

We shall, therefore, alter the conviction from murder to culpable homicide not amounting to murder under the second part of section 304 and direct that the prisoner be sentenced to five years' rigorous imprisonment.

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v.
SARDAR-
KAAN.

Conviction and sentence altered.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

GULABCHAND BALARAM MARWADI (ORIGINAL DEFENDANT No. 1),
APPELLANT v. NARAYAN BIN RAMA AND OTHERS (ORIGINAL PLAINTIFF AND
DEFENDANT No. 2), RESPONDENTS.*

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August 28.

Limitation Act (IX of 1908), Schedule I, Article 97—Money due on an existing consideration which afterwards fails—Limitation.

Defendant No. 1 agreed with the plaintiff in September 1908, for a price, to procure from defendant No. 2 a re-conveyance of a house to the plaintiff. In November 1908, defendant No. 2 conveyed the house to V. In 1910, V sued to recover possession of the house from the plaintiff and obtained a decree in July 1911. The plaintiff sued in January 1912 to recover the consideration money. The lower Courts held that the suit was within time under Article 97 of the first schedule to the Indian Limitation Act (IX of 1908). On appeal,

Held, that the suit was time-barred even under Article 97, for after the sale to V defendant No. 1 could not have had anything to do with the house and the possession which the plaintiff was allowed to retain must have been on V's sufferance.

SECOND appeal from the decision of G. K. Kanekar, First Class Subordinate Judge, A. P., at Sholapur, confirming the decree passed by H. V. Kane, Subordinate Judge at Akluj.

Suit to recover a sum of money.

The plaintiff mortgaged his house to the father of defendant No. 1, who sued on the mortgage and

* Second Appeal No. 196 of 1914.

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obtained a decree. The house was sold at a Court sale in execution of the decree and purchased by defendant No. 2 on 19th September 1904.

Defendant No. 1 received from the plaintiff Rs. 550 and agreed on the 10th September 1908 to procure a reconveyance of the house from defendant No. 2 to the plaintiff. Defendant No. 2, however, sold the house to one Vithal in November 1908. The plaintiff then asked defendant No. 1 to carry out the agreement; but on his failure to do so, the plaintiff preferred a charge of cheating against him. The trying Magistrate, however, referred the parties to a civil Court in February 1909. In 1910 Vithal sued to recover possession of the house from the plaintiff, and obtained a decree on the 22nd July 1911.

On the 11th January 1912 the plaintiff filed the present suit to recover the money. Defendant No. 1 contended *inter alia* that defendant No. 2 was a *benamidar* on his behalf and that he had carried out the agreement of 1908 by causing defendant No. 2 to convey the house to Vithal who was a nominee of the plaintiff. It was contended by defendant No. 2 that he was not a *benamidar* and that the sale by him was for Vithal himself.

The trial Court was of opinion that Vithal was not the plaintiff's nominee and passed a decree for Rs. 550 against defendant No. 1.

On appeal, this decree was confirmed by the lower appellate Court on the following grounds:—

The facts of the case are undisputed. The bone of the defendant's contention is that the present suit is governed as to limitation by Articles 62, 65, 115 of the 1st Schedule of Limitation Act of 1908 and not by Article 97 of that schedule. The pleader for appellant had to argue that the consideration for the contract of sale in suit has failed entirely and hence plaintiff's claim fell under Article 62 and not under Article 97 aforesaid. The pleader cited the authority of I. L. R. 25 Bom. 593 in support of his argument. The authorities of I. L. R. 18 Mad. 173 and I. L. R. 19 Cal. 123 and Bombay Law

Reporter, Vol. VIII, page 283 also lend countenance to the pleader's argument that Article 62 applies to the present case. The present case appears to be almost on all fours with the case of Bombay Law Reporter, Vol. XV, page 559 and is governed by the principles enunciated therein. In that case the principle laid down by the Privy Council in I. L. R. 19 Cal., page 123 as to the test of voidable and void agreements of sale has been discussed. It has been held that possession given under a contract is existing consideration as contemplated by Article 97 of the 1st Schedule aforesaid although the contract subsequently turned out to have been void *ab initio*. In all cases of that kind it is only when the promisee is deprived of that consideration and the true character of the contract becomes revealed that he has any ground for complaint. That is the proper time from which to compute the period of limitation. This is the principle underlying the provisions of Article 97 aforesaid. Exhibit 4 is pleading of defendant No. 1, para. 2 thereof clearly shows that plaintiff's possession of the suit house was referable to the suit agreement and that the advance of Rs. 550 was made by plaintiff to defendant No. 1 for obtaining possession of that house from defendant No. 1 in pursuance of that agreement. The authorities of I. L. R. 11 All., 47 and I. L. R. 25 All. 618 cited by respondent's pleader also show that the present suit is governed by Article 97 aforesaid. For these reasons, I hold that plaintiff's claim is not open to any objection on the ground of limitation.

Defendant No. 1 appealed to the High Court.

V. D. Limaye and *S. R. Gokhale*, for the appellant :— The suit is barred by Articles 62, 65 and 115 of the Limitation Act: it is one for compensation for breach of promise. The possession remained all through with the plaintiff. Such a possession cannot be deemed to be consideration for the contract between plaintiff and defendant No. 1. The cause of action, therefore, arose not when the possession was threatened, but when defendant No. 1 failed to carry out the agreement in 1908.

B. V. Desai, for respondents Nos. 1 to 4 :— Article 97 of the Limitation Act applies to the case. The possession which the plaintiff had was an existing consideration which failed when Vitthal obtained a decree on the 22nd July 1911 : see *Narsing Shivbakas v. Pachu Rambakas*.⁽¹⁾

⁽¹⁾ (1913) 37 Bom. 538.

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M. V. Bhat, for respondent No. 5.

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Limaye in reply, referred to *Hanuman Kamat v. Hanuman Mandur*.⁽¹⁾

BEAMAN, J.:—In our opinion the suit is clearly time-barred. Adopting the view of the lower Court—and that is admittedly the view most favourable to the plaintiff—that the suit is governed by Article 97, we should still be as sure that it was time-barred.

The admitted facts are that this agreement, whatever its true nature may have been, was entered into between the plaintiff and the defendant No. 1 in September 1908. Adopting, again, the plaintiff's case, the agreement was of this nature. The plaintiff had paid the defendant the money which he now seeks to recover on consideration of the defendant procuring for the plaintiff a reconveyance of certain property which had been sold under a Court decree in 1904. The nominal purchaser at that Court sale was the defendant No. 2, and the plaintiff's case is that the defendant No. 1 was the real purchaser, the defendant No. 2 being only his creature. That being the nature of the agreement, it is common ground that the defendant No. 1 did not procure a conveyance to the plaintiff from the defendant No. 2, but that in November 1908 the defendant No. 2 conveyed the property to an outsider called Vithal Narhar. The defendant's case was that Vithal Narhar was merely a *benami-dar* for the plaintiff. If that case were true, then the defendant would have fulfilled his obligation and the present claim would have no foundation whatever. That part of the defendant's case has been disbelieved by the Courts below and we accept their view. The position then is that the defendant No. 1 having contracted with the plaintiff, for a price, to

⁽¹⁾ (1891) 19 Cal. 123.

procure from the defendant No. 2 a reconveyance of certain property to the plaintiff in September 1908, the defendant No. 2 conveys that property in November 1908 to Vithal Narhar. These facts were all known to the plaintiff who almost immediately prosecuted the defendant No. 1 for cheating in respect of this transaction. That complaint was started in December 1908. It is, therefore, quite clear that if the suit falls under any of those Articles upon which the defendant No. 1, appellant here, relies, it must be time-barred. It is equally clear that it must be time-barred if the suit falls under the Article—and the only Article—upon which the plaintiff-respondent relies. The Courts below have viewed the continuance of the plaintiff's possession between September 1908 and the 22nd of July 1911 when Vithal Narhar took possession as an existing consideration for the contract of September 1908. But, on the facts we have stated, this is clearly wrong. The moment there was a conveyance to Vithal Narhar, whatever possession the plaintiff was allowed to retain, must have been on sufferance and by the grace of Vithal Narhar. The defendant No. 1 could have had nothing to do with it. Nor could that be regarded as consideration flowing from him, and the plaintiff must have been perfectly aware of that fact.

In whatever light, then, this transaction be regarded, we have no hesitation in saying that the conclusion arrived at by the lower appellate Court on the issue of limitation was wrong. The present suit is time-barred and must be dismissed with costs throughout.

Decree reversed : suit dismissed.

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