APPELLATE CIVIL.

Before Mr. Justice Chandavarkar, on reference from Mr. Justice Candy and Mr. Justice Whitworth.

ARDESIR (ORIGINAL PLAINTIFF), APPELLANT, *v.* VAJESING (ORIGINAL DEFENDANT No. 1), RESPONDENT.* 1901. *February* 19.

Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 62 and 97—Contract—Failure of consideration—Vendor and purchaser—No title in vendor to part of land sold—Failure to give possession to vendee—Suit by vendee for refund of purchase-money—Compensation—Damages.

On the 25th August, 1891, A sold certain property consisting of forty-two separate plots of land to the plaintiff by a sale deed which contained the usual covenant for quiet enjoyment. The plaintiff obtained possession of thirty-six of the plots, but not of the remaining six. The occupants of the latter had been in possession for many years and claimed to be owners of them. On 6th September, 1897, the plaintiff brought this suit for possession against A (his vendor) and the occupant of one of the six plots, and in the alternative he claimed compensation from A. Both the lower Courts found that A's title to the plot in question had been extinguished at the date of the conveyance to the plaintiff in 1891, and they held that the plaintiff's claim for compensation was barred by limitation under Article 62 of Schedule II of the Limitation Act (XV of 1877). On second appeal it was contended that the plaintiff's right to compensation arose only when the lower Court decided that he could not obtain possession of the land and that consequently his claim fell within Article 97 of the Limitation Act, and was not barred.

Held, (Whitworth, J., dissenting) that Article 62 applied and that the plaintiff's claim for compensation was therefore barred. As A (the plaintiff's vendor) had no title to the land at the date of conveyance, the contract of sale was void *ab initio*: there was then a failure of consideration and the plaintiff's cause of action for compensation arose on that date.

SECOND appeal from the decision of Ráo Bahádur Lalshankar Umiashankar, Additional First Class Subordinate Judge, A. P., of Ahmedabad, confirming the decision of Ráo Sáheb C. H. Vakil, Second Class Subordinate Judge at Dholka.

In 1861, one Vajesing Prathiraj (defendant No. 1) purchased a share (*wanta*) in a tálukdári village consisting of forty-two plots of land.

On the 25th of August, 1891, he sold the whole of his share lands to the plaintiff, Ardesir Kavasji, for Rs. 5,000, by a sale-

* Second Appeal No. 312 of 1900.

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deed which contained a covenant for quiet enjoyment in the following terms:

Should any one put forward a right or claim or cause obstruction or hindrance or make quarrel or disturbance in connection with this "wanta" land, I and my heirs and representatives are to answer for the same.

Plaintiff got possession of thirty-six out of the forty-two plots sold to him, but he was unable to get possession of the remaining six, the occupants of these plots claiming them as their own property.

On the 6th September, 1897, the plaintiff filed this suit to recover possession of one of the six plots of land. The first defendant was the plaintiff's vendor, Vajesing Prathiraj, and the second defendant was the occupant of the land. The plaintiff alleged that his vendor (Vajesing) ought to have put him into possession, but had not done so; that in January, 1896, possession was demanded from both the defendants but without effect. He dated his cause of action in respect of his claim for possession on 25th August, 1891, the date of the conveyance to him, and he claimed possession and the rent for the three years 1894, 1895, 1896. He further prayed that if the Court should not award him possession, it should award him as damages against the first defendant, his vendor, the sum of Rs. 200, being the market value of the land together with the three years' rent.

The Court of first instance found that the first defendant Vajesing had never obtained possession of the land; that the second defendant had been in adverse possession of it from the date of the first defendant's purchase in 1881 and even prior to that date, and had remained so up to the date of this suit, and that the plaintiff's claim to possession was therefore now barred by limitation. It further held that the plaintiff's claim against the first defendant for compensation was also barred under article 62 of the Limitation Act (XV of 1877).

The decision was upheld in appeal by the Additional First Class Subordinate Judge, A. P.

The plaintiff filed a second appeal in the High Court. The only point argued in appeal was as to whether his claim for compensation against the first defendant was barred. The second defendant was not made a party to the appeal.

The case was heard by a Division Bench (Candy and Whitworth, JJ.).

Ganpat Sadashiv Rao for appellant (plaintiff) :—The plaintiff's claim to compensation against his vendor (defendant 1) is not barred. Time did not begin to run against him in respect of this claim against his vendor until the date of the lower Court's decision that he could not recover the land itself by reason of the adverse possession of the second defendant. He is entitled to recover the money which he paid to his vendor, the consideration for such payment having failed. But it did not fail until the lower Courts held that his vendor (defendant 1) had lost his title, and could not give possession of the land. The plaintiff's right of action accrued then—Article 97 of the Limitation Act. It did not accrue at the date of the plaintiff's purchase in 1891, for at that time his vendor had still a title. It had not then become extinguished by the adverse possession of the second defendant or twelve years. The case is governed by *Hanuman Kamat* v. *Hanuman Mandur*[1] and *Venkatanarasimhulu* v. *Peramma*.[2] Further, the indemnity clause in the sale-deed distinctly provides that the vendor will be responsible personally if any obstruction to possession be offered by a third person. The plaintiff is entitled under this clause to claim compensation when he is obstructed in taking possession. This indemnity clause is in the nature of a covenant for quiet enjoyment, and the cause of action accrues when the covenant is broken—Dart's Vendors and Purchasers (6th Ed.), page 880; Sugden on Vendors and Purchasers (14th Ed.), page 610; *Raju Balu* v. *Krishnarao*.[3]

M. N. Mehta for respondent (defendant 1) :—The plaintiff's claim for compensation is barred. Article 62 of the Limitation Act applies and not article 97. The Courts have found that at the date of the plaintiff's purchase in 1891 from the first defendant, the title of the latter had already been lost by the adverse possession of defendant 2. There was therefore a failure of consideration at the date of the conveyance to the plaintiff and he should have sued the first defendant within three years from that date—*Hanuman Kamut* v. *Hanuman Mandur*.[4] The case of *Venkatanarasimhulu* v. *Peramma*[5] is distinguishable. In that

(1) (1891) 19 Cal. 123.
(2) (1894) 18 Mad. 173.
(3) (1877) 2 Bom. 273.
(4) (1887) 15 Cal. 51.
(5) (1894) 18 Mad. 173.

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case the purchaser had got possession under his conveyance and afterwards lost it, and it was held that the cause of action arose when the possession was lost. Here neither the plaintiff nor his vendor, however, had possession.

The indemnity clause relied upon by plaintiff refers to disturbance of possession after it had been obtained and not to resistance offered at the very outset to the taking of possession. That clause therefore does not help the plaintiff in the present case. The English cases draw a distinction between a covenant for title and a covenant for quiet enjoyment. In the one case limitation runs from the date of conveyance. In the other from the date of the breach thereof. The present case falls within the former category, and therefore plaintiff is not entitled to claim any relief—Dart on Vendors and Purchasers (6th Ed.), page 881.

CANDY, J.:—In my opinion the claim to compensation, which is the only claim before us, is clearly barred, so it is unnecessary to consider such questions as misjoinder &c. The first defendant in 1831 purchased a "wanta" consisting of numerous fields. Of these it is found as a fact by the lower appellate Court that the first defendant never obtained possession of the field now in dispute in the present suit. It was held adversely by the second defendant. Nevertheless, ten years afterwards in (1891) defendant sold this same "wanta" to the plaintiff, and by the conveyance he purported to convey and give possession of the whole "wanta," including the field now in dispute, which it is found as a fact he never had in his own possession.

There is in the conveyance the usual covenant for quiet enjoyment (should any one put forward a claim, or cause obstruction &c. I am to answer for the same), but this from the very nature of the case cannot be regarded as a covenant, that if the vendor fails to put the purchaser in possession of any part of the property, then the vendor will be liable for damages; for by the terms of the conveyance possession had been transferred to the purchaser. As remarked above the clause is the usual covenant for quiet enjoyment, *i.e.* that if any one assails the purchaser's possession (*viz.* the possession which had already been given) the vendor will be answerable.

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On 6th September, 1897, the present suit was filed by the purchaser against the first defendant his vendor, and against the second defendant the person who had been and is still in possession of the field in question, to obtain possession of the said field, asserting that his vendor ought to have put him in possession, but had not done so; that both the defendants were asked in January, 1896, to deliver possession, but they failed to do so, whereby plaintiff loses the rent (*santh*) of the land. Dating his cause of action in respect of possession as 25th August, 1891 (the date of the conveyance to plaintiff), he claimed possession and three years' rent (1894-95-96); and should the Court be unable to award possession, he asked the Court to decree him from the first defendant the sum of Rs. 200, the market value of the said land, as damages, together with the three years' rent. It is evident that the sum claimed as damages or compensation was a proportionate share of the purchase-money of the whole "wanta". As plaintiff said in his appeal to the District Court, he was entitled to recover from the first defendant the amount of the sale, which must mean the proportionate share of the purchase-money. There is not in the plaint any mention of the clause in the purchase deed covenanting for quiet enjoyment, and there is no reason for supposing that that clause was the foundation of the suit.

The question is, what is the period of limitation for such a suit? The answer is, in my opinion, to be found in the judgment of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur*.[1] In that case Doalat Mandur, who was joint with his sons, sold to plaintiff an undivided share of the joint property. There is no suggestion in the report of the case (see also 15 Cal. 51) that the conveyance purported to recite that possession was actually given to plaintiff. From the nature of the subject-matter that was impossible. When the plaintiff tried to obtain possession he was resisted by the sons, who under the law as administered in Bengal refused their consent to their father's alienation. In a suit brought by the plaintiff-purchaser to recover back his purchase-money, the question arose as to what was the article of the Limitation Act

(1) (1891) 19 Cal. 123.

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applicable. Their Lordships held that if there never was any consideration, then the price paid by the purchaser was money had and received to his account by the vendor (article 62). But if the sale was only voidable on objection taken to it by the other members of the joint family, then the consideration did not fail at once at the date of the purchase deed, but only from the time when the plaintiff endeavoured to obtain possession of the property, and being opposed found himself unable to obtain possession (article 97).

Applying these principles to the present suit, the case seems clear. *Quoad* the field in question, the failure of consideration was a failure from the beginning. Plaintiff purported to sell and give possession of a field which had never been his property or in his possession. The contract was from the first void. Under this view article 62 of the Limitation Act applies and the suit for the return of the purchase-money was barred. This view is borne out by the decision of the Madras High Court in *Venkatanarasimhulu* v. *Peramma*.[3] In that case the vendor executed a sale-deed of certain land, received the agreed consideration and placed the purchaser in possession. Thus the contract was completed, and it was impossible to say that it was void *ab initio*. Here it never was completed as regards the field now in dispute.

I would confirm the decree of the District Court with costs. As my learned colleague differs, the case must be referred to a third Judge.

WHITWORTH, J.:—Both the lower Courts have held that the plaintiff's claim for compensation against the first defendant is time-barred; and in so holding they have purported to follow the ruling of the Privy Council in *Hanuman* v. *Hanuman*.[2] But that ruling does not seem to me to support the conclusion arrived at in this case. On the contrary, I would take it, as the Madras High Court has taken it in *Venkatanarasimhulu* v. *Peramma*,[1] as leading to the opposite conclusion.

The view taken in this case is that as the first defendant had no title to the land in suit when he purported to sell it to the

(1) (1894) 18 Mad. 173.

plaintiff in 1891, the sale was void *ab initio*, and therefore the plaintiff's suit should have been brought, according to article 62 of the Limitation Act, within three years from the date in 1891. But in *Venkatanarasimhulu* v. *Peramma* also the defendant "had no title to convey" to the plaintiff, and yet, following the same decision of the Privy Council, it was held that the suit brought in 1892 on the purchase deed of 1885 was in time—article 97 and not article 62 of the Limitation Act being held applicable. It is true that in the Madras case possession of the property sold had been given, and in this case it had not; but I do not think that that fact alone, important as it is, is sufficient to determine the question of limitation. The loss of possession once given may carry the starting point of limitation forward to the date of the loss, but a reasonable expectation of obtaining possession may, I think, equally carry it forward to the date when that expectation is defeated.

Now in the present case the property in question is a small part of a *wanta* estate which the first defendant purported to sell to plaintiff in 1891. The value claimed is only Rs. 200 out of a total price of Rs. 5,000. The vendor had himself purchased the estate in 1881. He had himself obtained, and he made over to the plaintiff, possession of the greater number of the fields; but some few fields remained in respect of which this and other suits have been brought. At the time of the plaintiff's purchase a suit by his vendor to recover the remaining fields was still permissible, and it seems to me impossible to conclude that the existence of these fields and of the first defendant's title to them, however weak that title might be, was no part of the consideration of the plaintiff's purchase-money. There is no ground for suspecting fraud in the matter, and I cannot suppose that the deed was made to include the whole *wanta* instead of only the thirty-six fields of which possession could be given merely through idleness or perversity. And if there was a genuine contract extending to all the forty-two fields, then I would hold that the consideration in respect of the six of which possession was not given did not fail until the plaintiff found as a fact that he could not obtain possession of them.

It has been determined in this suit that the particular field in

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question has been long in the adverse possession of the second defendant: and as he has not been made a party to this appeal, that finding is final. But this condition was not known, and the second defendant's title may not even have matured at the time of the contract between the first defendant and the plaintiff. According to the terms of the contract possession of the whole property was actually given to the plaintiff. But such a clause is usual when the intention is to make a complete transfer from vendor to vendee, and has, I think, no more significance than a public officer's receipt, passed every month, for salary which he has *not* received. I should attach more importance to the claus e "Should any one put forward a right or claim or cause obstruction or hindrance or make a quarrel or disturbance in connection with this *wanta* land, I and my heirs and representatives are to answer for the same." For this, though also of a usual character, has a binding force for the future, while the other purports only to recite something that has taken place. But ev en without relying upon this clause I think the plaintiff acquired a right to sue for compensation when he found it was impossible to obtain possession of a part of the property sold. However small the hope of obtaining possession of this particular field may have been, it must according to its measure have affected the amount of the purchase-money.

There are other points arising in this appeal and I have written a judgment in respect of them: but as they will require determination only if the suit be held to be in time, and as my learned colleague takes a different view on the question of limitation, I withhold that judgment now.

Owing to the above difference of opinion, this case was referred to Mr. Justice Chandavarkar under section 575 of the Civil Procedure Code (XIV of 1882), who delivered the following judgment on 19th February, 1901.

CHANDAVARKAR, J.:—Assuming the finding of the lower Courts to be that the first defendant had no title when he sold the fields in dispute to the plaintiff, I think that the purchase-money paid by the latter became from that date in the hands of the former money had and received for the plaintiff's use. There was never any consideration for it and the sale was void *ab initio*. That

appears to me to be clearly the result of the transaction according to a number of decisions in the English law reports (see *Strickland* v. *Turner*[1]), and also the principle laid down by the Judicial Committee of the Privy Council in the case of *Hanuman Kamat* v. *Hanuman Mandur*.[2]

It is contended, however, for the plaintiff before me that it is not clear that on the date of his conveyance to the plaintiff the first defendant had no title to the fields in dispute. Mr. Justice Whitworth is inclined to think that he had a title on that day, though the title was weak because the second defendant was in possession and had two years from that date to acquire a right by adverse possession for twelve years. Assuming that on the date of his conveyance to the plaintiff the first defendant was owner and passed a good title to the former, it appears to me that no question of failure of consideration can arise to bring this case within article 97 of the Limitation Act, because the purchaser, having become the rightful owner under his executed conveyance, cannot after that hold his vendor liable in damages for the subsequent loss of the title in the absence of proper covenants in the deed itself giving a right to such damages. If a purchaser can sue his vendor for his purchase-money because some time after he has bought the property from the true owner and become himself its owner it is lost by the subsequent adverse possession of a third party, the purchaser would become entitled to a refund of his purchase-money in every case where the property is lost after he has acquired the ownership, as for instance where it is lost by accident or a natural cause. But that is clearly not the law. As observed by Pollock, C.B., in the case of the purchase of an annuity in *Strickland* v. *Turner*,[3] which I have above cited, if the purchase took effect, "though but for an instant, the plaintiff is not entitled to succeed, for he purchased the annuity and cannot complain that in so doing he has made a bad bargain, as the events have turned out." The right to damages can arise only where the subsequent failure of consideration in such a case is due to the act of the vendor himself, or, if it is due to some other cause, the vendor

(1) (1852) 7 Exch. 208. (2) (1891) 19 Cal. 123; L. R. 18 I. A. 158.
(3) (1852) 7 Exch. 208.

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has made himself answerable for it by proper covenants in his deed. Such a covenant, it is argued, there is in the present case. Reliance is placed on the following clause in the deed of conveyance passed by the first defendants to the plaintiff:—"Should any one put forward a right or claim or cause obstruction or hindrance or make a quarrel or disturbance in connection with this *wanta* land, I and my heirs and representatives are to answer for the same." The contention of the first defendant is that though there was a recital in the deed that possession of the fields in dispute was delivered to the plaintiff on its date, yet as a matter of fact the second defendant was then in occupation as a trespasser, and that by the clause in question the first defendant made himself answerable for the latter's "claim" or "obstruction." I find it difficult to read the clause in that way. Reading the deed as a whole, as I think it should be read, and taking the clause in connection with what has gone before,—particularly the recital that possession had been already delivered—I agree with Mr. Justice Candy that the clause is no more than a covenant for quiet possession of the kind which this Court had to deal with in the case of *Nagardas Saubhagyadas* v. *Ahmedkhan*.[1] Such a covenant comes into operation only when the purchaser is evicted after he has been put in possession. Were it the intention of the parties to provide that the first defendant should be answerable for failure on the plaintiff's part to recover possession from the trespasser or had the plaintiff bought on the understanding that the plaintiff's right to possession in consideration of his purchase-money was to accrue on, and was subject to, the recovery of the property from the second defendant, and that in case of failure to so recover it the first defendant was to return the money and be liable in damages, they would have and should have said so in the deed itself. And it is the deed that must determine the plaintiff's rights and the first defendant's liabilities. We cannot import terms into it which are not there. Where parties have not chosen to declare their intentions in their instrument, those who have to construe it should be, as observed by Bramwell, B., in *Tarrabochia* v. *Hickie*,[2] "chary in doing for them that which they might, but

(1) (1895) 21 Bom. 175. (2) (1856) 1 H. & N. 183 at p. 183.

have not done for themselves." It is true that the recital as to possession having been already delivered to the plaintiff is not of much significance so far as his right to recover it goes. But it is significant when we have to consider whether there is a covenant for title as distinguished from a covenant for quiet possession. In the case of the former in considering what amounts to a breach, "it may be premised that, as respects the covenants for seisin in fee," the covenants, "if broken at all, are necessarily broken immediately upon the execution of the assurance which contains them, so that the Statute of Limitations immediately begins to run in favour of the covenantor," whereas in the case of the latter the covenants "can only be broken by subsequent events." (See Dart on Vendors and Purchasers, page 881, 6th Edition. See also Mr. Justice Green's ruling in (1877) 2 Bom. 273.) Had the parties here intended that the first defendant was to be answerable for the plaintiff's failure to recover possession from the trespasser, they would not have said in the deed that possession had already been given. On the assumption, therefore, that the first defendant had a good title and conveyed it by his deed to the plaintiff, it must be held that there has been no failure of consideration to bring the case within article 97 of the Limitation Act.

But it is said though the title was good, yet it was defective, because the possession was not with the vendor but was with the second defendant as a trespasser. And that consideration, it is argued, brings the case within the principle of the Privy Council ruling in *Hanuman Kamat* v. *Hanuman Mandur*[1] so as to make article 97 of the Limitation Act applicable to the present case. That was the case of a sale by the father of an undivided Hindu family, consisting of their joint property of himself and his sons, governed by the Mithila law. The father had but limited authority to sell, and the sale was voidable at the option of the sons. In other words, it was a defective sale, which gave only an inchoate right to the purchaser, capable of being perfected or completed by the sons' consent and liable to be defeated by their avoidance. Till either of those events happened, the consideration for the purchaser's purchase-money

(1) (1891) 19 Cal. 123; L. R. 18 I. A. 158.

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was, as it were, in suspense, and directly the sons avoided their father's transaction, the consideration failed. It must be so in the case of transactions entered into by persons with limited authority, as for instance, a manager of a joint Hindu family, an agent, or a minor's guardian, or transactions which require election by some person authorised in law to elect to complete the vendee's title. The principle, then, which I gather from the ruling above referred to is that where a sale is *defective*, because something is wanting to give it full operation, the consideration does not fail till that something fails to happen. That was the principle laid down in the case of *Cowper* v. *Godmond*,(1) and it appears to have been adopted by the Legislature in article 97 of the Limitation Act.

The case, however, before us is not of a defective sale, the completion and validity of which depended upon the consent of anybody. Assuming that the first defendant was owner on the date of his conveyance to the plaintiff, he was the only person entitled to sell, and when he sold the property, the purchaser's title was good and complete. It is true that the second defendant was then actually in possession, but he was in possession as a trespasser. The mere fact that he had two years from that date to acquire a right by adverse possession could give him no right then. There could be therefore no question of his affirmance or avoidance to complete the plaintiff's title. That title was completed when the conveyance was executed by the owner, *i.e.* the first defendant—and the second defendant's wrongful occupation could not make it defective. If, on the other hand, we assume, what Mr. Justice Whitworth has suggested in his judgment, that both the first defendant and the plaintiff were on the date of the conveyance ignorant of the second defendant's possession, I fail to see how that improves the plaintiff's case on this question of limitation. All it shows is that the vendor's and the vendee's knowledge of the circumstances relating to the subject-matter of sale were equal, and that there was no fraud on the part of the vendor. But it also shows that the plaintiff, whose duty it was to make proper and careful inquiries both as to title and possession before buying, was so negligent that he

(1) (1833) 3 Moo. & Sc. 219.

purchased with his eyes shut. Had he inquired he should have known who was in possession. His failure to make careful inquiry is sufficient in law to impute to him the knowledge of what he would have found out had he enquired. We must take it, then, that he purchased the fields knowing that they were in the possession of a trespasser. That, however, cannot make his title incomplete after the conveyance was executed. There is nothing therefore in the facts of the case to bring it within the principle of the Privy Council ruling.

Before I part with the case, I must say a word as to the ruling of the Madras High Court in *Venkatanarasimhulu* v. *Peramma*.[1] I do not think that it is in conflict with the conclusion at which I have arrived on the question of limitation in this case.

There seems to be no warrant in the judgment in that case for saying that the learned Judges who decided it were dealing and meant to deal with the case of a vendor who had "no title to convey." It is true that in a previous suit brought against the purchaser by a third party it had been held that his vendor had "no title"; but with reference to that suit their Lordships say in the judgment that the findings in it are not binding on the purchaser in the suit brought by him against his vendor for failure of consideration. Apart from that, the judgment is clear, and no conflict arises between it and the view I take of the question of limitation under article 97, when we read that judgment with the facts of the case on which it is based. The sale there was by a wife of her husband's property during his absence. It was a defective sale, because the wife could be regarded as her husband's agent when she was in possession during his absence. She could not be regarded as a trespasser. The husband could therefore affirm or avoid her act. That was enough to bring the case within the ruling of the Privy Council, which is there cited and followed. Apart from that, this Madras ruling deals with a case where the purchaser had on the date of his conveyance obtained possession of the property conveyed and continued in possession till at the instance of a judgment-creditor of the vendor's husband it was judicially declared that he had no

(1) (1894) 18 Mad. 173.

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right to retain that possession. In fact the purchaser had got his consideration for his purchase-money and enjoyed the benefit of it till the judicial declaration, when obviously the consideration failed. I think the fact that the purchaser had obtained possession is not only important but is sufficient to determine the question of limitation and distinguish the Madras case from this, because so long as the purchaser is in possession, the consideration exists and no cause of action can arise for damages as for failure of it. For these reasons I agree with Mr. Justice Candy that the decree of the Court below must be confirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

1901. *March 6.*

RUSTOMJI ASPANDYARJI SETHNA AND ANOTHER (ORIGINAL DEFENDANTS 4 AND 5), APPELLANTS, *v.* SHETH PURSHOTAMDAS CHATURDAS AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1 TO 3), RESPONDENTS.*

Partnership—Several firms—Common partner—Money lent by partner to his own firm—Practice—Parties—Same party cannot be plaintiff and defendant in one suit—Debtor and creditor—Death of plaintiff pending appeal—Defendant becoming plaintiff—Power of Court of appeal to vary decree on grounds arising subsequently to decree—Partnership accounts—Contract Act (IX of 1872), section 264—Guarantee—Liability of surety—Right of surety to indemnity.

Where an individual is a common partner in two houses of trade, no action can be brought by one house against the other house upon any transaction between them while such individual is a common partner. This doctrine is founded on the rule that the same individual, even in two capacities, cannot be both a plaintiff and defendant to one and the same action.

One partner cannot sue for money lent by him to a firm of which he is a member. The advance is but an item in the partnership account.

It is open to the Court of appeal to vary a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed—*Sákharam* v. *Hari*.(1)

* Appeal No. 112 of 1899.

(1) (1881) 6 Bom. 113.