

## ORIGINAL CIVIL.

Before Ameer Ali J.

HARISHANKAR PAL.

v.

SARADAPRASAD DAS.\*

1931.

June 18, 23.

*Vendor and Purchaser—Sale of land—Suit by purchaser for specific performance—Reference as to title—Distinction between “showing” and “making” a good title—Enquiry as to the time when good title shown—English practice—Costs.*

Where, in a suit by the purchaser for specific performance of a sale of land, a decree was passed, directing an enquiry as to whether the vendor “can make out a good title,” and, if so, directing him to convey,

*held* that the question of establishing when a good title is shown is material to the matter of payment of interest by the purchaser and the liability for the costs of the reference as between vendor and purchaser. The ordinary rule is that the purchaser pays interest from the point at which a good title was shown and costs are given against the vendor up to that time.

*Held*, further, that it is desirable to follow the English practice of including in the order directing the *principal enquiry* (i.e., as to whether a good title can be made) a *secondary enquiry* (i.e., as to the time at which a good title was shown).

*Hyde v. Wroughton* (1) referred to.

*Held*, also, that if such secondary enquiry is not asked for by the purchaser at the time of the original order, such secondary enquiry should not be ordered after the conclusion of the main enquiry except at the cost of the party who requires it.

The facts will appear fully from the judgment.

*B. N. Ghosh* for the plaintiff.

*S. M. Bose* for the defendant, Saradaprasad Das.

*Cur. adv. vult.*

AMEER ALI J. The report of the Official Referee as to the title of No. 2, Shashibhooshan Soor’s Lane is confirmed.

The outstanding question is as to the costs of the reference as to title.

\*Application for confirmation of report by the Official Referee in Suit No. 1730 of 1923.

The short facts are as follows :—

The first defendant contracted to sell the property in question, by certain terms of settlement, dated the 6th April, 1923, subject to approval of title by the plaintiff's solicitors and free from all encumbrances, for a price of Rs. 38,000.

On the 2nd May, 1923, the first defendant gave notice to the plaintiffs that the contract would be rescinded failing completion within 10 days.

On the 9th June, 1923, the plaintiffs filed the present suit for specific performance.

On the 26th March, 1926, a decree was passed directing an enquiry as to whether the first defendant "can *make out* a good title" to the premises and, if so, ordering the defendant to convey. The plaintiff obtained the costs of the suit, the consideration of all further directions and the subsequent costs of the suit were reserved.

The enquiry proceeded from the 22nd March, 1927, and resulted in the report in favour of the title dated 17th April, 1931.

The report itself shows that, during the enquiry, much was done by the defendant, either to remedy defects of title or to satisfy the requirements as to title by the plaintiffs. This appears from the report itself.

The difficulty in this case, in my opinion, arises from the wording of the decree "*make out* a good title." This follows the wording of clause (c) of the plaint.

The ordinary meaning of the expression "make out" is to establish or demonstrate or show. The enquiry which should have been directed was whether the vendor "can *make* a good title." See section 1366 of Fry on Specific Performance. There is a marked distinction [which is of importance in this case], between "*making*" and "*showing*" a good title. The distinction is explained in sections 1384 to 1390 of Fry on Specific Performance. "A good

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“title is *shown* when all matters essential to the title  
 “are stated in the abstract; it is *made* when those  
 “matters are proved.”

The question of showing a good title and as to when such title is shown is material in connection with the payment of interest by the purchaser and liability for costs of the reference. The ordinary rule is that the purchaser pays interest from the point at which a good title is shown and that costs are given against a vendor up to that time. Section 1383, Fry on Specific Performance.

It is for this reason that, according to English practice, the order for reference directing the main enquiry as to whether a good title can be made, also as a rule directs a secondary enquiry as to the time at which a good title was shown. According to the English practice, the direction for the latter enquiry should be made in the original order and the Court has refused to order an enquiry on this point subsequent to the certificate as to title: See *Hyde v. Wroughton* (1), on the ground of the additional delay and expense which might have been avoided by including such direction in the original order.

I have no doubt that, at the time of obtaining the decree, the legal advisers of the parties had not in mind the above considerations and were under the impression that the reservation of costs was adequate. The wording of the order for reference would no doubt help to confirm that impression.

When, however, the matter comes before the Court for adjudication as to the costs reserved, the difficulty becomes at once apparent.

I indicated at an early stage of the hearing, that I was not competent to decide the question and that I could not myself on the materials before me come to a conclusion as to the stage up to which the vendor should pay costs. I indicated that, if this matter is to be investigated, it must be the subject

(1) (1818) 3 Madd. 279; 56 E. R. 512.

matter of an enquiry by the officer who held the main enquiry.

Mr. S. M. Bose, in objecting to this course, relies on the absence of the necessary direction in the original decree and upon the case above cited. Although the English practice does not necessarily apply here, the common sense of the ruling is apparent, and I consider that in future such directions should be included in the original decree or order or otherwise refused.

Mr. B. N. Ghosh was not inclined to ask me to order further enquiry, but argued that I must assume that a good title was not made until the date of the report and that the onus is upon the vendor to establish the contrary.

This argument is clearly based upon a disregard of the distinction between making and showing a good title.

Mr. B. N. Ghosh has asked me to look at the minutes of the reference with a view to coming to conclusion upon the point at issue. I have done so, but they serve only to confirm the view already expressed that I am unable on this application to arrive at any satisfactory conclusion.

The question which remains is whether I should, in this case, depart from what I have already indicated is, in my opinion, the proper rule and whether I should at this stage allow an enquiry as to when a good title was shown. It appears to me that were I to do so, it will involve the parties in considerable expense which might have been avoided if the enquiry had been directed in the first instance. It would not be right to burden the vendor with this expense. This omission was that of the purchaser.

In the circumstances, I am only prepared to order an enquiry as to "*when a good title was shown*" at the plaintiff's cost. If the plaintiff desires to have this enquiry upon these terms I am prepared in this case to make the order.

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Mr. B .N. Ghosh, counsel for the plaintiff, having informed me that his clients desire to have the enquiry upon the terms stated I order that the Registrar do enquire and report as to "*when a good title was shown*" by the vendors. This enquiry will be at the purchasers' costs in any event.

The question of the apportionment of the costs of the main reference will be dealt with upon the submission of the second report.

G. K. D.