

ASHTAMURTHI v. SECRETARY OF STATE FOR INDIA. used may not be (as a term of art) altogether appropriate, but the section appears to us clearly to refer to cases in which Government have a partial or limited interest in a forest along with a private individual, and this is precisely the state of affairs which on the terms of the lease put before us exists in this case.

We think then that the Government were jointly interested along with plaintiff in the forest within the meaning of section 33 of the Act.

The appeal is dismissed with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.*

1889.  
Oct. 26.  
1890.  
Feb. 14.

KANNAN AND ANOTHER (DEFENDANTS NOS. 8 AND 9), APPELLANTS,

v.

KRISHNAN AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 7),  
RESPONDENTS.\*

*Registration Act—Act III of 1877, s. 48—Transfer of Property Act—Act IV of 1882, s. 54—Oral agreement for sale of land—Subsequent conveyance with notice—Delivery of possession—Priority—Specific Relief Act—Act I of 1877, ss. 27, 42—Specific performance—Declaratory suit—Consequential relief.*

Plaintiff being in possession of certain land as an incumbrancer under a registered instrument agreed orally with the mortgagor in 1835 to purchase it. The mortgagor subsequently sold the land to others who took the conveyance which was registered with notice of the plaintiff's mortgage and of the oral agreement with him. Plaintiff now sued for a declaration that the conveyance was not binding on him and for specific performance of the oral agreement:

*Held*, (1) that the suit was not bad for want of a prayer for delivery up, and cancellation of the conveyance;

(2) that the plaintiff's possession under his incumbrance together with the agreement to sell was equivalent to delivery of possession within the meaning of Registration Act, s. 48;

(3) that the plaintiff was entitled to have the oral contract specifically enforced notwithstanding the subsequent registered sale.

SECOND APPEAL against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 351 of 1887, confirming the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in original suit No. 44 of 1886.

Suit for a declaration that a registered sale-deed, dated 19th September 1885, and executed by defendants Nos. 1 to 7 to defendants Nos. 8 and 9 was not binding on the plaintiff, and for specific performance of an oral agreement entered into on 2th January 1885 for the sale by defendants Nos. 1 to 7 to the plaintiff of the land purported to be conveyed by the instrument of 19th September 1885. The plaintiff was in possession of the land in question as an incumbrancer (whether o'tidar or kanomdar) under a registered instrument, dated 12th October 1867. Defendants Nos. 8 and 9 had notice at the date of the sale to them, of both the instrument of October 1867 and the oral agreement for sale of 27th January 1885.

The instrument of 12th October 1867 was as follows :—

“ Kanom deed executed, on the 27th Kanni 1042, or 12th October 1867 to Ammalil Kytheri Krishnan, of Vattoli desom, Kannanam amshom, Kottayam taluq, residing in Kanakath house by Matayatti Pakra of Kottayam Nagaram. The loan obtained by me from you to-day to liquidate my tarwad debts, &c., is Rs. 2,312-8-0. For these Rs. 2,312-8-0, properties Nos. 1 to 9 mentioned below, which are my jennm, are granted to you on kanom. Holding the above-mentioned lands and paying the revenue, you will take the remaining income on account of interest on the said kanom amount. For the security of the kanom the jennm deeds of properties Nos. 1 to 5 are herewith given. As I have filed the jennm deeds of property No. 7 in suit No. 341 of 1866 on the file of the District Munsif's Court of Chavasheri, that and the document in respect of No. 8 are not herewith given. The marupats obtained on giving these lands to tenants on simple kozhu right are also herewith given. Knak to tenants is also given so that the tenants who hold the property may attorn with you, that this year's rent may be paid to you, and that in future you may do as you please. This and all other documents should be returned on paying of the kanom amount.”

The further facts of the case appear sufficiently for the purpose of this report from the judgment of Muttusami Ayyar, J.

The Subordinate Judge passed a decree as follows :—

“ It is declared that the jennm deed executed by defendants Nos. 1 to 7 to the defendants Nos. 8 and 9 on 19th September 1885, in respect of the plaint lands, is not binding on plaintiff or on the plaint lands, and it is further ordered and decreed, that on

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plaintiff paying the balance purchase money, viz., Rs. 2,394 into Court for payment to defendants Nos. 1 to 7 within six months from this date, the defendants Nos. 1 to 7 do execute to him (plaintiff) a deed conveying to him the plaint lands in jenm, and that the defendants do pay plaintiff's costs."

The District Judge on appeal confirmed this decree.

Defendants Nos. 8 and 9 preferred this second appeal.

Mr. *Wedderburn*, Mr. *Ramasami Raju* and *Sankaran Nayar* for appellants.

On the pleadings the Lower Courts have granted relief to which the respondents were not entitled. Defendants Nos. 1 to 7 were not entitled to the decree which has been passed. Moreover the registered sale-deed of September 1885 remains unaffected by the decree though it is impeached as fraudulent in the pleadings. In the view taken by the Courts it could have been cancelled, accordingly the plaint praying for a declaratory decree and not for this consequential relief was bad under Specific Relief Act, s. 42, and the suit should have been dismissed. This is not a suit by an *ottidar* to enforce his right of pre-emption for he does not allege any tender by him to the purchasers of the sum paid by them *Vasudevan v. Keshavan*(1). But in fact the document does not purport to be an *otti*—it is a mere *kanom* without a provision for payment of rent. See *Wigram's Malabar Law*, pp. 100-132, and the Lower Courts were not entitled to employ the alleged *enaks* or notices by the mortgagor to third parties to show that the document was what it does not purport to be. See Evidence Act, ss. 94, 95 and 98.

As to the transaction of January 1885, the plaint refers to it as an agreement to sell while the Lower Courts seem to regard it as a sale. If it was a sale, it is invalid under Transfer of Property Act, s. 54; if it was an agreement for sale, then the instrument of September 1885 has priority under Registration Act, s. 48, in spite of the finding as to notice, for the words "accompanied or followed by delivery of possession" cannot mean merely accompanied by possession and so apply to the case of a sale to one already in possession.

(HANDLEY, J.—Cannot the Court, in spite of Registration Act, s. 48, set aside the subsequent conveyance?)

The object of the Registration Acts must not be defeated. See *Nallappa v. Ibram*(1), *Madar v. Subbarayalu*(2), *Muthanna v. Alibeg*(3), *Kirty Chunder Haldar v. Raj Chunder Haldar*(4), and see per Hutchins, J., in *Kadar v. Ismail*(5). The case of *Narasimulu v. Somanna*(6) proceeded on the finding as to fraud not notice: the Act says I may buy with notice.

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[It was also argued that the agreement of January 1885 was not valid by Malabar Law.]

*Bashyam Ayyangar* for respondent No. 1, the plaintiff in the suit.

Specific Relief Act, s. 42, does not apply, for in fact consequential relief is asked for in the prayer for the execution of a conveyance to the plaintiff; the delivery up and cancellation of the prior instrument would not have been appropriate relief.

As regards the transaction of January 1885 it is proved that it was an agreement to execute a conveyance, so no question arises under either Registration Act, s. 48, or Transfer of Property Act, s. 54. The rulings cited amount only to this, that the mere fact of notice does not take away the priority given by registration; but here the sale to defendants Nos. 8 and 9 was fraudulent within the meaning of the Transfer of Property Act, s. 53. Specific Relief Act, s. 27, is not applicable where the plaintiff is wanting in *bona fides*, or contracts with notice of prior rights. As to Registration Act, s. 48, see *Bhandu Rajaram v. Damaji Jivaji*(7).

(HANDLEY, J.—The words in section 48 are agreement or declaration.

MUTTUSAMI AYYAR, J.—Probably that section has to be read with Specific Relief Act, s. 27, and the question arises how far they affect each other.

Mr. Wedderburn.—Section 4 of the Specific Relief Act saves the Registration Act).

In the Act of 1866 it was expressly provided that no effect was to be given to an oral agreement such as that now in question, but the Act of 1871 introduced the phrase as to delivery of possession in section 48. If that section has to be applied here I say that

(1) I.L.R., 5 Mad., 73.

(2) I.L.R., 6 Mad., 88.

(3) I.L.R., 6 Mad., 174.

(4) 22 W.R., 273.

(5) I.L.R., 9 Mad., 119.

(6) I.L.R., 8 Mad., 167.

(7) 6 Bom. H.C.R., 59.

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there was delivery of possession in the same sense as when by a conveyance to a lessee his tenancy is terminated, and his possession becomes that of a vendee.

(HANDLEY, J.—The policy of the Act has to be considered.)

Yes: but the finding as to notice alters the matter with reference to "delivery." Compare the cases of gifts held to be valid from the date of such delivery as the subject-matter admits of.

As to the document of October, 1867 it is clearly an otti and not a kanom. See Ramachendrier's Malabar Law, p. 97. Moreover there is the fact that no rent was reserved

(MUTTUSAMI AYYAR, J.—This matter is of the less importance as it was the plaintiff's own case that the right of pre-emption had at the date of the suit merged in the agreement).

*Govinda Menon* for respondents Nos. 2—8, defendants Nos. 1 to 7 in the suit.

*Mr. Wedderburn* in reply.

MUTTUSAMI AYYAR, J.—This was a suit for the specific performance of a contract of sale, and the land agreed to be sold had been in the plaintiff's possession under exhibit B from October 1867. The contract was oral and it was made on the 27th January 1885, and the price agreed on was Rs. 5,000 inclusive of the amount due under exhibit B, and a sum of Rs. 293-8-0 was paid as an advance at the date of the contract. Defendants Nos. 1 to 7 are the jenmis or owners of the land in dispute, and defendants Nos. 8 and 9 purchased it for Rs. 5,000 under a registered sale-deed on the 19th September 1885 (exhibit I). Exhibit B, which evidences the prior mortgage in favor of the plaintiff, is also a registered document, and it is found by the Courts below that defendants Nos. 8 and 9 had, at the date of their purchase, notice of document B and of the oral contract of sale. The Lower Courts were also of opinion that document B evidenced an otti, and not a mere kanom as suggested by defendants Nos. 8 and 9, and decreed the claim declaring the sale in favor of defendants Nos. 8 and 9 void as against the plaintiff and directing defendants Nos. 1 to 7 to execute a conveyance in his favor on receipt of the balance of the purchase money. Defendants Nos. 8 and 9 have preferred this second appeal.

It is first urged on their behalf that exhibit B evidences, on its true construction, only a kanom; but it would not be necessary to consider that question if the prior oral contract should prevail

against the subsequent sale as held by the Courts below. The main question for decision therefore is whether the oral contract ought to be specifically enforced, notwithstanding the subsequent registered sale in favor of the appellants.

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The appellants' Counsel relies on section 54 of the Transfer of Property Act and section 50 of the Registration Act and argues that there was no registered instrument and therefore no valid sale, whilst the oral contract for sale created no interest in the property agreed to be sold under section 54 of the first-mentioned enactment; and that even if this contention should fail, the registered sale should prevail against the prior oral agreement since the land in dispute was not delivered at the time of the agreement.

It is true that the oral contract did not in itself operate to create an interest in immovable property, but it was accompanied by an agreement to execute and register a sale-deed within five days. Such a contract, even when in writing, need not be registered under section 17, clause (b) of the Registration Act, for the intention of the parties was to obtain another document which, when executed and registered, would create such interest. Section 54 of Act IV of 1882 does not apply, because there was no sale creating a present interest and there was only a contract for a future sale as expressly noticed at the end of that very section. Nor does section 48 of the Registration Act apply, for it presupposes a competition between a registered instrument and an unregistered instrument which purports to create a present interest. Until a vested interest is created as prescribed by Act IV of 1882, s. 54, and in accordance with the provisions of the Registration Act, the obligee under the contract of sale has only a right to demand that a sale shall take place in accordance with its terms subject to certain contingencies, the remedy for its breach being a suit for specific performance. The Specific Relief Act is a special enactment prescribing rules as to the party against whom the remedy is available and the conditions subject to which it may be enforced against third parties who may claim an interest in the same property. It is provided by section 27 clause (b) that specific performance may be granted against a third party claiming under a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. The words used are transferee for value and they signify a person to whom the property is trans-

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ferred for value which can alone be under a registered instrument when the value exceeds Rs. 100. The intention is to adopt the equitable doctrine of notice in suits for specific performance, to protect *bonâ fide* purchasers for value, and to treat at the same time purchasers with notice as persons purchasing subject to the vendor's pre-existing contractual obligation, or with notice of a trust in favor of the party entitled to specific performance. Neither the Transfer of Property Act, nor the Registration Act overrides this provision of the Specific Relief Act. Section 2 of Act IV of 1882 repeals Act I of 1877 only to the extent mentioned in the schedule attached to it, and the extent mentioned in the schedule consists in the omission of the words "in writing" in sections 35 and 36, which omission has the effect of including oral contracts among those entitled to the specific relief provided by those sections. Section 48 in protecting oral agreements accompanied with or followed by delivery of possession against the rule of priority contemplates oral alienations referred to in paragraph 3 of section 54 of Act IV of 1882, and has the effect of treating delivery of possession as equivalent to registration. But there is no trace in either enactment of an intention to override section 27 of Act I of 1877, and contracts of sale are expressly excluded from both as creating no present interest in immoveable property. The contention for the appellants that notice is not sufficient to defeat the claim of priority under the Registration Act except as provided by section 48 is no doubt supported by a series of decisions. But on referring to them it will be seen that they rest on the ground that the Legislature intended to encourage registration, and departed from the ordinary rule of equity that a party taking with notice is affected with knowledge of the title of which he has notice and that it cannot be defeated by his act. But a contract for sale creates no present interest in immoveable property, and is not therefore intended to defeat the policy of the Registration Act, a future registered document being contemplated. Those decisions have no reference to section 27 of Act I of 1877 which adopts the principle on which the Court of Equity refuses specific performance only against *bonâ fide* purchasers for value. The decided cases bearing on the point are *Chunder Nath Roy v. Bhojrab Chunder Surma Roy*(1), *Nemai Charan Dhabal v.*

(1) I.L.R., 10 Cal., 250.

*Kokil Bag*(1), *Waman Ramchandra v. Dhondiba Krishnaji*(2), and *Kadar v. Ismail*(3), a decision of three Judges of this Court, in which specific performance of an unregistered agreement was decreed against a purchaser under a registered sale with notice of the prior instrument. As pointed out in that case by Mr. Justice Parker the competition is not between the unregistered instrument which created no present interest and a registered instrument which created a present interest, but it is between the decree which may be passed on the former and the latter instrument. The same principle, it seems to me, governs this case. The conclusion to which I come is neither Act IV of 1882, nor the Registration Act, nor the decisions as to the effect of notice with reference to section 50 of the last-mentioned enactment override the doctrine of equity embodied in section 27 of the Specific Relief Act. Even on the view that under section 4 of Act I of 1877, section 27 of that Act is displaced by section 48 of the Registration Act, the plaintiff was already in possession under his kanom, and such possession together with the agreement to sell is equivalent to a delivery of possession under the oral agreement.

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Another contention is that the plaint contains no prayer for a direction that the registered sale-deed in favor of defendants Nos. 8 and 9 be cancelled and delivered up, and though it prays for a declaration that the sale is void as against the plaintiff, it is open to the objection that a declaration is asked for without asking for consequential relief. This was a suit for specific performance and the appropriate relief is the execution of a sale-deed by defendants Nos. 1 to 7 pursuant to the contract sought to be specifically enforced. The cancellation and delivery up of the sale-deed in favor of the appellants is a species of auxillary equitable relief which the plaintiff is not bound to claim under section 42. The proviso of that section is applicable only to such relief as is appropriate to and consequent on the right asserted, *viz.*, the execution and registration of a sale-deed and the transfer of possession when the plaintiff is not in possession. The next contention is that the decree appealed against contains no provision for a refund of the purchase-money which the appellants have paid. There was no claim advanced to a refund of the

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(1) I.L.R., 6 Cal., 534. (2) I.L.R., 4 Bom., 126. (3) I.L.R., 9 Mad., 119.



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purchase-money in the written statement, nor is the plaintiff liable for such refund. If they have really paid the purchase-money to defendants Nos. 1 to 7, their remedy lies in a fresh suit against them when the sale in their favor is declared to be inoperative.

I am of opinion that this second appeal fails and it must be dismissed with costs.

HANDLEY, J.—The first objection taken to the decree upon second appeal is that the suit is wrongly framed and that no relief such as has been given is allowable under section 42 of the Specific Relief Act, because it is in effect a suit for a declaratory decree, and consequential relief, *viz.*, the execution of a deed of sale by defendants Nos. 8 and 9 to plaintiff could have been sought and granted. I think there is nothing in this objection. Consequential relief is sought for and given by the decree, *viz.*, the execution of a *jemm* deed by defendants Nos. 1 to 7 to plaintiff, and the suit being one for specific performance of an agreement by defendants Nos. 1 to 7 to sell to plaintiff, the relief sought for, *viz.*, a declaration that the subsequent sale to defendants Nos. 8 and 9 is void as against plaintiff, and a decree compelling defendants Nos. 1 to 7 to carry out their contract with plaintiff by conveying the *jemm* to him, was the relief appropriate to the cause of action.

It is objected that the decree as it stands leaves the registered sale-deed by defendants Nos. 1 to 7 to defendants Nos. 8 and 9 in their hands and the money they paid to defendants Nos. 1 to 7 still in the hands of those persons who will thus be paid twice over for the same thing. Strictly speaking the Court should have ordered under section 39 of the Specific Relief Act that the sale-deed to defendants Nos. 8 and 9 should be delivered up to be cancelled, and that a copy of the decree should be sent to the Registration Office. The plaintiff however does not object to the decree on this ground and defendants Nos. 8 and 9 have no right to do so. As to the purchase-money alleged to have been paid by defendants Nos. 8 and 9, they can sue for its recovery if they have in fact paid it. They did not object to the decree on this ground in their appeal to the Lower Appellate Court and there is no reason to think any injustice will be done to them by the decree as it stands.

The next ground of second appeal relied on is that the Lower Courts are in error in holding that plaintiff's mortgage was an

otti and not a kanom. The deed of mortgage, exhibit B, speaks of the transaction simply as a kanom, and the District Judge is apparently wrong in supposing that any such words as "purapad adakki kanom"\* appear in it.

But the fact that no rent was reserved by the deed remains and this, though not conclusive as to the character of the transaction, is some evidence that it was an otti, and I think that the Lower Courts were right in holding that the enaks or notices to tenants issued at the date of the mortgage (exhibits G and H) were admissible in evidence to show what the transaction was. It appears however that these documents were not proved and therefore there is nothing in evidence to show that the mortgage was an otti, but the deed itself, and that is not decisive on the point. In this state of the evidence I should not have been disposed to concur with the finding of the Lower Court that the transaction was an otti. In my view however that question is of no importance. The plaintiff sued upon an express agreement for sale and both Courts have found that agreement to be proved and that defendants Nos. 8 and 9 had notice of it. It is argued that if there was any sale to plaintiff it was invalid by section 54 of the Transfer of Property Act, not being by registered instrument. As to this it is clear that what was set up and proved by plaintiff was an agreement for sale, and that it was contemplated by the parties that a regular jenm deed should be executed on payment of the balance of the purchase-money. Such a transaction need not be by registered instrument under section 54 of the Transfer of Property Act, for the latter part of that section expressly declares that it does not create any interest in the property. Then it is contended for the appellants that by section 48 of the Registration Act the subsequent registered sale-deed to defendants Nos. 8 and 9 must prevail over the oral agreement for sale to plaintiff, and that whether defendants Nos. 8 and 9, had notice of the agreement with plaintiff or not.

The respondent's vakil relies upon section 27 of the Specific Relief Act, and section 53 of the Transfer of Property Act as protecting the first purchaser against the subsequent purchaser with notice, but I think the appellants' Counsel is right in his contention that these provisions do not override those of section

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\* Kanom, free of rent.

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48 of the Registration Act. Section 4 of the Specific Relief Act expressly saves the operation of the Registration Act, and section 2(a) of the Transfer of Property Act by saving the operation of any enactment not thereby repealed has the same effect.

The question then is does section 48 of the Registration Act operate to make the registered conveyance to defendants Nos. 8 and 9 prevail over the prior oral agreement for sale to plaintiff, defendants Nos. 8 and 9 being found to have notice of that agreement?

The result of the decisions both of this Court and the other High Courts upon the question is that notice is immaterial except as evidence of fraud, and that taken by itself it is not sufficient evidence of fraud to deprive the subsequent purchaser of his priority under the Registration Act. Most of the Madras decisions are upon section 50 of the Registration Act; but the principle is the same.

In the present case there does not seem to be any evidence of fraud beyond the fact of notice. But the section exempts from its operation cases where the oral agreement or declaration has been accompanied or followed by delivery of possession. Here plaintiff was in possession already under his mortgage, so that actual delivery of possession was impossible; but I think his remaining in possession is a constructive delivery of possession within the meaning of the section.

In *Palani v. Selambara*(1), where the land was in the occupation of tenants, it was held that a notice to them by the vendor to pay rent to the purchaser and attornment by them accordingly to him were sufficient constructive delivery of possession to entitle the purchaser to the benefit of the exception in section 48, and I consider that the same principle may be extended to cases where possession is already with the purchaser and he retains it under the agreement. Such delivery of possession as is possible under the circumstances is made and that I think is sufficient to satisfy the requirements of the section, the object being that possession shall not remain with the vendor, whereby persons dealing with him subsequently might be deceived.

I would confirm the decree of the Lower Appellate Court and dismiss this second appeal with costs.

(1) I.L.R., 9 Mad., 267.