1915.

NISSIM ISAAC BEKHOR v. HAJI SULTANALI SHASTARY & Co.

Solicitors for the defendants: Messrs. *Matubhai, Jamietram & Madan.*

Suit dismissed.

M. F. N.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

1915.

June 30.

ACHUT RAYAPA SHANBAG (ORIGINAL DEFENDANT) APPELLANT v. GOPAL SUBBAYA SHANBAG (ORIGINAL PLAINTIFF) RESPONDENT.*

Limitation Act (IX of 1908), Schedule I, articles 92, 93—Suit to declare the forgery of an instrument—Attempt—Lease—Attempt to record a lease under the Record of Rights Act (Bom. Act IV of 1903) is not an attempt to enforce.

The defendant applied to the Mamlatdar to record, under the Record of Rights Act 1903, a lease under which he claimed to be entitled to a rent of 400 cocoanuts from the plaintiff. The application was made on the 4th August 1908 but the plaintiff having complained that the document was a forgery the Mamlatdar declined to record it. The defendant then applied to the Collector who on the 11th August 1909 ordered that the lease should be recorded. On the strength of the record, the defendant sued in the Mamlatdar's Court for the enforcement of the terms of the lease and recovered in April and July 1912 cocoanuts of the value of upwards of Rs. 40. Within three years of the recovery of these cocoanuts the plaintiff brought the suit to recover back the value of the cocoanuts on the footing of the alleged lease being a forgery. The defendant contended that the suit was barred under article 93 of the Limitation Act, on the ground that it was filed more than three years after the 4th August 1908, the date of an attempt to enforce it against the plaintiff.

Held, that the suit was not barred under article 93 of the Limitation Act, 1908, as the first real 'attempt to enforce' the lease took place when the defendant attempted to recover the rent under the lease and that attempt was made within three years of the institution of the suit. The attempt to get the lease recorded under the Record of Rights Act, could not be put higher than an unsuccessful attempt to have a document registered in a case in which registration was necessary (art. 92); and that such an attempt was not an attempt to enforce the lease.

* Appeal from Order No. 59 of 1914.

1915.

ACHUT RAYAPA v. GOPAL SUBBAYA.

SECOND appeal against the decision of C. V. Vernon, District Judge, Karwar, reversing the decree passed by J. A. Saldanha, Subordinate Judge at Kumta.

Suit for declaration.

The plaintiff's family held certain lands on mulgeni lease. The defendant claimed to be the lessor of the lands under a lease (*edurnudi*) executed by Narsinva (a brother of the plaintiff) and under which he was to receive 400 cocoanuts as rent every year. On the 4th August 1908 the defendant applied to the Mamlatdar to have the lease recorded under the Record of Rights Act (Bom. Act IV of 1903). The plaintiff complained that the document was a forgery and the Mamlatdar declined to record it. The defendant having appealed, the Collector ordered the lease to be recorded on the 11th August 1909. On the strength of the said deed the defendant recovered from the plaintiff in April 1912 through village officers, 400 cocoanuts as rent for the year 1910-11; and in July of the same year recovered another 400 cocoanuts as rent for the year 1911-12. The plaintiff, therefore, on the 6th August 1912 filed the present suit to obtain a declaration that the defendant had no *nadgi* right over the land and that the plaintiff was not a lessee of the defendant; and to recover Rs. 42-8-0 the value of the cocoanuts. The defendant contended *inter alia* that the suit was barred by limitation.

The Subordinate Judge held that the attempt to record the lease in the Record of Rights was an 'attempt to enforce' and therefore dismissed the suit on a preliminary ground that it was barred under articles 92 and 93 of the Limitation Act, 1908.

On appeal, the District Judge reversed the decree and remanded the suit to the first Court for trial on

1915.

ACHUT RAYAPA v. GOPAL SUBBAYA.

merits, holding that the suit was not barred, on the following grounds :—

"The lower Court has held that the suit is time-barred under articles 92 and 93 of the first schedule to the Indian Limitation Act. The suit is for a declaration that the defendant's family has no *nadgi* rights in plaintiff's mulgeni lands. Articles 92 and 93 relate to suits 'to declare the forgery of an instrument.' Assuming for the sake of argument that this is such a suit, limitation runs from the date of 'issue' or 'attempt to enforce' the instrument. The lower Court has held that mere presentation for entry in the Record of Rights is an 'attempt to enforce.' I am of opinion that the first real attempt to enforce was when defendant filed his rent suit No. 9 of 1909. It has not been shown that three years have elapsed since that suit was filed and the actual decree in defendant's favour in that suit is dated 11th August 1909.

I am also of opinion that this is not a suit to declare the forgery of an instrument. Plaintiff is in possession and this fact materially differentiates the present suit from there cited in which the party sued is in possession under colour of an instrument. In the latter case it is necessary to get the instrument set aside. In the present case all that plaintiff need sue for is a declaration ; it will be for the defendant to prove his alleged *nadgi* lease in reply.

As to the meaning of 'issue' in article 92 see *Hurri Bhusan* v. *Upendra Lal*, I. L. R. 24 Cal. p. 1 from which it would appear that article 92 is in no way applicable to the present case."

S. M. Kaikini for the appellant :—I contend that the plaintiff's suit was in effect for a declaration that the rent note (Ex. 23) was a forged document and the suit was, therefore, governed either by article 92 or 93 of the Limitation Act. In either case limitation began to run from the 4th August 1908 when this rent note was produced before the Mamlatdar. It was the date of 'issue' under article 92 and it was also the date of 'the attempt to enforce' the instrument. Both these words mean to publish. Attempting to enforce means asserting one's rights or seeking to place oneself in an advantageous position which but for the instrument one could not occupy. See *Fakharooddeen Mahomed*

Ahsan v. *Pogose*[1] which is confirmed by the Privy Council case of *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal.*[2]

Under section 135 (j) of the Land Revenue Code, the entry in the Record of Rights should be held true between the parties, that is, it is final between the parties unless it was altered by an appeal to the superior authorities or by a decision of a Civil Court.

Nilkanth Atmaram for the respondent:—The attempt referred to under article 93 of the Limitation Act is a successful attempt. Until the attempt is successful and the defendant gets an advantageous position no cause of action arises to the plaintiff. If there was no entry made in the Record of Rights the plaintiff had no cause to pray for any relief before the Courts; it was only after the entry was made that the plaintiff's position became insecure and he was forced to ask for the present relief in the Civil Court. This view was supported by the ruling of the Privy Council in the case of *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal.*[2]

The term 'issue' does not apply to documents of the present kind; it was used only as regards documents familiar in business to which that term is usually applied: *Hurri Bhusan Mukerji* v. *Upendra Lal Mukerji.*[3]

Kaikini, in reply:—The Limitation Act itself lays down that time from which limitation begins to run is the date of the attempt. A successful attempt would not be called an attempt. It is the first step towards any act that is called an attempt. Even in the case of *Fakharooddeen Mahomed Ahsan* v. *Pogose*[1] their

(1) (1878) 4 Cal. 209. (2) (1881) 8 Cal. 178.
(3) (1896) 24 Cal. 1.

1915.

ACHUT RAYAPA v. GOPAL SUBBAYA.

Lordships call the application made by Mr. Pogose an attempt. In that particular case it did not matter whether limitation was calculated from the date of the application or the granting of that application. To bring the suit under article 93 of the Limitation Act, the plaintiff ought to have brought the suit within three years from the date of the attempt as that was the date from which limitation began to run.

SCOTT, C. J. :—The defendant in this case, who is now the appellant, applied to the Mamlatdar of the District in which the land in suit is situate for record under the Record of Rights Act of a lease under which he claimed to be entitled to a rent of 400 cocoanuts. That application was made in or about the beginning of August 1908, and upon notice being given to the respondent-plaintiff, who was the alleged lessee, the plaintiff complained that the document was a forgery. The Mamlatdar, thereupon, declined to record it and returned it to the applicant. The applicant was not satisfied and applied to the Collector to have the document recorded. That application was not disposed of until the following year, and on the 11th of August 1909, the Collector ordered that the lease should be recorded, and from that date it was recorded in the Record of Rights in effect that the defendant was the landlord of the plaintiff. On the strength of that record, the defendant sued in the Mamlatdar's Court for enforcement of the terms of the alleged lease and recovered on various occasions cocoanuts of the value of upwards Rs. 40. Within three years of the recovery of those cocoanuts the plaintiff brought this suit to recover back the value on the footing of the alleged lease being a forgery. It is contended that the suit is barred under article 93 of the Indian Limitation Act, on the ground that it is filed more than three years after the date of an attempt to enforce it against the plaintiff. Now the attempt

to enforce it for the purpose of recovering the rent under it was made well within three years. So the appellant is driven to the contention that an attempt took place at an earlier date.

The attempt to have it recorded under the Record of Rights, which is relied upon, was made in August 1908 and failed, and it is contended that although the plaintiff had nothing to fear for upwards of a year owing to the success of his contentions before the Mamlatdar, he nevertheless ought to have sued to have that instrument declared to be a forgery. It appears to us that an attempt, such as that made by the defendant to have the instrument recorded under the Record of Rights Act, cannot be put higher than an attempt to have a document registered in a case in which registration is necessary and the particular attempt relied on in the present case cannot be put higher than an unsuccessful attempt to register. Now cases of registration of forged documents, or documents which, the plaintiff contends, are forged, are dealt with by article 92, and limitation for the purpose of a suit to declare the forgery of the instrument runs from the date when the registration, not the attempted registration, becomes known to the plaintiff. We do not think that it can be contended that an attempt to register is an attempt to enforce, otherwise there would be no object in a special Article with reference to issue and registration as distinct from the Article relating to attempts to enforce, and if registration is not an attempt to enforce, it is clear, we think, that the attempt to record is not an attempt to enforce. In their ordinary and natural meaning the words "attempt to enforce" would be applicable to an attempt to recover rent under a lease, and the first attempt of that kind took place within three years of the institution of the suit. We are, therefore, of opinion that the suit is

1915.

ACHUT RAYAPA v. GOPAL SUBBAYA.

within time. We affirm the order of the lower appellate Court and dismiss the appeal with costs.

Order affirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

1915. *July* 5.

USMANMIYA ABDULLAMIYA AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2) APPELLANTS v. VALLI MAHOMED HUSAINBHAI AND ANOTHER (ORIGINAL DEFENDANTS NO. 3 AND PLAINTIFF) RESPONDENTS.*

Mahomedan law—Acknowledgment of son—Acknowledgment of legitimate sonship—Inference of acknowledgment.

A Mahomedan cannot legally acknowledge as his son a person who is shown to be the son of another man. The acknowledgment must be not merely of sonship but of legitimate sonship; but the fact that the acknowledgment was of legitimacy as well as of sonship may be inferred from circumstances justifying that inference.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree passed by K. K. Sunavala, Additional Subordinate Judge at Ahmedabad.

Suit to recover possession of certain share in property left by one Husainbhai. The plaintiff Sardarbibi claimed to be his wife; defendants Nos. 1 and 2 were his brothers; and defendant No. 3 claimed to be his acknowledged son.

The plaintiff alleged that as widow of the deceased, her share was one-fourth. She denied that defendant No. 3 was the acknowledged son of the deceased. Defendants Nos. 1 and 2 supported the denial.

* Second Appeal No 494 of 1912.