

## APPELLATE CIVIL.

Before S. K. Ghose J.

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 May 20.

NAJIBULLA SARDAR

v.

HARIMOHAN MITRA.\*

*Specific Performance—Suit for recovery of account papers—Contract—Alternate relief for damages—Value less than Rs. 500—Second Appeal to High Court—Damages—Specific Relief Act (I of 1877), ss. 10, 25 (b).*

Where a suit was brought for the recovery of certain account papers of a *darpatni mehál* that had to be prepared on the basis of a contract contained in a registered *kabuliyat* and, failing such recovery, the plaintiff claimed a compensation of Rs. 100 ; on a preliminary objection that a Second Appeal did not lie, as the suit was of the nature cognisable by a court of small causes and the value was less than Rs. 500,

*held* that it was not an ordinary money suit of that value but one for specific performance of contract within the meaning of section 10 of the Specific Relief Act and consequently not cognisable by a court of small causes.

*Held*, further, that, assuming that this was a contract running with the land, the defendant could not be ordered to perform specifically the contract for the preparation of a set of account papers relating to the *mehál*, the case coming within the provisions of section 21 (b) of the Specific Relief Act.

*Held*, in addition, that damages could not be ordered as none had been incurred.

*Bhagwan Das v. Surendra Narain Singh* (1) followed.

SECOND APPEAL by the defendant.

The facts of the case and arguments of counsel appear fully in the judgment.

*Nasim Ali* and *Narendranath Chaudhuri* for the appellant.

*Bijankumar Mukherji*, *Rupendrakumar Mitra* and *Dheerendranath Ghosh* for the respondent.

S. K. GHOSE J. The plaintiff, who is the *patnidár*, sues defendant, who is the *darpatnidár*, for recovery of *thoká*, *shehá*, *jamáwâsil* and

\*Appeal from Appellate Decree, No. 1915 of 1929, against the decree of Phanibhushan Banerji, First Subordinate Judge of Hooghly, dated Feb. 22, 1929, affirming the decree of Manmohan Banerji, First Munsif of Uluberia, dated Jan. 31, 1927.

*hastabud* papers of the *darpatni mehâl* for the years 1329 to 1332, on the basis of a contract contained in a registered *kabuliyat* dated the 19th Chaitra, 1286. Failing such recovery, plaintiff claims Rs. 100 as compensation. The defence mainly is that the contract is not binding on the defendant and that the plaintiff is not entitled to claim specific performance. The courts below have agreed in finding in favour of the plaintiff. The trial court made an order on the defendant "to make over the "claimed papers to the plaintiff within 30 days" and failing that the plaintiff would recover Rs. 60 as compensation. This decree was affirmed by the lower appellate court. The defendant now comes in Second Appeal.

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There is a preliminary objection that the Second Appeal does not lie, as the suit was of the nature cognizable by a court of small causes and the value was less than Rs. 500. It is contended that it is really a suit for recovery of moveables coming under section 10 of the Specific Relief Act. But it does not seem to me to be an ordinary money suit of that nature. The plaintiff bases his claim upon a contract, which is of an executory character. I consider that this is really a suit for specific performance of contract and consequently is not cognizable by a court of small causes. "As a "general rule, the proper remedy of a person seeking "to enforce the observation of a positive contract is "an action for specific performance, as distinct from "the enforcement of a negative contract by "injunction. As a further distinction, it should be "noted that an action for specific performance is "appropriate only to the enforcement of the "obligations of an executory as distinguished from "an executed contract. For this purpose an "executory contract is an agreement which is not "intended between the parties to be the final "instrument regulating their mutual relations "under their contract. An executed contract, on the

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“contrary, is a contract in which all has been “already done to settle finally the relative positions “of the parties.” (See Halsbury’s Laws of England, Vol. 27, article 3, page 3.) Further; “an action” for delivery of a specific chattel “differs from an action “for specific performance, since it is based on an “allegation, not that a contract to deliver has not “been performed, but that the chattel is the property “of the plaintiff and is being wrongfully detained by “the defendant.” (*Ibid.*, page 5.) This latter description cannot apply to the prayer in this case. This is clear from a consideration of the contract itself, to which I shall presently refer. But, meanwhile, I may say that, in the view that I have taken, the preliminary objection that no Second Appeal lies fails.

Then coming to the appeal on its merits, the point that has been raised is that the plaintiff is not entitled to claim specific performance of the contract. This contract, as mentioned already, is contained in a *kabuliyat* or *pâtâtâ* of the 15th Chaitra, 1286. The recital shows that certain reservations were made with regard to certain classes of land. It is provided that the *darpatnidâr* would not enter into any *kâyemi bandobast* with any person, that he would not interfere with *debattar* lands or lands held in *khâs*, and then the stipulation is: “we shall submit “to you (*patnidar*) the *jamâwâsil-baki* papers, *etc.*, “and *lawâzimâ* papers of the *mouzâ*; if we do not “submit the same you will realise them according to “law.” There has been some argument as to whether such a contract is one running with the land. It may be assumed that it is. It is also not disputed that the defendant, who is a private purchaser from an auction purchaser of the original *patnidâr’s* interest, had notice of the stipulation contained in the document of 1286. Now what the courts have directed the defendant to do is to make over the account papers mentioned by the plaintiff within 30 days. One obvious difficulty is in finding out what

these papers are and who is to judge whether any papers, which the defendant might choose to make over in compliance with the decree, are the correct papers or not. I had at first thought that it might be the case that the defendant was already in possession of the claimed papers and that there was no difficulty as to their identity. But this is not at all clear from the pleadings of the parties and, although the defendant admits that he has got certain account papers, it does not follow from the evidence, nor has it been found, that the particular papers, which plaintiff wants, and in respect of which he has got a decree, are already in the defendant's possession. Therefore, the decree amounts to this, that the defendant has been ordered to perform specifically the contract for the preparation of a set of account papers relating to the *mehál*. A case like this is covered by a previous decision of this court in the case of *Bhagwan Das v. Surendra Narain Singh* (1). There it was held that the contract was one clearly coming within section 21 (b) of the Specific Relief Act, being a contract of which from its very nature the court could not enforce specific performance. This case was brought to the notice of the learned Subordinate Judge in the court below and he distinguished it on the ground that, in that case, the contract had not been enforced for 50 years and a plea of waiver was raised. But that makes no difference. The *ratio decidendi* was what I have mentioned above. I do not see how that difficulty can be got over. Then the other point is whether, failing to recover the papers, the plaintiff is entitled to a decree for damages. This was also considered in the case mentioned above, and it was pointed out that damages could not be ordered because none had been incurred. The plaintiff had still to show that he had actually incurred some damage by reason of non-recovery of papers. It would be then for him

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to sue for damages. I do not see why that reason should not apply here. The fact that previously plaintiff obtained decrees against the defendant's predecessor-in-interest makes no difference. Defendant himself never complied with this part of the contract, nor was there any previous decree against him, nor has any plea of *res judicata* been urged in this case.

For all these reasons, I consider that the courts below were wrong in decreeing the plaintiff's claim. The Second Appeal must succeed. The judgment of the lower appellate court is reversed and the suit will stand dismissed with costs of all the courts.

This is not a fit case, in which leave should be granted for presenting an appeal under the Letters Patent. The prayer for such leave is accordingly refused.

*Appeal allowed: suit dismissed.*

G. S.