Shankarlal Vs. Chimanlal and ors.

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Court : Rajasthan

Decided On : May-14-1971

Reported in : 1971WLN163

Judge : C.B. Bhargava, J.

Appeal No. : S.B. Civil Regular First Appeal No. 37 of 1963

Appellant : Shankarlal

Respondent : Chimanlal and ors.

Disposition : Appeal dismissed

Judgement :

C.B. Bhargava, J.

1. This is appeal by the defendants from the judgment and decree 19-1-1963 of the District Judge, Udaipur, arising out of a suit for recovery of Rs. 16828/-.

2. Shortly stated the case of the plaintiffs in the court below was that on 1st May, 1948, they took a If also of a Cinema house known as Summer Tallies situated at Kishargarh from Maharaja Sumersingh of Kishangarh for a period of five years on a monthly rent of Rs. 2500/- On 6th August, 1948, it was orally agreed between the plaintiffs and the defendants at Udaipur that the said Cinema house be sublet to the defendants on the same terms and conditions en which they bed taken it from Maharaja of Kishangarh. On 7th August, 1848, in pursuance of the said oral agreement possession over the Cinema house was delivered to the defendants and they also executed an agreement en 10th August, 1948, at Kishengarh by which they undertook to pay the monthly rent of Rs. 2600/- directly to Maharaja of Kishangarh, and in case they committed default of any of the conditions of the sub-lease, they would be responsible for the damages sustained by the plaintiffs. The defandents continued in possession of the cinema reuse upto 16th April, 1949, when it was closed because of a fire having broken cut in it. The defendants, however, did rot pay rent to the Maharaja Kishengarh from 1-11-48 to 16-4-49 as a result of which Maharaja Kishengarh instituted the suit for recovery of arrears of rent amounting to Rs. 13833/5/3 against the plaintiffs as well as the defendants. The above suit was decreed only against the plaintiffs but was dismissed against the defendants because it was held that there was no privity of contract between the Maharaja of Kishengarh and the defendants. Maharaja of Kissinger in execution of the decree recovered from the plaintiffs Rs. 7000/- on 26th April, 1968, Rs. 4000/- on 3rd July, 1959, & Rs. 2690/- on 8th September, 1960 The plaintiffs, therefore, claimed that they were entitled to recover the above am from the defendants together with interest amounting to Rs.

1739/- and other expenses which they had to incur in the litigation with Maharaja of Kishengarh on the ground that the defendants had committed a breach of the terms of the agreement, and that trey were liable to indemnify the plaintiffs on that account.

3. The defendants contested the suit. They stated that both the agreements dated 1st May, 1948, executed by the plaintiffs in favour of Maharaja of Kishengarh and 10th August, 1948 executed by the defendants in favour of the plaintiff were inadmissible in evidence for want of registration and the plaintiffs were debarred from enforcing their terms. It was stated that there was oral agreement between the parties that unless the agreement dated 10th August, 1948, was duly registered, its terms would not be enforced. The defendants admitted that they were put into possession of the Cinema House and it is no longer in dispute that their possession continued upto 16th April 1949, but their case is that they were in possession as agents of the plaintiffs and not as sub-lessees. Objection regarding the jurisdiction of the court to entertain the suit was also raised on the ground that no oral agreement took place at Udaipur as alleged by the plaintiffs. Bar of limitation and res judicata was also pleaded.

4. On the above pleadings, the lower court framed the following issues:

1- D;k oknhx.k us rk0 1&5&1948 dsk tks flusek ukeh lqesj Vkdht dsk pykus ds fy, 2500 & :0 ekgokj es egkjkt lkgc fd'kux<+ ls 5 lky ds fy, fdjk;s ij fy;k vkSj fdjk;snkjh dk bdjkj rk0 1&5&1948 dk egkjkt lkgc lqesj flg th ds gd es fy[k fn;k vkSj bUgh 'krksZ ij oknhx.k us izfroknh dks dj fn;k A oknh

2- oknhx.k vkSj izfroknhx.k ds njfe;ku fdjk;snkjh dh 'krsZ rk0 6&8&48 dsk mn;iqj es tckuh r; ik;h vkSj mlh ds vuqlkj rk0 7&8&48 ds vuqlkj rk0 7&8&48 dks izfroknh fd'kux<+ tkdj flusek gkmlij dCtk fd;k A oknh

3- D;k izfroknhx.k us rk0 10&8&48 dks fyf[kr bdjkj flusek gkml dks fdjk;s ij nsus dk fy[k fn;k oknh

4- D;k izfroknhx.k us flusek gkml ds eqrkfyd oknhx.k dk gj izdkj dh {kfr ls eqDr djus dh ftEesnkjh vius mij ys yh vkSj mlds vuqlkj 2500&:0 ekgokj ls rk0 10&8&48 ds vuqlkj flusek gkml dk fdjk;k mudsk egkjkt lkgc fd'kux< dks vnk djuk Fkk Aoknh

5- D;k oknhx.k us mDr flusek gkml dk fdjk;k 13690 :0 rkjh[k 8&2&60 rd egkjkt lkgc fd'kux< dsk vnk dj fn;k tks izfroknhx.k ikus ds vf/kdkjh gS Aoknh

6- D;k oknhx.k dks izfroknhx.k ls mDr flusek gkml ds fdjk;s ds o gjtkus ds dqy feykdj 16829 :0 olwyh dk vf/kdkj gS oknh

7- vxj rudhg ua0 2 oknhx.k ds gd es QSlyk gks rks D;k nkok ml U;k; ds T;wfjfMDlu dk ugh gS A izfroknhx.k

8- D;k nkok cSju e;kn gS A

9- D;k rk0 10&8&48 o rkjh[k 26&8&49 ds nLrkost jftLVjh 'kqnk u gksus dh lwjr es dkfcy vn'kky gS Aoknhx.k

10- vxj rudhg ua09 oknhx.k ds gd es QSlyk gks rks D;k fd'kux<+ es fy[kk gqvk rk0 10&8&48 dk bdjkj ds ckcr njfe;ku Qjhdu ;g r; gqvk fd fdjk;s ukes dh 'krsZ gS mldh jftLVh djk nsxs vkSj mlds ckn gh ftEesnkjh izfroknhx.k ij vk;n gksxh vFkok ugh

izfroknhx.k

11- D;k izfroknhx.k dk dCtk mDr flusek gkml ij oknhx.k ds ,tsUV ds ugh jgk oknhx.k

12- D;k oknhx.k dks okn ua0 17 lu~ 1951 flfoy tt U;k;ky; fd'kux<+ rFkk vihy uEcj 48 lu~ 1955 gkbZdksVZ tks/kiqj ds QSlys ds ckn oknhx.k ;g nkok ugh yk ldrs gS izfroknhx.k

13- D;k izfroknhx.k dks [kjpk 35, ds rgr feyuk pkfg, izfroknhx.k

14- nknjlh

5. In support of the above issues, plaintiff Ghimanlal and Ratanlal gave their own statements & examined Madanlal P.W. 3, Shankerlal P.W. 4. MadanLal s/o Motilal P.W. 5 and Kesrisingh P.W. 6. In rebuttal, Shankerlal defendant gave his own statement as D.W. 1 and examined Meghraj, D.W. 2, Ballabhdas D.W. 3 and Sumersingh D. W. 4. Besides the above oral evidence, both parties produced documentry evidence. The learned District Judge upon a consideration of the above evidence came to the finding that the plaintiffs took lease of the cinema house from Maharaja of Kishengarh and that it was further sub-let to the defendants by the plaintiffs on the same terms and conditions on which they had taken it from the Maharaja. On issue No. 2 it was found that the terms and conditions for sub-letting the Cinema house to the defendants were settled on 6th August, 1948, and possession over the cinema house was delivered to them on 7th August, 1948 and thereafter the lease-deed was executed on 10th August, 1948. Issue No. 3 was also decided in favour of the plaintiffs and on issue No. 4 it was held that the agreement dated 10th August, 1948, entered into between the parties contained a clear recital that the defendants would indemnify the plaintiffs for loss and injury suffered by them on account of the Said agreement. Even otherwise it was held that where a conveyance contains a covenant by the sub-lessee to pay of rent direct to the superior landlord it impliedly gives rise to a contract of indemnity. On issue Nos. 5 and 6, it was held that the plaintiffs were entitled to recover a sum of Rs. 13690/- which they had to pay to the Maharaja of Kishengarh under the decree obtained against them. Oh issue No. 6 the court only allowed the plaintiff's claim of Rs. 1739/- for interest on the sum of Rs. 13690-/ and disallowed the other amount claimed in the suit. Issue No. 7 was decided in favour of the plaintiffs and it was held that the court at Udaipur had jurisdiction to entertain the suit The suit was also held to be within time as being governed by Article 83 of the Indian Limitation Act, 1908. As regards issue No. 9 which has been the subject matter of 'lengthy arguments in this Court, the learned Dist. Judge in view of the judgment of the High Court between the parties in D.B. Civil Regular Appeal No. 48 of 1955 decided on 8-3-1960, decided it against the defendants. Issues No. 10 & 11 were decided against defendants. Issue No. 12 was decided against the defendents and it was held that the suit is not barred on the ground of res judicata. As a result of the above findings, plaintiff's were given a decree for Rs. 15429/- with proportionate costs and pendente lite and future interest at the rate of 6 percent per annum.

6. In this appeal, objection regarding jurisdiction of the lower court to entertain the suit was given up because the lower court did not suffer from any inherent lack of jurisdiction and no prejudice was caused to the defendant on account of the suit being tried by that court. It was, however, contended that (1) the suit for enforcing the indemnity clause in the agreement Ex. 2 dated 10th August, 1948, is not maintainable because the agreement of lease was not admissible in evidence for want

of registration and the indemnity clause was an integral part of the agreement and as such could not be regarded as a collateral transaction, (2) that Article 83 of the Limitation Act was not applicable to the facts and circumstances of the case and the suit was barred by limitation b cause it was only a suit for recovery of rent which could' have been filed within the three years from the accrual of the cause of action and (3) that the suit was also barred on the principles of res judicata.

7. On the other hand, learned Counsel for the respondent has urged that the agreement Ex. 2 is not inadmissible in evidence because it has not been shown that any law of registration containing provisions similar to Section 17 of the Indian Registration Act. was in force in the erstwhile Kishengarh State when the said document was executed. In the alternative it was urged that the terms and conditions of sub-letting the Cinema House were orally settled between the parties on 6th August, 1948, and possession was delivered on 7th August, 1948, and thereafter the agreement was executed on 10th August, 1948, and it is simply a record of the past transaction and therefore is admissible in evidence. It was also urged that the present suit can be decreed against the defendants on their admission and Jit was not necessary to call in aid the agreement Ex. 2. In this connection, it was lastly urged that the indemnity clause in Ex. 2 is not an essential part of the sub-lease and can be forced and the document is admissible for proving that term which is a collateral purpose. It was urged that in the present suit the document is admissible because it does not affect any immovable property and is not being admitted into evidence for any such transaction. The present suit is for enforcement of a personal obligation based upon a breach of contract. As regards the equation of limitation, it was pointed out that the lower court has rightly applied Article 83 of the Limitation Act to the facts of the case and the cause of action to institute the suit arose when the plaintiff was damnified. As for the plea of res judicata, it is urged that the question involved in the present litigation was not necessary to be decided in the previous suit filed by Maharaja of Kishengarh against the plaintiffs and the defendants nor was that question decided. The only question that was decided in that case was whether there was any privities of contract between the plaintiffs & the present defendants and that question having been found in favour of the present defendants Maharaja Kishengarh's suit was dismissed against them and the decree for arrears of rent was passed against the plaintiffs only.

8. That there may be res judicata as between co-defendants has been recognised by along course of Indian decisions. But before the rule of res judicata be applied as between co-defendants the following three conditions are requisite: (1) there must be a conflict of interest between the defendants concerned (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims and (3) the question between the defendants must have been finally decided. See Mt. Munni v. Tirlok Nath AIR 1931 P.C. 114 and Ghandu Lal v. Khalilur Rahman AIR 1950 P.C. 17.

9. Now in the previous suit instituted by Maharaja Sumer Singh of Kishengarh, the present plaintiffs were arrayed as defendants Nos. 1 to 3 and the present defendants as No. 4 and 5 and the suit was for recovery of arrears of rent. The plea of defendants Nos. 1 to 3 was that the possession of defendants No. 4 and 5 over the Cinema House was with the direction of the plaintiffs and so they were only liable for payment of arrears of rent while defendants Nos. 4 and 5 asserted that there was no privaty of contract between them and the plaintiffs with whom they had not entered into any transaction. The point in issue, therefore, in that suit was whether there was any privaty of contract between the plaintiff and defendants No. 4 and 5 and upon its

decision the suit was dismissed against them. The terms of Ex. 2 and the indemnity clause did not come up for consideration in that suit nor was it necessary to consider it because Maharaja Kishengarh the plaintiff in that suit was not a party to Ex 2 and therefore its terms and conditions were not binding on him. Even the rule of constructive res judicata as contended by the learned Counsel has no application in the present case because even if the defendants Nos. 1 to 3 rested their defence on the indemnity clause contained in Ex. 2, the court would not have gone into that question because giving of relief to the plaintiff did not depend upon the determination of that question. It is, therefore, evident that the second and the third conditions are not satisfied in the case and the rule of res judicata cannot therefore apply. It was contended that in the previous suit the lower court had decided that the two documents i.e., the agreement of lease between the present plaintiffs and Maharaja Sumer Singh and the second agreement Ex. 2 between the plaintiffs and defendants were inadmissible in evidence for want of registration and, could be admitted for collateral purposes only and that decision should operate as res judicata and issue No. 9 should not have been re-determined. But here too the learned Counsel does not stand on a sound footing. The order of the trial court did not finally decide the question of the registration of the two agreements because an appeal was preferred against the judgment of the trial court to the High Court and the High Court as would appear from its judgment dated 8-3-60 Ex. A-1 left that question undecided because in its view a valid tenancy could be inferred from the circumstances of the case even if the lease deed was inadmissible for want of registration, In was because of this decision that issue No. 9 was not pressed in the lower court. I, therefore, hold that the rule of res judicata has no application in the present case.

10. The next question is whether there was any law requiring compulsory registration of the agreement Exs. 1 and 2, in force in the erstwhile Kishengarh State. Learned Counsel for the appellant has failed to produce any enactment relating to the registration of documents in Kishengarh State but he has placed reliance upon a Robkor (order) published in Kishengarh State Gazette dated 1st April, 1944, at page 2 to show that the provisions of Section 17 of the Indian Registration Act were being followed in that State. I would therefore assume for the purpose? of this case that under the law of Registration in force in Kishengarh State, leases of immovable property from year to year or for any term exceeding one year or reserving a yearly rent required compulsory registration.

11. But the learned Counsel for the respondent urges that Ex. 2 is not the transaction itself but is only a record of the past transactions. In support he relies on paragraphs 2 and 3 of the plaint where in oral agreement of lease dated 6.8.48 between the parties has been specifically pleaded. It has also been alleged that possession over the Cinema House was delivered to the defendants on 7th August. 1948, i.e., two days before the execution of Ex. 2. It is urged that the lower court's finding on these points is in favour of the respondent and it has not been challenged in this Court. In my view the contention is not without force. Apart from the finding of the lower court on this point, upon a true interpretation of the terms of Ex. 2 it would be found that lease by oral agreement had come into being on 7th August, 1948. The following recital will bear this out:

pwfd vkils ;g Bsdk rkjh[k 7 vxLr lu~ 48

ls bu 'krksZ ds lkFk tks vkids vkSj Jheku egkjktk

lk0 ds njfe;ku r; ik;h x;h gS mu ij geus fy;k gS

bl okLrs rk0 7 vxLr 48 ls dqfy;k 'kjk;rks dh ikcanh

gekjh tkr o [kkl o tk;nkn ij ykteh gskxh A

The lease was therefore, an oral one and Ex. 2 contained a recital of the factum of lease dated 7th August, 1948, and in this view of the matter it would be admissible in evidence to corroborate the oral agreement. Though Ex. 2 was executed on 10th August, 1948, the terms and conditions of lease are admitted in Ex. 2 to have become binding from 7th August, 1948. It is also the plaintiff's case that the terms and conditions of the lease were orally settled between the parties on 6th August, 1948, and possession over them Cinema House was delivered on 7th August, 1948, that is why the terms of lease became operative from 7th August, 1948.

12. In Banarsilal v. Shri Bhagwan 1955 R.L.W. 129 it was held that:

When the document was executed only by the lessee and not by the lessor & was unregistered it was held that it was not a lease deed and as such could not be admitted in evidence as proof of lease. It did not create a lease under Section 107 of the Transfer of Property Act and therefore it would not be admissible as a lease-deed but if there was an oral agreement accompanied by delivery of possession, such a document could be admitted in evidence to corroborate the fact of such agreement and the terms thereof.

The same view was taken in Raghbir Saran v. Union of India . Ex. 2 also has been executed by the lessee only and not by the lessor. It has not been shown that there was any provision similar to Section 107 of the Transfer of Property Act in force Kishengarh State at the time Ex. 2 was executed requiring the making of lease for any term exceeding one year only by a registered instrument. The plaintiff can therefore legitimately rely upon the total agreement of lease accompanied by delivery of possession though it was for a term exceeding one year.

13. Learned Counsel for the appellant contends that the suit is not based on the oral agreement of lease and is based only on Ex. 2 and the lower court gave its finding on issue No. 2 only to decide the question of jurisdiction of the court to entertain the suit. Earned Counsel further contends that evidence relating to the negotiations prior to the agreement of lease Ex. 2 is inadmissible in evidence because of Section 91 of the Indian Evidence Act as Ex. 2 is the sole repository of the terms of lease settled between the parties. Reliance is placed on the following decisions-

Mst. Raj Rani v. Hukam Chand AIR 1930 Lah. 675 Kuppuswami v. Chinnaswami AIR 1928 Mad. 546 Seetarma v. Krishnaswamy Row 35 Indian Cases 18, Jagwanti v. Udit Narayan AIR 1927 All. 587 Punjab National Bank v. Chaudhry AIR 1943 Oudh 392 Dula Meah v. Abdul Raheman 81 Indian Cases 641.

In my view issue No. 2 is quite clear and explicit though upon its decision question of the jurisdiction of the court might have also rested. But the court has come to the finding that the terms and conditions of the lease were orally settled between the parties on 6 8.1948, and possession was also delivered on 7.8.1948. As already observed, the recitals of Ex. 2 support the respondent's contention of their having an oral agreement of lease to the execution of Ex. 2. The decisions relied on by the

learned Counsel relate to those cases where agreement itself represents the transaction between the parties and the prior negotiations are only a prelude to it or where oral evidence was sought to be given to prove the terms of the written contract requiring, compulsory registration Even if the agreement Ex. 2 is not admissible in evidence for want of registration, it is well settled that, it can be admitted in evidence under the proviso to Section 49 for collateral purposes. Section 49 lays down a rule of substantive law but the proviso embodies a rule of evidence.

14. The terms 'collateral purpose' is vague and has to be determined on the facts of each particular case. However, all purposes other than those which try to create, declare, assign, limit or extinguish right, title or interest in immovable property are collateral purposes. Earned Counsel for the appellant cited a number of decisions to show that a lease deed requiring compulsory registration cannot be admitted in evidence for proving the period of lease, condition to vacate without notice and for recovery of rent because they are not collateral purposes. He contends that the indemnity clause contained in Ex. 2 is also integral part of the agreement and is not separable from the other conditions of the sub-lease and, therefore, the agreement cannot be admitted for proving this condition also. Earned Counsel for the respondents, however, urges that the condition to parent by the lease directly to the superior landlord and in case of its breach to indemnify the lessor is not an essential part of the sub lease because an agreement could have been entered into separately by an ueregistered deed. Besideds this, it is argued that in the present litigation the agreement is not being produced for the purpose of affecting any immovable property or as evidence of any transaction affecting such transaction or such property or conferring such power. In the present case, it is the personal obligation to indemnify the lessor in case of breach of the terms of the lease which is to be enforced which does not in any way affect the immovable property and as such it can be admitted in evidence. Earned Counsel urges that the indemnity clause contained in Ex. 2 is quite divisible from the other terms of the lease Reliance is placed on Arseculeratne v. Perera AIR 1928 P.C. 273 and Muruga Mudaliar v. Subha Reddiar : AIR1951Mad12 . In the latter case it was held by the Full Bench that:

An agreement of lease in writing required to be registered but un-registered may be used as evidence of the agreement in a suit for damages for its breach.

The point was referred to the Full Bench because there was some confect of opinion in the two Full Bench decisions of that Court that is in Rajah of Venkatagiri v. Narayana Rtddi Narayan Chetti v. Muthiah Servai ILR 35 Mad. 63. ILR 17 Mad. 456. The learned Chief Justice expressed the view:

My view of Section 49(c), Registration Act is this. It prohibits the use of an unregistered document in any legal proceeding in which such a document is sought to be relied on in support of a claim to enforce or maintain any right, title or interest to or in immovable property. So long as the document is not to be sought to be relied on as evidence of any right, title and interest to or in immovable property, there is nothing to prevent the document being received in evidence for other purposes. In this view, it may be that a distinction will have to be made between a suit for specific performance and suit for damages. In a suit for specific performance, the relief sought does concern title to or interest in land; whereas a claim for damages is personal and may be enforced without in any manner affecting immovable property.

15. The learned Chief Justice agreed with the view of the Full Bench in Rajah of

Venkatagiri v. Narayana Reddi (supra) where the learned Judges had held that:

If the plaintiff's action was founded on an alleged title in virtue of a lease granted by the defendant there can be no doubt that the document VI could not be admitted in evidence. The plaintiff would then be seeking to use it as evidence of a transaction affecting immovable property. It is clear that the plaintiff does not assert his title under the incomplete lease, and that he does complain of the breach of contract on the part of the defendant in refusing to register the Kabuliat and give him a Knowles and also in disturbing his possession.

The learned Chief Justice also observed that the observations of the Judicial Committee in M.E, Moola Sons Ltd. v. Burjorjee 15 1932 P.C. 118 do throw some light on the subject particularly in the manner of approach to the construction of section. In the Privy Council case AIR 1932 P.C. 118, their Lordships of the Judicial Committee dealt with the construction of Section 49 of the the Registration Act and after examining the provisions observed:

There Lordships are satisfied that there is nothing in the section cited when properly construed to compel the Court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immovable property comprised in such document.

Here the agreement has been admitted throughout. Indeed, it was first put in by the appellant. Further the proceedings do not in any respect affect any immovable property. The immovable property affected by the agreement long since passed out of the picture, and the claim in these proceedings is a personal one for damages for breach of an admitted contract against an alleged undisclosed principal who denies he was a principal.

From this judgment, two principles definitely emerge (1) that there can be no objection to admit a document in evidence for other purposes unless it is the foundation of a judgment affecting immovable, property comprised in such document, or, in other words, the document on which the title claimed in the suit is based. Secondly there can be no objection to the admissibility of the document which is sought to be used as evidence of the personal claim e.g., for damages for breach of an admitted contract.

16. The Privy Council decision AIR 1932 P.C. 118 was also followed by A.N. Grover J. as he then was in Rattanchand v. Bhagirathram AIR 1958 Pun. 408 and he dissented from the view taken in Bahawal v. Amrik Singh AIR 1932 Lah. 655. The learned Judge observed after referring to the Privy Council decision AIR 1932 P.C. 118 that:

The ratio of this decision is that an unregistered document admitted in proceedings relating to a personal claim and not affecting immovable property may be taken into consideration.

Learned Counsel for the appellant, however, contends that the aforesaid decisions have no relevancy in the present case because it is not a suit for damages on account of breach of the contract. I am unable to agree with his contention. In Ex. 2, the defendants gave an undertaking that if they will commit any breach of the terms of the agreement, they will be personally liable, and since they did not pay the rent directly to Maharaja of Kishengarh and thus committed a breach of the terms of the

agreement and are therefore liable to indemnify the plaintiffs from whom the amount had been recovered under decree obtained against them. In the present suit, therefore, the liability of the defendants arises on account of the breach of the terms of the agreement. At any rate, the judgment in the present case will not affect the immovable property and the document is used only for the enforcement of a personal claim arising out of the breach of the terms of the agreement. In view of the decision of the Privy Council there can be no objection to the admissibility of Ex. 2 in the present suit. In the present case also the defendant Shankerlal has admitted the execution of Ex. 2. He has also admitted that he had to pay Rs. 2500/- as monthly rent of the Sumer Talkies to the plaintiffs. He has also admitted that he had started running the Cinema House from 7th August, 1948, and that he had taken the sub-lease on the same terms and conditions on which the plaintiffs had taken it from Maharaja Kishengarh. He has also admitted that he undertook to pay rent directly to Maharaja of Kishengarh because the plaintiffs had told him that they were living at Udaipur and therefore he should pay the rent to the Maharaja Sahib. He has also admitted that he had paid Rs. 20000/- towards rent to the plaintiffs On seeing Ex. 2, he stated that all its conditions were acceptable to him. He also admitted that the realised the income from the Cinema House as a sub-lessee during the period was running it. Thus practically all the allegations made in the plaint are admitted by defendant.

17. Learned Counsel for the appellant says that all the admissions made by the defendant in his statement are inadmissible in evidence because they refer to the terms of document which itself was inadmissible and, therefore, by virtue of Section 91 of the Evidence Act the questions relating to the terms of the document ought not to have been allowed to be put to the appellant. But in view of my conclusion, that the document is admissible in evidence for enforcing the personal claim arising out of the breach of the terms of the agreement, the admissions made by the defendant can be taken into consideration.

18. The only question which now remains to be considered is whether the suit is within limitation. The objection in this Court is solely based on the ground that if Ex. 2 for want of registration is not taken into consideration, then the present suit is, in substance, for recovery of rent, and having been instituted after the expiry of three years from the date when the rent became due is barred by limitation. In view of the finding that Ex. 2 is admissible in evidence and its terms can be lec ked into, this objection is not be tenable. But even otherwise, both on the express terms of the agreement Ex. 2 as also by implication, then the defendants undertook to directly pay rent to the superior landlord, they are bound to dandify the plaintiffs and the cause of action for such a suit would take place when the plaintiffs were dandified. The learned District Judge has dealt with this question in detail and has also discussed the law in this connection. The present case rightly falls within the ratio of the decisions of Hamendra Nath Mukerjee v. Kumarnath Roy ILR 32 Cal. 169 & Lachmi Missir v. Deoki Kuar AIR 1915 Cal. 370. The conclusion of the learned District Judge also finds support from the following decision Seetanna v. Narayanamurthia AIR 1920 Mad. 615 where it was held:

The cause of action on the breach of an indemnity clause in a contract arises when the party complaining of the breach is damnified. A mere breach of one of the terms in the indemnity clause does not start the cause of action at once; it is open to the party to waive the right and to wait till he is damnified.

Where there is a convenant to relieve a person from liability for debts contracted by the convenantor on behalf of the joint family of the parties by the convenantor undertaking to discharge them himself and where, in consequence of its breach, the other party has to meet a creditor's suit and discharge the obligation, the cause of action for damages for the breach arises only when the plaintiff has to discharge the creditor's decree. In Shatni Sarup v. Janaksingh : AIR1958All170 it was held that:

Where a conveyance contains a convenant by the purchaser to pay off an encumbrance on the property sold, the failure of the purchaser to do so may give rise two distinct causes of action. The failure of the purchaser to discharge the encumbrance within such time as is provided, expressly or by implication, in the conveyance entitles the vendor to bring an action to have himself put in a position to meet the liability which purchaser has failed to discharge, and, secondly, if as a result of that failure the vendor incurs loss as a consequence of the incumbrances recovering from the vendor the amount due under the mortgage, then the vendor is entitled to file a suit on the contract of indemnity.

In the first of these cases, limitation will run under Article 116 of the Limitation Act (or under Article 115 if the sale deed as unregistered) from the date upon which the purchaser ought to have paid off the mortgage, in the second it will, under Article 83, run from the date upon which the vendor is damnified. If the conveyance is registered the period of limitation is, under Article 83 read with Article 116, six years from the year from the date upon which the vendor is damnified.

It is immaterial in the latter case whether the conveyance contains an express convenant to indemnify, as, the purchaser's convenant with the vendor to pay off the incumbrances as a contract of indemnity.

I, therefore, concur with the finding of the learned District Judge that the present suit is within time and Article 83 read with Article 115 applied to it. It is not disputed that if Article 13 governs the case, then the suit is within limitation.

19. The result, therefore, is that the appeal is dismissed with costs.