

mistake corrected for the benefit of Wasek Ali or persons representing him.

We are not concerned with a consideration of the rights of the females. As already stated the purchaser of their rights has been held in a previous suit to have lost his rights by reason of the revenue sales, and both the plaintiff and the defendant were parties to that suit.

We are of opinion that the entire 7 annas $1\frac{1}{2}$ pies share constituting *hissya* No. 2 passed to the plaintiff at the sale for arrears of revenue, and this appeal will accordingly be dismissed with costs.

O. M.

Appeal dismissed.

CIVIL REFERENCE.

Before Mookerjee and Richardson JJ.

SHEIKH GALIM

v.

SADARJAN BIBI.*

1915

March 22.

Specific Performance—Contract to lend or borrow money—Suit for balance of mortgage money—Damages—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cls. 15, 16—Civil Procedure Code (Act V of 1908) s. 113, O. XLI, r 1.

A suit for specific performance of a contract to lend or borrow money is not maintainable.

Rogers v. Challis (1), *Sichel v. Mosenthal* (2), *Larios v. Gurety* (3) and *The South African Territories v. Wallington* (4) followed.

* Civil Reference No. I of 1915 by Sris Chandra Banerjee Munsif, Iswarganj, Mymensingh, exercising the powers of a Small Cause Court Judge, dated Dec. 4, 1914.

(1) (1859) 27 Beav. 175, 178, 179. (3) (1873) L. R. 5 P. C. 346, 354.

(2) (1862) 30 Beav. 371, 377. (4) [1898] A. C. 309.

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Nor would a suit to recover the balance of the mortgage money, or a suit for the rectification of the instrument be cognisable by a Court of Small Causes. (*Vide* clauses 15 and 16, Schedule II, Provincial Small Cause Courts Act, 1887.)

But a suit for damages for breach of contract is cognisable by a Court of Small Causes, if the amount is within its pecuniary jurisdiction.

REFERENCE under s. 113 of the Code of Civil Procedure.

On the 3rd December 1914 Mr. J. D. Cargill, District Judge of Mymensingh, forwarded to the Deputy Registrar of the High Court, Appellate Side, for the orders of the Hon'ble Court, the record of a reference made by Babu Siris Chandra Banerjee, Munsif of Iswargunj, on 4th December 1914, in Small Cause Suit No. $\frac{1399}{569}$ of 1914, Sheikh Galim v. Sadarjan Bibi.

The statement of the case by the Munsif was as follows:—

“The plaintiffs in this suit executed a mortgage by conditional sale in favour of the defendants in July 1912. They allege that though the mortgage was for Rs. 150 the defendants paid them Rs. 104 as consideration therefor, and not Rs. 150. They therefore sue to recover Rs. 46 being the sum not paid to them with Rs. 18 as interest and Rs. 11 as compensation, total Rs. 75 only.

The defendants have filed a written statement traversing the allegations made in the plaint, but at the time of trial the defendant No. 2, who is the husband of defendant No. 1 admitted that he did not pay the full amount of Rs. 150. He said that he paid Rs. 106 only. The question that arises is whether the plaintiffs can recover the sum not paid to them? It is argued on behalf of the plaintiff that while the defendants contracted to pay them Rs. 150, they are bound to pay that sum and so it is competent to them to bring a suit for recovery of the sum not paid.

On the other hand, it is evident that the defendants have not yet claimed to recover Rs. 150 from the plaintiffs on foot of the mortgage. The plaintiffs may take this objection when the defendants sue upon the mortgage, or they may sue to redeem the mortgage by saying that Rs. 104 was the consideration, which was paid. I am however of opinion that this suit is not cognisable by a Court of Small Causes. However as I entertain a reasonable doubt on this point, I beg to make a reference to

the High Court under Rule 1, Order XLVI of the Civil Procedure Code. The points on which the decision of the High Court is sought :—

Whether a mortgagee, can sue the mortgagor for the recovery of the balance of the mortgage money not paid to him ; and, if so, whether such a suit is cognisable by a Court of Small Causes. ?”

The parties were not represented in the High Court.

MOOKERJEE AND RICHARDSON JJ. This is a reference by the Munsif of Iswarganj in a suit instituted before him as a Small Cause Court suit.

The plaintiffs allege that out of Rs. 150, the nominal consideration for a mortgage by conditional sale in favour of the defendants, the plaintiffs received only Rs. 104. The suit was brought to recover the balance together with interest and Rs. 11 as compensation. When the case came on for hearing, one of the defendants admitted that the plaintiffs had not received the full amount of the consideration but only Rs. 106.

The questions referred by the Munsif are :

(i) Whether a mortgagor can sue for the recovery of the balance of the mortgage money not paid to him?

(ii) If so, whether such a suit is cognizable by a Court of Small Causes?

In regard to the first question, it is clear that the claim to which it refers can only be regarded as a claim for the specific performance of so much of an agreement to lend money as has not already been performed. Authority shows that such a claim is not maintainable.

In *Rogers v. Challis* (1), the defendant agreed to borrow the sum of £1,000 from the plaintiff on certain security. The defendant afterwards obtained better

(1) (1859) 27 Beav. 175, 178, 179.

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terms from a third person and refused to perform his agreement with the plaintiff. The plaintiff asked for specific performance which was refused. The Master of the Rolls (Sir John Romilly) said :

“It certainly is new to me, that this Court has ever entertained jurisdiction in a case where the only personal obligation created is, that one person says, if you will lend me the money I will repay it and give you good security, and the terms are settled between them. The Court has said, that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said, that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, I have sustained pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation, and a jury would easily assess the amount of the damage which the plaintiff has sustained. I express no opinion whether an action (that is, an action for damages) would or would not lie.”

In that case an attempt was made to compel a man to borrow money. In *Sichel v. Mosenthal* (1), an attempt conversely to compel a man to lend money was equally unsuccessful. The same learned Judge said : “It would be quite new to me to hear that this Court could specifically enforce a contract to lend money, and as to compelling a person to borrow money according to his agreement, that was the point which I decided in *Rogers v. Challis* (2). He went on to suggest that the proper remedy was an action for damages.

These cases were cited and approved by the Privy Council in *Larios v. Bonany Y Gurety* (3), where

(1) (1862) 30 Beav. 371, 377. (2) (1859) 27 Beav. 175, 178, 179.

(3) (1873) L. R. 5 P. C. 346, 354.

the agreement which it was sought to enforce took the form of aⁿ conditional sale. Their Lordships said: "The parties throughout the negotiation which led up to the contract were stipulating for advances of money on one side, and for security for those advances on the other; the pleadings state and admit an agreement of that nature; and it seems impossible to treat the cause of action in this case as anything more than the breach of a contract to honour the drafts of the respondent to the extent of the amount agreed to be advanced and placed to his credit. And, upon a full consideration of the arguments and the authorities, their Lordships are constrained to admit that the Court of Chancery would not have entertained a suit for the specific performance of such an agreement, but would have left the party aggrieved by the breach of it to seek his remedy, where he would find an adequate remedy, in a Court of Law."

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The case of the *South African Territories v. Wallington* in the House of Lords (1) is to the same effect.

Upon the principle so exemplified, it is clear that the present suit, regarded as a suit for specific performance of the contract between the parties, does not lie. Nor would such a suit or a suit for the rectification of the instrument be cognizable by a Court of Small Causes: Provincial Small Cause Courts Act, 1887, Schedule II, clauses (15) and (16). Both the questions referred must therefore be answered in the negative.

On the other hand, it is open to the plaintiff to sue in the Small Cause Court for damages for the breach of contract, provided the damages are within the pecuniary jurisdiction of the Court.

If the plaintiff is prepared to confine himself to a claim for damages within the jurisdiction of the

(1) [1898] A. C. 309. A.

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Court to award, he may be given an opportunity to make the necessary amendments in his plaint and the suit may then be proceeded with. Otherwise the plaint should be returned to him,

G. S.

APPELLATE CIVIL.

Before Fletcher and Teunon JJ.

1915
 March 23.

JOGENDRA CHANDRA BANERJEE

v.

PHANI BHUSHAN MOOKERJEE.*

Hindu Law—Stridhan—Inheritance—Female heirs.

Stridhan inherited by female heirs does not become the latter's stridhan. The female heirs take only a Hindu woman's estate in the property.

Sheo Shankar Lal v. Debi Sahai (1), *Prankissen Laha v. Noyanmoney Dassee* (2) and *Huri Doyal Singh Sarmana v. Grish Chunder Mukerjee* (3) referred to.

SECOND APPEAL by Jogendra Chandra Banerjee, the defendant No. 3.

This was a suit for establishment of title to the disputed lands and for confirmation of possession thereto. One Khantamani Debi was the original plaintiff in the case. She was the daughter of one Manikmani Debi, who possessed the disputed property as her stridhan. The plaintiff claimed the property as

* Appeal from Appellate Decree, No. 2911 of 1911, against the decree of Asutosh Banerjee, Subordinate Judge of Burdwan, dated July 27, 1911, modifying the decree of Gopeswar Banerjee, Munsif of Katwa, dated March 22, 1910.

(1) (1903) I. L. R. 25 All. 468 ; (2) (1879) I. L. R. 5 Calc. 222.
 L. R. 30 I. A. 202. (3) (1890) I. L. R. 17 Calc. 911.