PRIVY COUNCIL.

PRAMATHANATH MITRA

v.

GOSTHABIHARI SEN.

P. C.*
1931

Oct. 23, 27, 28;
Nov. 24.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Specific Performance—Agreement for lease—Agreement by part owner to let whole property—Specific Relief Act (I of 1877), s. 15.

In a suit for specific performance of an alleged contract to let a property, the plaintiff relied upon a document, signed only by the owners of a 12-anna undivided share, purporting to agree to a lease of the whole at a specific rent and on payment of a *selâmi*. The plaintiff had paid the *selâmi* to the signatories; he had also prepared and registered a *kabuliyat*, but the owners of the 4-anna share, who had not authorized the transaction, refused to accept it. The suit was against both owners. The plaint claimed the execution of a lease and possession, also Rs. 600 for loss of profits. The owners of the 12-anna share contended that the whole transaction was conditional upon the consent of the owners of the 4-anna share. The High Court affirmed a decree of the District Judge declaring that the plaintiff was lessee of the 12-anna undivided share upon the terms of the *kabuliyat*, and decreeing mesne profits on that share and a return of one-quarter of the *selâmi*.

Held that the suit failed as upon the evidence there was no concluded contract. But that, even if there had been a contract, the court could not order specific performance as to the 12-anna share, because the plaintiff had not relinquished all other claims as required by the proviso to section 15 of the Specific Relief Act.

Decree of the High Court reversed.

Appeal (No. 79 of 1930) by some of the defendants from a decree of the High Court (August 19, 1928) affirming a decree of the District Court of 24-Parganas (February 13, 1926) which reversed a decree of the Subordinate Judge.

The appellants were the owners of a 12-anna undivided share in three plots of land, the *pro forma* respondents Nos. 2 and 3 being the owners of the remaining 4-anna share. In circumstances which appear from the judgment of the Judicial Committee, respondent No. 1 instituted a suit against the appellants and the *pro forma* respondents, claiming an

**Present*: Lord Thankerton, Lord Salvesen and Sir George Lowndes.

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order for the execution of an *âmalnâmâ* in his favour as to the property in the terms of a *kabuliyat* which he had executed, possession, Rs. 600 as compensation for loss of profits and further relief.

The Subordinate Judge dismissed the suit on the ground that no contract was established.

The District Judge affirmed the finding that the owners of the 4-anna share had not authorized a lease; he was of opinion, however, that the owners of the 12-anna share having sanctioned the lease without reservation, the plaintiff was entitled to a decree against them declaring the plaintiff lessee of that share, also to a return of one-quarter of the *selâmi*, and mesne profits on the 12-anna share.

The High Court (Suhrawardy and Garlick JJ.) affirmed the decree of the District Judge.

Dunne K. C. (with him *Dube*) for the appellants. There was no contract concluded. Both parties believed that the consent of the other owners would be given. Upon the evidence, the consent of the owners of the 4-anna share was a condition to any agreement. Having regard to provisos (*1*) and (*3*) to section 92 of the Evidence Act, oral evidence to establish that condition was admissible: *Guddalur Ruthna Mudaliyar* v. *Kunnattur Arumuga Mudaliyar* (1), *Pym* v. *Campbell* (2). The finding of the District Court that there was a contract by the appellants was one of mixed fact and law, and was not binding: *Damusa* v. *Abdul Samad* (3). But even if there was a binding contract, it was an indivisible contract as to the whole property, and did not warrant the decree made. The suit was really one for specific performance, and governed by the Specific Relief Act, 1877. As held by the High Court, sections 14, 16, 17 did not apply; further section 15 did not apply as the plaintiff had not relinquished all other claims as required by the proviso: *Graham* v. *Krishna Chunder Dey* (4). The

(1) (1872) 7 Mad. H. C. R. 189, 196.
(2) (1856) 6 E. & B. 370; 119 E. R. 903.
(3) (1919) I. L. R. 47 Calc. 107; L. R. 46 I. A. 140.
(4) (1924) I. L. R. 52 Calc. 335; L. R. 52 I. A. 90.

suit was upon an alleged indivisible contract as to the whole property; the decree was invalid as it was based upon a contract not alleged: *Official Trustee of Bengal* v. *Krishna Chandra Mozumdar* (1).

Hyam for the first respondent. The appellants contracted in terms as to the whole property. The evidence does not show that the appellants made consent by the other owner a condition; evidence to that effect was not admissible under section 92. Under section 108 A (*a*) of the Transfer of Property Act the appellants were bound to tell the respondent of the defect. In any case, the District Judge found that the appellants contracted unconditionally, and his finding was binding in Second Appeal: *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (2), *Nafar Chandra Pal Chowdhury* v. *Shukur Sheikh* (3). Even if the document signed by the appellants was not a contract, the *kabuliyat* was accepted by the appellants and its terms constituted a contract. The suit was one for specific relief but not for specific performance. Upon the principles of justice, equity and good conscience, the plaintiff was entitled to a decree in respect of the interest the appellants had: Woodfall's Landlord and Tenant, 22nd edn., p. 109; *Burrow* v. *Scammell* (4). If the suit was governed by the Specific Relief Act, there was nothing to disentitle the plaintiff to a decree under section 15 in respect of his 12-anna share.

Dunne K. C., in reply.

The judgment of their Lordships was delivered by

LORD SALVESEN. This is an appeal from a judgment and decree, dated the 16th August, 1928, of the High Court of Judicature at Fort William in Bengal, which affirmed a judgment and decree, dated

(1) (1885) I. L. R. 12 Calc. 239, (245); L. R. 12 I. A. 166 (169).
(2) (1890) I. L. R. 18 Calc. 23; L. R. 17 I. A. 122.
(3) (1918) I. L. R. 46 Calc. 189; L. R. 45 I. A. 183.
(4) (1881) 19 Ch. D. 175

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13th February, 1926, of the Additional District Judge of Alipore, who had reversed the judgment and decree, dated 21st August, 1924, of the Subordinate Judge of Alipore.

The facts of the case may be very shortly stated. The suit relates to three plots of land of the total area of 6 *bighâs*, situated not far from Calcutta. The appellants, who are known as the Mitras of Shyambazar, and are hereafter referred to as Mitras, have a 12-anna undivided share in these lands. The defendants-respondents, hereinafter referred to as Basus, own a 4-anna share. The appearing respondent, Gosthabihari Sen (hereinafter called the respondent), was desirous of obtaining a lease of the whole lands, and commenced negotiations for this purpose in the beginning of 1919 by sounding the appellants through their representative as to their willingness to lease their interests in the lands. Nothing came of these primary negotiations, but, in January, 1920, the appellant again called at the house of the Mitras. According to his own evidence, he was then informed that settlement could only be made with the consent of those who represented the Basus' 4-anna share. At the same time, the Mitras indicated the terms upon which they for their part would be disposed to agree to such a lease. Within eight or ten days after this, the respondent, according to his own evidence, saw the representatives of the Basus, who told him that they had given their consent to the proposed lease and had instructed the manager of the Mitras accordingly. He then called on the Mitras on the 13th January, and the result of his interview with them was a document in the following terms :—

A *be-meyâdi* (without any fixed period) settlement with Gosthabihari Sen in respect of the *jamâ* (tenancy) at Bonehughli formerly held by Jogendranath Bagchi and at present in the *khâs* possession of the estate is approved on the following terms :—(1) A total sum of Rs. 300 should be paid as *selâmi* (bonus) for this *jamâ* ; (2) the annual rent is fixed at Rs. 60 ; (3) the lessee would not be entitled to alienate this *jamâ* at any time on any ground whatever ; if he does, the *jamâ* would become *khâs* ; (4) if the land is acquired by Government, the proprietors would get a moiety of the compensation

money; (5) the lessee would not be authorised to make a permanent or *kâyemi* settlement with, or to grant a long lease to, any person. 28th September, 1926.

(Sd.) P. MITRA.
(Sd.) B. B. MITRA.

13-1-20.

It will be observed that this document was not signed by the respondent and that it deals with the whole lands, of which it was known to the parties at the time that the Mitras only held a 12-anna undivided share. Yet, on the terms of this document alone and without reference to the evidence, which gives no support to his conclusion, the District Judge has held that it was a "final contract" and that the Mitras thereby undertook a binding obligation on behalf of themselves and of the other co-sharers that the respondent was to obtain a lease of the whole lands on the terms briefly set forth in the document itself. Their Lordships are clearly of opinion that, looking to the state of mind of both parties at the time, such an obligation cannot be implied. On the one hand, the Mitras had clearly stated from the first that they would only grant a lease to the respondent if the consent of the other co-sharers was obtained, and, on the other hand, the respondent was at the time under the belief that he had already secured the assent of those co-sharers to the proposed lease. It is incredible, under these circumstances, that the appellants should either have been asked or agreed to bind themselves to an unconditional contract of lease of lands which in part did not belong to them. On the other hand, the document is entirely consistent with the attitude of the appellants that they were adjusting the terms of the proposed lease on the footing that the other co-sharers in the lands had already consented, or at all events were prepared to consent, to a settlement on similar terms. Moreover, it was throughout admittedly in the contemplation of both parties that a formal *kabuliyat* would be drawn up as between the respondents and all the co-sharers in which the full terms of the proposed lease would be embodied. In fact, an oral agreement to this effect was entered

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into at the same interview. Thus it would be more proper to describe the document as heads of a proposed agreement than as a final contract, as it has been interpreted by the District Judge.

Following on the signature of the Mitras to the document in question, the respondent paid Rs. 300, which was to be the *selâmi* in respect of the whole lands. This is easily explained on the footing that the respondent believed that he had already obtained the consent of the other owners and that the whole matter of the proposed lease had been substantially arranged with all the parties concerned.

In terms of the arrangement made as above set forth the respondent on the 15th January had a draft *kabuliyat* prepared and sent to the appellants' representatives. This draft was revised by them and was subsequently registered by the respondent. This draft contains numerous additions to the heads of agreement of 13th January, and it is addressed not to the Mitras alone, but to the other co-sharers. So far as the Mitras were concerned, the plain inference from the terms of the *kabuliyat* is that no lease could be concluded without the signature of the other co-sharers, to whom along with them it was addressed. On the other hand, the respondent had previously ascertained that his belief that the Basus would join in the proposed lease was unfounded. On the 14th January, 1920, he called upon the Maharaja, who represented one of the co-sharers, and showed him a copy of the terms. He did not, however, obtain the signature of the Maharaja. Notwithstanding this, and apparently in the hope that he might yet induce the Maharaja to accept the terms provisionally arranged with the Mitras, he registered the *kabuliyat* on the 24th January, and thereafter again called on the Maharaja on the 3rd February to induce him to accept the *kabuliyat*, but failed to get him to agree to its terms. A third attempt had the same negative result. On the 5th March, 1920, he caused his solicitor to write to the appellants to the effect

that they and the other co-sharers had granted a permanent lease of the property in question and that the Mitras had undertaken to grant the usual *âmalnâmâ* in his favour and undertook to get the same signed and executed by the Maharaja and Manmatha on behalf of the Basus. This was the first time, so far as the evidence discloses, that this attitude was taken up on his behalf, and it was not adhered to in the plaint of the suit which he raised two years later. This plaint proceeds on the footing that it had been agreed by all the owners of the property in the beginning of January, 1920, that they should grant him a lease of the lands in question and the suit was accordingly directed against all the co-sharers. He accordingly prayed :—

(*a*) That the defendants be ordered to execute an *âmalnâmâ* in favour of the plaintiff corresponding to the terms of the said *kabuliyat* executed by the plaintiff and annexed hereto.

(*b*) That the defendants do make over possession to the plaintiff of the said lands and premises.

The leading issues of the case, as adjusted by the Subordinate Judge, were :—

2. Whether all the defendants agreed to the proposal of the plaintiff to take a lease of the land in suit ?

3. Had the defendants Nos. 1-3 any power or authority to make settlement with the plaintiff or to act in that behalf ?

4. Was there a valid agreement to lease between the parties ? If so, what are its terms and is it binding on all the defendants ?

All these issues were found against the plaintiff by the learned Subordinate Judge, and 2 and 3, which are issues of fact, have been found against the respondent by the District Judge, whose findings of fact are conclusive.

On the fourth issue, which their Lordships think was at all events in part an issue of law, they are in agreement with the learned Subordinate Judge. The whole actings of the parties, and the conduct of the respondent in particular, are wholly inconsistent with the view that is now put forward and was sustained

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by the District Judge and the High Court, that the appellants undertook a binding obligation to the respondent to lease their own 12-anna share in the lands to him irrespective of what action the other co-sharers might take. The point has never been raised in the pleadings of the parties and was only suggested in argument when the respondent's pleader realised that the attitude taken up in the plaint was incapable of proof. The result is that there was no concluded contract of lease with respect to the land in question, the whole negotiations having proceeded on the footing that all the owners of the property would consent to the lease. As the consent of the Basus was never obtained, the negotiations fell to the ground and the Subordinate Judge was right in dismissing the suit.

Even on the assumption that the interpretation put upon the document of 13th January were well founded, their Lordships would have been unable to sustain the view of the learned District Judge and of the High Court, that the respondent was entitled to the relief which has been given him. The suit as framed is obviously one for specific performance and not for a mere declaration of title. The plaintiff prays that the defendants be ordered to execute an *âmalnâmâ* in favour of the plaintiff, corresponding to the terms of the *kabuliyat* annexed to the plaint. That cannot be done as the *kabuliyat* is addressed not merely to the appellants, but to the other two defendants, who have never accepted it. They agree with the learned Judges of the High Court that sections 14, 16 and 17 of the Specific Relief Act have no application to the present case. Section 15, however, is in these terms :—

> Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

And it is upon this that the learned Judges of the High Court proceeded.

The proviso to the section, however, has been overlooked. The plaintiff has not relinquished all claim to further performance and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendants. On the contrary, he claimed in his plaint Rs. 600 as loss of profit already suffered and he has obtained a decree for the return of that share of the *selâmi* which enured to the 4-anna share. The learned Judges who allowed the appeal on the ground that an important question of law was involved stated this as one of the questions which they thought might properly be submitted to this Board, and their Lordships have thought it right, although in the view that they take of the case it is not necessary for their decision, that their opinion should be recorded.

On the whole matter, their Lordships will humbly advise His Majesty that the appeal should be sustained and the judgments of the High Court and the District Court recalled with costs, and the judgment of the Subordinate Judge affirmed. The first respondent must pay the appellant's costs of the appeal.

Solicitors for appellants: *Watkins & Hunter.*

Solicitors for respondent No. 1: *Clarke, Rawlins & Co.*

A. M. T.