had sustained any loss on account of the failure of defendant 1 to pay the dues of Palakdhari, they were entitled to no relief in the present suit. As to limitation the learned Judge dealt with that question as follows:

It appears to me also that the suit is barred by limitation. It is provided in the sale-deed that if the debts to the creditors are not paid off on the date of the execution of the sale-deed the purchaser will have to suffer any damage there

from. Six years" limitation runs under Article 116 from the date when the contract is broken, that is, from the date of the kabala which is 16th December 1909. The suit, therefore, is beyond time. There has been some discussion regarding the interpretation of this time clause in the kabala, but the above appears to me to be the correct interpretation. The learned pleaders for the appellant also argued that apart from the terms of the kabala, it has been proved by evidence that the defendant refused to pay Palakdhari within one week of the kabala, when requested to do so by the plaintiffs and this also constitutes a breach of the contract. The evidence does not support this, since it is not stated distinctly that there was any refusal to pay on his part.

7. It may be mentioned that what the sale-deed actually provides is that the purchaser was to pay to Palakdhari a sum of Rs. 249-9-0 which was the amount of debt due to him by calculation on the date of the execution of the sale-deed. There is, however, also a clause which provides that the vendee might pay the duos later, but in that case he alone would, be responsible for the payment of whatever interest might accrue due to the creditor from the date of the sale-deed and the vendor was to have no concern therewith.

8. I shall first deal with the question as to whether the plaintiffs had the right to maintain the present suit. It is admitted that the plaintiffs had conveyed certain property to defendant 1, and defendant 1 had contracted to pay a certain price for the property. It is also admitted that defendant 1 did not pay the entire amount which was fixed as the price of the property in cash to the plaintiffs but kept in his hands a portion of this amount undertaking to pay it to Palakdhari, one of the creditors of the plaintiff. It is also not disputed that defendant 1 did not pay the amount to Palakdhari. In these circumstances the question is whether the plaintiffs are entitled to sue for and recover the amount which would have been paid to them but for the covenant entered into but not carried out by defendant 1 that the amount would be paid to Palakdhari instead of to the plaintiffs. In my opinion the plaintiffs are entitled to sue for as well as to recover the amount and if any authority is needed to support the view taken by me in this matter it will be found in the case of *RaghunaChariar v. Sadagopa Chariar* [1911] 36 Mad. 348.

9. In that case A transferred his property to B in consideration of B agreeing to pay certain sums to third persons. The amounts due to two of these persons were in fact paid by A's brother and not by A himself. It was alleged by A that he had made good the amount to his brother by some adjustment with him. On this allegation he brought a suit to recover the amount which Shad failed to pay to those two persons. Both the lower Courts disbelieved the adjustment and dismissed the suit holding that the plaintiff had no cause of action to recover the amount as he had not sustained any damage by the defendant's breach of his contract. It was, however, held that in such a case A was entitled to sue and recover the amount which the defendant had agreed to pay to third parties and that he was not bound to show that he was in any way damnified by the failure

to B to pay the sums left with him to be paid to the two creditors. The learned Judges who decided the case observed as follows:

It is next contended that as the debts due to the plaintiff's creditors have been actually paid by the plaintiff's brother and as there is nothing to show that the brother could or would proceed against him, the plaintiff ought not to be given a decree. It is not clear to us that the plaintiff's brother would not be entitled to proceed against him. Assuming, however, that he could not, that does not, affect the plaintiff's right in the view we have expressed above.

10. Again one of the questions raised in the case of *Raghubar Rai v. Jaij Raj* [1912] 34 All. 429 was that an action for a breach of contract could not be maintained until the plaintiff had suffered actual loss and the learned Judges disposed of the argument as follows:

The contention of the learned Counsel for the appellants is that so far only a decree has been obtained against the plaintiffs; that they have paid no money under it, and that as they have suffered no actual loss, their suit is premature.

The reply of the learned vakil for the respondents is that that the breach of a covenant is sufficient to create a cause of action and that an actual loss is unnecessary. He refers us to the following cases; *Lethbridge v. Mytton* [1831] 2 B and Ad. 772; *Carr v. Roberts* [1833] 5 B and Ad. 78 *Loosemore v. Radford* [1842] M. & W. 657 *Ashdown v. Ingamells* [1880] 5 Ex. D. 680 *Dorasinga Tevar v. Arunachalam Chetti* [1889] 23 Mad. 441 and *Raghunath Rai v. Brijmohan Singh* [1901] A.W.N. 14. The cases cited by the learned vakil for the respondents fully support the proposition that the breach of a covenant without any actual loss gives a sufficient cause of action.

11. Thus I hold that the plaintiff had a cause of action and it will not be correct to say that he is entitled to no relief.

12. The next question which arises in this appeal is as to whether the suit is barred by limitation. There can be no doubt that the suit is barred if it is held that the case is governed by Article 111, Lim. Act, which provides that suits by a vendor of immovable property for personal payment of unpaid purchase money should be brought within three years from the time fixed for completing the sale or (where the title is accepted after the time fixed for completion) the date of the acceptance. There are, however, numerous authorities to support the view that the suit is really governed by Article 116, Lim. Act. This article provides that a suit for compensation for the breach of contract in writing registered should be brought within six years from the time when the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases. Now it was laid down as early as in the year 1881 by a Full Bench of the Allahabad High Court in *Husain Ali Khan v. Hafiz Ali Khan* [1881] 3 All. 600 that this article was applicable to a suit for the recovery of a specified sum of money due on a registered bond and not necessarily confined to a suit for unliquidated damages.

I may here quote the following passage from the judgment of Straight, J., one of the Judges who decided that case:

The introduction of the word "compensation" has perhaps not unnaturally given rise to some difficulty, but I cannot so interpret it as to hold that the longer period of limitation, of which registered instruments had the advantage before Act 15 of 1877 became law, was thereby summarily abridged. Nor upon consideration does it appear to me that the expression "compensation" is wholly inapplicable or inappropriate to suits in respect of bonds and promissory notes, as might at first sight seem to be the case. Every bond and promissory note is a contract, by which the obligor or promissory agrees to pay money, either upon a particular date, or upon demand and such contract can be performed either upon the specified date or when the demand is made. If payment is refused, or is not forthcoming then there is a breach, and the suit against the defaulting obligor or promisor is not to make him do something in furtherance of the contract for the time for its performance is passed, but is in reality one for damages for the breach of it, the measure of which will be the amount of the debt with interest.

13. There have since been a number of decisions in which the view taken in the Pull Bench case referred to above has been supported, and recently in *Tricomdas Gooverji Bhoja v. Gopi Nath Jiu Thakur* AIR 1916 P.C. 182 which was a suit to recover mining royalties on the basis of a registered kabuliyat, it was held by the Judicial Committee that although that was a suit for rent, it was governed by Article 116 and Lord Sumner in delivering the judgment in that case observed as follows:

On the one hand it has been contended that the provision as to rent is plain and unambiguous, and ought to be applied, and that in any case "compensation for the breach of a contract" points rather to a claim for payment of a sum certain. On the other it has been pointed out that "compensation" is used in the Indian Contract Act in a very wide sense, and that the omission from Article 116. of the words, which occur in Article 115, "and not herein specially provided for" is critical

Where the terms of a statute or ordinance are clear their Lordships have decided that even a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the meaning of the enactment. Such is not the case here. However arguable the construction of Act 15 of 1877 may have been when the matter was one of first impression, it certainly cannot be said that the construction for which the appellants argue, was ever clearly right. On the contrary, their Lordships accept the interpretation so often and so long put upon the statute by the Court in India, and think that the decisions cannot now be disturbed.

14. This decision was referred to by Sir Ashutosh Mookerjee, J., in *Mohamad Mazahral Ahad v. Mahamad Azimuddin* AIR 1923 Cal. 507 and it was pointed out that the decision of the Judicial Committee though concerned directly with the

applicability of Article 110 and Article 116 to a suit for arrears of rent instituted upon a registered lease must be regarded as of far reaching application. In that case that learned Judge also tried to show that the term "compensation" as used in Article 116 was wider in significance than the term "damages." The following observation which I quote from the judgment in that case will bring out the distinction which was sought to be drawn in that case between these two terms:

In answer to the contention that claims of this character sound in debt and not in damages, it may be pointed out, however, that the term used in Article 115 and Article 116 is not damages but compensation, which also occurs in Section 73, Contract Act. As Lord Esher observed in *Dixon v. Calcraft* [1892] 1 Q.B. 458 the expression compensation is not ordinarily used as an equivalent to damages, although as remarked by Fry, L.J. in *Skinner's Co. v. Knight* [1891] 2 Q.B. 542 compensation may often have to be measured by the same rule as damages in an action for the breach. The term compensation, as pointed out in the Oxford Dictionary, signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. The term compensation etymologically suggests the imago of balancing one thing against another; its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent.... The term compensation as used in Articles 115 and 110 is thus, perhaps not sufficiently precise, while the technical distinction between debt and damages may be too refined for the purpose.

15. It has now been definitely held that Article 116 applies not only to a suit for a specified sum of money due on a registered bond but also to a suit like the present where the vendee having agreed to apply a portion of the purchase money to the payment of a [previous debt due by the vendor, fails to apply it in that way and a suit is brought to recover that amount from him: see *Raghubar Rai v. Jaij Raj* [1911] 36 Mad. 348. *Daswant Singh v. Shah Ram Jan Ali* [1907] 6 C.L.J. 398; *Babu Ishri Pershad Vs. Syed Muhammad Sami* and after his death *Elvina Sami and Others*, .

16. It is thus clear that the present suit will not be barred if it is shown that it was brought within six years from the breach of the contract sued upon.

17. The question, however, which presents some difficulty is as to what will be the starting point of the period of limitation in this case and when the contract with which we have to deal was actually broken by defendant 1.

18. It is argued on the authority of *Raghubar Rai v. Jaij Raj* [1912] 34 All. 429, that the period of limitation will be taken to run from the date of the execution of the sale deed which was 16th December 1909 and, therefore, the suit is barred by limitation. In that case also the vendees had covenanted that the vendors should pay a certain sum of money on account of a mortgage debt due by the

vendors. They did not pay in accordance with the covenant and the mortgagee thereupon brought a suit upon his mortgage and obtained a decree. The vendors then sued the vendee for compensation for breach of the covenant. It was held in these circumstances (1) that it was not necessary that the vendors should have suffered any loss before they could bring their suit and (2) that as no time was specified in the sale-deed for the payment of the mortgage money, time began to run from the date of the execution of the deed. It appears that one of the arguments advanced in that case before the learned Judges was that the period of limitation would run not from the date of the execution of the sale deed but from the date on which the plaintiffs had suffered actual damage as a result of the breach of the contract and the learned Judges dealt with the matter as follows:

One breach of a contract can only furnish one cause of action and no more. Actual loss when it occurs is only one of the results of the breach and is not an act of the party who breaks a contract and can, therefore, create no second cause of action. It is a pity that the case of *Battley v. Faulkner* [1820] 3 B. & Ald. 288, was not brought to the notice of the learned Judges. That case is a clear authority for the proposition that consequential damage arising from the breach gives no new cause of action. The claim in that case was for compensation for a breach of contract brought within six years from the date on which damages occurred, but beyond six years from the breach. The suit was held to be barred by time. Bayley, J., said: "If the plaintiff in this case had released the defendant from the breaches of contract, that release would have been a bar to the present action for the special damages subsequently occurring, and this shows that the foundation of the action is the breach of contract. It was, therefore, from the period when the contract was broken that the cause of action accrued, and as that happened more than six years before the commencement of the present action, I think the non-suit was right." Holroyd, J., said: "It is said, however, that although the notion might be maintained upon the breach of promise, yet the damage sustained forms a substantive ground of action, but cannot be so considered in this form of action."

19. It is, however, to be noted that in the case to which I have just now referred the decision was based on the clear finding that no time had been specified in the sale-deed for the payment of the mortgage money and it was, therefore, assumed that the vendee had contracted to pay the money on the date of the execution of the sale-deed. In a subsequent case decided by a Division Bench of the Allahabad High Court *Babu Ishri Pershad Vs. Syed Muhammad Sami and after his death Elvina Sami and Others*, the facts were in certain respects more similar to the facts of the present case. In that case two persons had executed a usufructuary mortgage of a certain proprietary share in lieu of a sum of Rs. 1,000 and out of that sum they had left Rs. 530 in the hands of the mortgagee for payment to a prior mortgagee. In the mortgage deed it had been clearly set down that the money was to remain with the mortgagee and that the liability to pay any interest which might accrue on this sum in the future was to be entirely

upon his shoulders and that he would have to pay it when he paid Rs. 530. Thus it was quite clear from the deed that the money was left with the mortgagee to pay whenever he pleased so long as he did pay it, he being solely responsible for any interest which might accrue. He failed to pay the amount with the result that the prior mortgagee brought a suit and obtained a decree and ultimately the original mortgagors, in order to save the property, paid the amount due and then brought a suit to recover compensation from the mortgagee. On these facts it was held that the period of limitation began to run not from the date of the execution of the sale-deed but from the time when the mortgagor had to pay the decretal money to satisfy the decree. The reason as to why in such a case the period of limitation does not run from the date of the execution of the deed has been very clearly set forth in *Daswant Singh v. Shah Ramjan Ali* [1907] 6 C.L.J. 398. In that case the facts were as follows: On 12th July 1897 the plaintiff had executed in favour of defendant 1 a conveyance of various properties for a sum of Rs. 7,000 out of which a little over Rs. 6,000 was retained by the purchaser for payment to certain specified creditors of the vendor. One of these creditors was a mortgagee of certain properties. The conveyance contained a covenant under which the purchaser was to be responsible for the payment of whatever interest might accrue due to the creditors from that date and the vendor was to have no concern therewith. The purchaser, however, did not make the payment and the mortgagee who was not paid off sued to enforce his security against the plaintiff and obtained a decree. The plaintiff thereupon satisfied the decree by executing a mortgage bond in favour of the decree-holder and then commenced an action for damages against the vendee for breach of contract. It was conceded in that case that Article 116, Lim. Act, was applicable to the case but it was contended that the suit was barred by limitation because the contract had been broken on the date of the conveyance as the creditor ought to have been paid on that date. *Mookerjee, J.*, however, dealt with this contention as follows:

In our opinion, this argument is fallacious. There was an express covenant that the purchaser would satisfy the debt due to the creditor, but there was no time specified for the performance of the contract; on the other hand, the clause by which, the purchaser undertook to pay the interest which might accrue due to the creditor between the date of the conveyance and the date of the actual-payment, indicates that the contract might be performed at any time when the performance was possible. In other words, the contract might be performed at any time before performance became impossible on account of the satisfaction of the debt by payment or novation. A contract may be broken quite as much by repudiation of liability under it, as by making it impossible to fulfil the terms of the contract. In the case before us, there was a breach by renunciation on 12th November 1833, when the defendant refused to perform the contract; the refusal was absolute, distinct, and unequivocal. There was, further, a breach by impossibility on 18th December 1898, when the mortgage debt which the defendant had undertaken to satisfy and which had passed from the domain of contract into the domain of judgment, was extinguished by the consideration of

the now mortgage bond. Whether, therefore, we assume that the contract was broken by refusal on 12th November 1898, or by reason of impossibility on 18th December 1898, the suit is amply in time.

20. I have already said that in the present case the deed of conveyance did not provide any specified time for making payment to Palakdhari. On the other hand there was a clause by which in the event of the payment being made at a later date the purchaser was responsible for the payment of whatever interest might accrue; due to the creditor from the date of the execution of the Sale-deed, and it was clearly stipulated that the vendor was to have no concern therewith. Thus it is impossible to hold that the contract was broken by defendant 1 on the date of the execution of the sale-deed simply because he failed to pay the debt due to Palakdhari on that date.

21. The question then arises as to when the contract was actually broken. Obviously it must be deemed to have been broken (1) when the liability under it was expressly repudiated by defendant 1; (2) when the performance of the contract became impossible on account of the debt due to Palakdhari having been satisfied or paid off. In this case as the Munsif pointed out in his original judgment the debts due to Palakdhari were partly satisfied on 21st February 1918, and were wholly satisfied on 15th March 1918, and the suit of the plaintiff being within six years of both these dates was therefore clearly within time. It may also be pointed out that there is nothing to show that defendant 1 repudiated his liability to pay off Palakdhari's dues before any of these dates. It may be said that he repudiated his liability in a way when he resisted the suit brought by Sheonandan to recover the decretal amount due to Palakdhari which he had to pay off to him in order to save his property. That suit, however, was brought by Sheonandan in the year 1921 and even on that view the plaintiffs' suit is within time. The plaintiff also alleges in his plaint that it was only on 30th Pous 1331 that defendant 1 flatly refused to pay the debts due to Palakdhari. This statement, however, is left out of account by me because there is no finding of any of the Courts on that point. I therefore do not agree with the lower appellate Court that the present suit is barred by limitation and in my view the plaintiffs must succeed.

22. The next question is as to the amount of compensation which should be awarded to the plaintiffs in this case. Ordinarily in those cases where some damage is proved to have been sustained as a result of the breach of contract, one will have to proceed upon certain principles which have been clearly laid down by Mookerjee, J., in *Daswant Singh v. Syed Shah Ramjan Ali* [1907] 6 C.L.J. 398, in the following passage:

The principle upon which damages are to be assessed is, as Baron Parks observed in *Robinson v. Harman* [1848] 1 Ex. 830, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed. This necessarily leads to the two rules stated in *Hadley v.*

Baxendale [1854] 9 Ex. 341, namely, first, that where two parties have made a contract which one of them has broken, the damages which, the other ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered, as arising naturally, that is, according to the usual course of things from such breach of contract itself, and secondly, that the damages may be such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it. The damages, however, cannot include compensation for any remote and indirect loss or damage sustained by reason of the breach.

23. In this case there is no proof that the plaintiffs sustained any damages as a result of the breach of the contract beyond this that they have been deprived of a specified sum of money which they would have received but for the express-covenant that defendant 1 would pay this sum to Palakdhari. Such a case will in my opinion be governed by the following rule laid down by Straight, J. in Hussain Ali Khan v. Hafiz Ali Khan [1881] 3 All. 600 .

If payment is refused, or is not forthcoming, then there is a breach, and the suit against the defaulting obligor or promisor is, not to make him do something in furtherance of the contract, for the time of its performance is passed, but is in reality one for damages for the breach of it, the measure of which will be the amount of the debt with interest.

24. In Raghunath Chariar [1911] 36 Mad. 348 also to which a reference has already been made it was held that the defendant was entitled to recover the amount which the defendant had agreed to pay to third parties.

25. Thus the plaintiffs are in this case entitled to recover with reasonable interest from defendant 1 half of Rs. 245-9-0: which was the amount in deposit with; defendant 1 for the purpose of being paid to Palakdhari. In my opinion the reasonable interest in this case will be at the rate of six per cent per annum as allowed by the Court of first instance, but this interest will run from 15th March 1918, the date when the performance of the contract became impossible to the date of the suit. The plaintiffs will also be entitled to future interest at the same rate.

26. I would therefore set aside the judgment and decree of the lower appellate Court and decree the suit of the plaintiffs in those terms and allow proportionate costs to the plaintiffs on the amount decreed in all the Courts.

Das, J.

I agree.