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to be released. He was accordingly released from the jail, but, immediately after he was released, was arrested on a warrant obtained by the judgment-creditor. It is argued that that arrest was illegal, because the debtor ought to be treated as if he stood in the position he was in on the 15th July, and was therefore privileged from arrest. The argument amounts to this, that because the imprisonment followed on the order of the 15th July was illegal, therefore the debtor must be treated in the meanwhile as either in attendance upon the Court or returning from it. This involves a fiction of a rather extreme character. No authority is cited for such an extension of the doctrine of privilege, and it appears to me to be inconsistent with the principle on which the doctrine is rested, namely, that it is the privilege of the Court and not of the party (See *Magnay* v. *Burt*(1). Looking to the language of section 642 of the Code of Civil Procedure, I can find no sanction for extending it to the present case. No doubt that section covers the case of parties attending the Insolvency Court, but I think it is impossible to hold that a debtor, who is arrested in the circumstances above stated, is either attending or returning from the Insolvency Court.

The motion for release must be dismissed with costs.

Ramanujacharyar, attorney for appellant.

Wilson and King, attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1889. August 21. Sept. 11. October 15.

GHOUSIAH BEGUM (PLAINTIFF), APPELLANT,

v.

RUSTUMJAH (DEFENDANT), RESPONDENT.*

Transfer of Property Act (Act IV of 1882), s. 55—Vendor and purchaser—Implied covenant for title—Acts amounting to waiver of covenant—Possession taken under contract.

On 16th August 1886 the defendant, having agreed to purchase a house belonging to the plaintiff, executed an agreement, in which it was stated "that that he had this day purchased the house belonging to Ghousiah Begum Sahiba (plaintiff) for Rs. 16,000, that he had paid Rs. 1,000 as an advance and taken possession, that

(1) 5 Q. B., 393.

* Appeal No. 1 of 1889.

he would pay the balance with interest at the rate of Re. 1 per cent. *per mensem* within fifteen days, and obtain a sale-deed from the said Begum."

The plaintiff at the time of the agreement had not obtained a conveyance of the house to her, and was not able to tender a conveyance to the defendant until January 1887, when she did so. Meanwhile the defendant took possession under the agreement, paying only a portion of the balance of the purchase money; he also executed certain repairs on the house and let it to a tenant and enjoyed the rent. It further appeared that shortly after the above agreement he sought to obtain a sale-deed from the plaintiff and attempted to raise a sum of money on a mortgage of the house. On 22nd December 1885 the defendant wrote to the plaintiff demanding a conveyance and giving notice that if the sale be not completed in the following month, the interest on the balance of the purchase money should cease; but no evidence was given as to any appropriation of the purchase money by the defendant. In 1887 the plaintiff filed the present suit to recover the unpaid purchase money with interest at 12 per cent:

Held, that the acts of the defendant amounted to a waiver of the implied covenant for title, and that the plaintiff was entitled to recover the unpaid purchase money with interest at the agreed rate up to the date of payment, and that he was further entitled to a lien on the property for that amount.

APPEAL against the decree of Shephard, J., in civil suit No. 292 of 1887 on the file of the High Court.

Suit by the vendor to recover with interest at the rate of 12 per cent. per annum the unpaid purchase money of a house, &c., and for a declaration of a lien on the property for that amount.

The facts of the case are stated fully in the judgments of the Court.

SHEPHARD, J., held on the evidence that the implied covenant for title by the vendor had not been expressly excluded; and he ruled that the acts of the defendant did not amount to a waiver of the covenant, but only to a waiver of any objection to the purchase which the defendant might otherwise have had on the ground of the plaintiff's delay in completing, and accordingly held that the plaintiff was entitled to a decree only on her showing that she could give the purchaser a title free from reasonable doubt. (Specific Relief Act, s. 25.) He also ruled that the plaintiff would not in any event be entitled to receive interest on the unpaid purchase money at the contract rate, but only to recover damages which he assessed, citing *Deen Doyal Lall* v. *Het Narain Singh*(1) and *Nanchand Hansraj* v. *Bapusaheb Rustambhai*(2) at 6 per cent. interest on the principal sum.

The plaintiff preferred this appeal.

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(1) I.L.R., 2 Cal., 41. (2) I.L.R., 3 Bom., 131.

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The Advocate-General (Hon. Mr. *Spring Branson*) and Mr. *K. Brown* for appellant.

Mr. *Wedderburn* and Mr. *R. F. Grant* for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the following judgments:—

WILKINSON, J.—This is a suit to recover the balance of purchase money of a house conveyed by plaintiff to defendant on the 16th August 1885. On that day defendant executed the agreement (exhibit A), in which it was set forth that defendant "has this day purchased the house belonging to Ghousiah Begum Sahiba (plaintiff) for Rs. 16,000, that he had paid Rs. 1,000 as an advance and taken possession, that he will pay the balance with interest at 12 per cent. within fifteen days and obtain a sale from the plaintiff." The defendant did not pay the balance due before the 1st September, but paid Rs. 2,000 on the 4th September and Rs. 1,000 on the 4th November. These facts are not disputed.

The plaintiff asserts that defendant had been informed, and was on the date of his purchase fully aware, that disputes and differences existed between the plaintiff's vendors, which had already delayed and would probably still further delay the execution by them of an assignment in plaintiff's favor.

The defendant on the other hand maintains that he was informed at the time of sale that the plaintiff had a good title and would prove the same and execute a conveyance to defendant before the 1st September and that, learning after the payment in November that plaintiff had not a good title, he on the 22nd December gave notice to plaintiff that he was prepared to pay the balance upon being furnished with a good title, and that if the sale were not completed before the 15th January 1886, he must decline to pay any further interest.

The learned Judge who tried the case found that defendant had not waived his right to demand a good title, and that his right was not prejudiced by his taking possession, and held that plaintiff was only entitled to a decree on her showing that she had a title free from reasonable doubt, and that plaintiff was entitled, provided her title was made out, to damages measured not according to the terms of exhibit A, but at the usual rate, 6 per cent.

In appeal three points have been argued. First, it is contended that defendant with full knowledge of all the facts con-

sented to accept such title as the plaintiff could give him; second, that if there had been an agreement for good title, defendant's possession and dealing with the property amounted to waiver of his right to demand proof of plaintiff's title; and thirdly, that plaintiff was entitled to interest at 12 per cent. on the unpaid balance.

The provisions of the law in this country as to the covenant for title are laid down in section 55 of the Transfer of Property Act. "In the absence of a contract to the contrary, the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same." The learned counsel for the respondent argues that it is incumbent on the purchaser to make out an express contract entered into between himself and the buyer that the title of the purchaser is accepted, and that as exhibit A is silent on the question, the plaintiff is under the terms of section 25 of the Specific Relief Act not entitled to specific performance. The right to a good title is not a right growing out of the agreement between the parties, but is given by the law. But a vendor may stipulate that the purchaser shall accept the title as it is. Moreover, the purchaser may be precluded from taking objection to the vendor's title by the fact that he had clear notice of the state of the title before he entered into the contract for sale (*Mancharji Pestanji* v. *Narayan Lakshumanji*(1)), and this is more especially the case where vendor and vendee deal with each other as in this case without legal advice, and the purchaser relies on the implied covenant for title. (See also Dart's *Vendors and Purchasers*, 6th edition, p. 495). The learned Judge remarks that he should have taken this view if the evidence showed that after a full explanation of the facts the defendant had consented to accept such title as the plaintiff could give him. Now, it is the plaintiff's contention that the defendant was put in full possession of all the facts relating to plaintiff's title which has never been in doubt, and that he was satisfied with the title made out. The learned Judge thought it probable that defendant did not trouble himself about the title, but on the ground that that there was no distinct declaration in exhibit A that defendant accepted plaintiff's title, coupled with his demand in December 1885 for proof

(1) 1 Bom. H.C.R., 77.

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of title and the omission to reply to that demand, the Judge refused to believe that defendant had expressly waived his right to require a good title.

The contract for sale was negotiated on behalf of plaintiff by Raja Eswara Doss (first witness) and his darogah (second witness). They have gone into the box and given a full and apparently trustworthy account of the negotiations prior to the execution of exhibit A. The learned Judge thinks it would be rash to accept the evidence of these witnesses as absolutely accurate, but he appears to have overlooked the fact that their evidence is uncontradicted, and that the defendant has not tendered himself for examination. Raja Eswara Doss and his darogah were the persons who on the plaintiff's side were in a position to give evidence as to what had taken place, and the only evidence on the defendant's side is that of a servant of defendant, and it does not negative that of the Raja. Another fact which was overlooked is that certain translations in the vernacular were at the request of the defendant furnished to him, so that the learned Judge's objection that the mere showing to defendant exhibits B, C, D and K in English, which he remarks defendant did not understand (there is no evidence of this) falls to the ground.

Turning to the evidence—Eswara Doss deposes that he informed defendant why no conveyance had been executed in favor of plaintiff and that he showed him his mortgage (exhibit D) and informed him that that was the only incumbrance on the property. Defendant's letter of the 22nd December (exhibit H) confirms this portion of Eswara Doss' evidence, for the said mortgage is therein distinctly referred to. Eswara Doss goes on to say, "defendant asked me for all previous deeds and I told him we had bought at Sheriff's sale (exhibits B and C) and sold to plaintiff (K). He asked me to draft sale and mortgage deeds and I did so (called for and not produced). Defendant said that the vouchers on which plaintiff had bought (exhibits B and C) were enough for him and authorized me to advance money for him. I told him the dispute with Vallaba Doss would be settled in a year or two and that it was this dispute which stood in the way of the execution of a conveyance to plaintiff." I can see no reason why the evidence of this witness should be distrusted. It has not been contradicted and though in one sense an interested witness in that he had a mortgage on the property to the amount of Rs. 12,000, there is no

reason to entirely reject his testimony on that account. It certainly shows that the defendant not only, as the learned Judge finds, waived all objection on the score of the plaintiff having no conveyance in her favor, but impliedly, if not expressly, waived his right to question her title. And his subsequent conduct confirms this view, for not only did he enter into possession of the house, but he also made subsequent payments, leased the property to a tenant, and made an attempt to mortgage it. He had at first consented to mortgage it to Eswara Doss, but he never executed the deed which was sent to him and subsequently applied to Agar Chand (his fourth witness) to advance him the Rs. 12,000 to pay plaintiff. When this application was made Agar Chand cannot definitely state but Eswara Doss deposes that it was after *he* took out summons against defendant to compel him to register exhibit A. That document was registered on the 15th December 1885. If, as Eswara Doss states, defendant fell out with him at that time, the defendant's application to Agar Chand and to Messrs. Champion and Short, who on his behalf sent plaintiff the letter of 22nd December, is accounted for. I am unable to accept Agar Chand's statement that he asked Raja Eswara Doss for the title-deeds of the property and was informed they were in Court. Raja Eswara Doss denies this, and it seems to me improbable that Agar Chand would, after he had been informed by Raja Eswara Doss that defendant intended to mortgage the property to him (Raja Eswara Doss), have insisted on seeing the title-deeds. It is far more likely that he would have accepted the Raja's statement and have taken, as in fact he did take, no further steps about the proposed mortgage. No doubt a person selling property to another without conditions is impliedly bound himself to have, and to give to his purchaser a title free from reasonable doubt. But he may relieve himself of the implied obligation by special contract, and if the purchaser chooses to buy subject to such terms, he will be bound by them. It is the duty of the vendor to inform the buyer of all the facts within his knowledge material to title; and if by reason of misstatement or suppression of facts within his knowledge, which the purchaser is entitled to know and the vendor is bound to communicate, the purchaser is misled, he would not be bound (*Motivahoo* v. *Vinayak Veerchand*(1)). But in the present case

(1) I.L.R. 12 Bom., 1.

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defendant was placed in possession of all material facts to enable him to decide as to the validity of plaintiff's title and with those facts before him he executed exhibit A. In *Haydon* v. *Bell*(1) it was held that where possession was taken, part of the purchase money paid and a mortgage of the lessee's interest made, the purchaser was not, after thus dealing with the property, entitled to call for the production of the lessor's title. And in the *Port of London Assurance Company's case*(2), Lord Justice Turner remarked that where a purchaser has taken possession of and enjoyed the subject-matter of a contract, it is the duty of the Court to make every reasonable presumption in favor of the validity of the contract. In the present case, the defendant was informed that the property had been purchased in 1876 in execution of a decree by Raja Eswara Doss and Gunsham Doss, who were partners, that after the death of Gunsham Doss disputes arose between the sons of Gunsham Doss and Raja Eswara Doss, that the property was sold by auction, on the motion of Eswara Doss and Vallaba Doss, the only adult son of Gunsham Doss, that the plaintiff had purchased at that auction and been placed in possession, executing a deed of mortgage for a portion of the purchase money in favor of Eswara Doss, and that a conveyance would be executed in her favor as soon as the disputes between her vendors were settled. The defendant thereupon executed exhibit A, took possession and paid Rs. 1,000. Notwithstanding the non-execution on the 1st September 1885 of the sale-deed by plaintiff which respondent contends was an essential part of the contract, defendant remained in possession, leased the house, executed repairs, paid further portions of the sale amount, and attempted to raise money on it by way of mortgage in order to pay off the whole sum due. There does not appear to have been any cloud upon the plaintiff's title at the time of purchase or subsequently, and I think it must be held that defendant both expressly, before the execution of exhibit A and impliedly, by his subsequent conduct, waived his right to any further proof of plaintiff's title. In exhibit H, the only question raised as to plaintiff's title was that defendant had been informed that there were disputes relating to the house between Eswara Doss and Vallaba Doss. Of these disputes which concerned not the house, but the partnership, defendant was fully

(1) 1 Beav., 337. (2) 5 De G. M. & G., 465.

informed prior to the 16th August and with full notice of them, he took possession and made payments. The learned Judge lays stress on the fact that the claim set up by exhibit H was not at once repudiated and that no reference was made to this letter in the letter written to defendant by Messrs. Branson and Branson, the plaintiff's solicitors, on 26th January 1887 (exhibit F). But a conveyance had then been executed in plaintiff's favor by Raja Eswara Doss and the sons of Gunsham Doss (exhibit E), and the only objection which defendant had raised to the purchase was thereby removed. There was therefore no necessity to refer to exhibit H.

As to the interest, it was laid down by Sir John Leach in *Esdaile* v. *Stephenson*(1) that where there is an express stipulation as to the payment of interest by the purchaser it applies to every delay however occasioned, unless such delay is owing to the gross misconduct or wilful delay of the vendor. And as remarked by Lord St. Leonards "if the money was not actually and *bonâ fide* appropriated for the purchase, or the purchaser derived the least advantage from it or in any way made use of it, the Court would compel him to pay interest." (Sugden's *Vendors and Purchasers*, 14th ed., p. 628).

The cases quoted by the learned Judge do not apply as the agreed rate of interest was neither excessive nor extraordinary but reasonable and usual. The purchaser has been in possession of the rents and profits of the property. He has never tendered the balance of the purchase money, nor has he adduced any evidence to show that he had the money by him in readiness for payment. I think he is bound to pay interest at 12 per cent.

For these reasons, I would set aside the decree of the learned Judge and give plaintiff a decree as sued for with costs throughout.

MUTTUSAMI AIYAR, J.—I have had the advantage of reading the judgment of my learned colleague and I concur in the conclusion at which he has arrived. But for a difference of opinion as to one of the grounds of decision and the importance of the case both as regards the amount sued for and the questions raised for decision, I should not have written a separate judgment.

The suit brought by the appellant was substantially one for the specific execution of a contract of sale. That contract is evi-

(1) 1 S. & S., 122.

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denced by document A which bears date the 16th August 1885. Though the suit was instituted only in November 1887, the learned Judge below found and the finding is warranted by evidence in the case that time was not of the essence of the contract, and it is not questioned on appeal by the respondent. The only questions arising for our decision are—first, whether the decree was properly made conditional on the appellant showing a good title, and, secondly, whether the rate of interest awarded to her from the 1st September 1885 is less than what she is entitled to under the circumstances of the case.

As regards the first question, the appellant's contention is that the respondent expressly agreed prior to the date of A, though not in writing, to accept such title as she had and that by his subsequent conduct the respondent waived his right, if any, to call for proof of the appellant's title.

Document A is silent on the subject and under section 55 of Act IV of 1882, which was in force when it was executed, it must be read, in the absence of a contract to the contrary as if it contained a covenant for title. Though it describes the house bought as "belonging to" the appellant, yet I do not consider that the description can be accepted as equivalent to a statement that the respondent has waived his right to investigate the appellant's title. They are mere words of description and ought not to be so construed, especially as section 55 requires an express contract to exclude its operation. I take it, therefore, that there was an implied covenant for title.

As to the question whether the respondent had previously agreed to accept the appellant's title, such as it was, the decision must rest on the weight due to the oral evidence in this case. On the one hand Raja Eswara Doss and his darogah say that there was such an agreement, whilst on the other, the respondent's servant contradicts them. Although the evidence for the appellant is apparently somewhat stronger than the evidence for the respondent by reason of the comparative social position of the witnesses, yet the learned Judge below who had them before him considered that it was unsafe to act upon it. It cannot be denied that the Raja has some personal interest in the result of this suit, that he negotiated the sale in question and pays the expenses of this litigation. If there was a conversation regarding title as alleged, and if it was understood by the respondent to form part

of his agreement, I do not see my way to account satisfactorily for the omission of Raja Eswara Doss to insert a provision to that effect in document A, having due regard to his shrewdness and intelligence in matters of business and also to the fact that document A was drawn up under his dictation or direction at the instance of the respondent. It seems to me more probable that beyond showing documents B, C, D and K,* the Raja did not press the matter farther and make a definite contract as to the title. It must be remembered that an agreement to take such title as the vendor has is in restraint of the purchaser's legal right, and that when it is set up as being antecedent to a written contract in a suit to *enforce* specific performance, it must at all events be established with the greatest clearness and precision. I am not prepared to disturb the finding of the learned Judge below on this point.

But as regards implied waiver by subsequent conduct, I concur in the opinion of my learned colleague. The question of waiver is in the main one of evidence, and in determining it, we have to consider each of the acts of the party concerned in the light thrown by his knowledge at the time of material facts in relation to the title, and then to see whether an intention *not* to rely on the implied covenant as a subsisting covenant can clearly and unequivocally be inferred from them. It is in evidence in this case that Raja Eswara Doss not only showed documents B, C, D and K to the respondent prior to the date of A, but also furnished translations in the vernacular. In coming to a finding on this matter, the learned Judge below overlooked the last-mentioned fact, and I am also of opinion that we must take it upon the evidence that the respondent had the means of knowing, and knew, their contents. On referring then to these documents as evidence of the respondent's knowledge, I find that they only trace the appellant's title up to the Sheriff's sale in 1876 but do not carry it beyond. It is therefore reasonable to presume that it was known to the respondent that no document was shown regarding the state of the title prior to the Sheriff's sale.

It is also admitted that on the date of A, the respondent knew that there was litigation between Raja Eswara Doss and Vallaba Doss, that the appellant herself had no conveyance, and that there might be delay in her executing one in his favor. It is, however, shown that the appellant obtained a conveyance before January

* *See* as to these exhibits *ante*, p. 162.

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1886, and that when she tendered one to the respondent, the dispute with Vallaba Doss had been compromised and that it had never cast any cloud on the title to the house in dispute. Hence it is the state of title prior to the Sheriff's sale that is of moment in this case, and keeping this fact in view, I pass on to consider the respondent's subsequent acts and to estimate their value as evidence of waiver.

I may first refer to the two part payments made by him, viz., of Rs. 2,000 on the 4th September and of Rs. 1,000 on the 4th November 1885. Exhibit A shows that the balance of purchase money was intended to be paid on or before the 1st September and a conveyance was to be taken. Though the appellant was not in a position to execute a conveyance, yet the respondent proceeded to make the part payments without any inquiry or further proof as to the state of the title prior to the Sheriff's sale in 1876. At law, the purchaser could not have the right to the estate nor the vendor to the money until the conveyance was executed, and according to exhibit A, both are concurrent acts. The part payments appear to indicate an intention to dispense with the benefit of this provision of law, and of the contract, and even if they stood alone, they would be some evidence to show that he did not attach importance to proof of title prior to 1876.

Another fact which has an important bearing on the question of waiver is the respondent's endeavour about one month after the date of A to obtain at once a sale-deed and to execute a mortgage in favor of Raja Eswara Doss for the unpaid balance of the purchase money. On this point there is the evidence of Raja Eswara Doss that he prepared drafts and sent them to the respondent and that he sent again at his request fresh drafts in the name of his son. There is also the evidence of Gulam Khadir in regard to it. The evidence of Agar Chand shows that the Raja told him that the respondent had agreed to mortgage the house to him. It is also in evidence that notice was given to the respondent to produce the drafts but that the respondent did not produce them. I see no sufficient reason to doubt that the respondent agreed to mortgage the house to Eswara Doss and take a sale-deed, that drafts were sent to him at his request and that they are withheld lest they may weaken his case. This conduct on his part appears to me to be inconsistent with a belief that the appellant must prove her title or that the dispute with Vallaba Doss had reference to title.

The next fact in evidence is the respondent's endeavour to borrow Rs. 12,000 from Agar Chand in view to pay off the balance of the purchase money. This is spoken to by Agar Chand, who is the respondent's witness. This attempt again indicates that the respondent was endeavouring to deal with the property as his own and to pay off the purchase money though the appellant was not in a position to give him a conveyance. I am unable to reconcile these attempts to exercise acts of ownership with the continuance of an intention to treat the implied covenant as a subsisting covenant.

Though Agar Chand states in his evidence that the Raja told him that the title-deeds of the house were in Court, yet Raja Eswara Doss contradicts him, and there is thus oath against oath. But the evidence also shows that Raja Eswara Doss was unwilling that Agar Chand should take a mortgage and desired that he himself should take the mortgage; and it may well be that if Raja Eswara Doss did really say that the title-deeds were in Court, he did so in order to prevent Agar Chand from advancing money on the house. As already observed, it was in the respondent's knowledge that the Raja had documents B, C, D and K with him, and looking at his subsequent conduct in connection with this fact, the evidence conveys the impression that it was the obstruction caused to Agar Chand advancing the money so as to enable the appellant to complete his contract that really originated the misunderstanding which has finally resulted in this litigation.

The effect of the evidence then is that until the date of the last part payment, the respondent's conduct is inconsistent with a belief on his part that the appellant had first to prove her title before he completed his contract.

It is again in evidence that Raja Eswara Doss bought the house at the auction sale in 1876 without investigating the title of Prince Azimja's daughter, that the appellant accepted the title of the purchasers at the Sheriff's sale, that the dispute of Vallaba Doss raised no doubt as to title and that the daughter of Prince Azimja had been in possession for several years before the Sheriff's sale. It may well be that the respondent thought that it was not necessary for him to ask for more and endeavoured to complete the contract as shown above until December 1887.

The first document which shows a desire on the respondent's part to ask for proof of title is exhibit H, dated the 22nd

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December 1887. Though the first paragraph speaks of an agreement by Raja Eswara Doss to get the appellant to hand over the title-deed, showing a good title in the said Begum (appellant), yet the second paragraph refers to the dispute with Vallaba Doss as the cause of her not being able to give a good title and execute a conveyance. It is remarkable that there was no allusion to the state of the title prior to 1876 whilst there was an allusion to a dispute which as is shown by exhibit E and the evidence of Vallaba Doss had nothing to do with the title to the house. This indicates that even when the relation between the respondent and Raja Eswara Doss was strained, the former continued to treat with the latter irrespective of the state of the appellant's title prior to the Sheriff's sale.

The next occasion to which I have to refer is the tender for the appellant of a conveyance in January 1886 after the dispute with Vallaba Doss was settled and the appellant was thereby enabled to obtain a conveyance. It was not until then that the respondent indicated any intention to insist on proof of title beyond the point to which exhibits B, C, D and K traced it. It is further in evidence that the respondent has been in possession of the house since August 1885 though the appellant declined to prove title in 1886. It is no doubt true that the respondent entered into possession under the terms of document A and his continuance in possession until the appellant repudiated her obligation to prove title beyond 1876 might in the absence of a waiver be referred to a supposition on his part that the appellant would execute her implied covenant. But the retention of such possession after the appellant repudiated her obligation to show title beyond a certain stage and the appropriation by him of rents to his own use without either rescinding the contract or depositing the remainder of the purchase money or setting it apart with notice of the same to the appellant imply a desire on his part to take undue advantage of his position as the party originally let into possession.

Taking the evidence as a whole, the conclusion to which I am led is that prior to the execution of A, the respondent had knowledge that the title-deeds which the Raja had with him showed title only up to the Sheriff's sale in 1876, that there was no definite agreement as to title when A was executed, that his subsequent conduct until December 1885, was inconsistent with a belief on

his part that the appellant had first to prove her title before he completed his part of the contract, that it was the obstruction to his raising money from Agar Chand and Eswara Doss' desire to lend money himself that created a disagreement and induced him to change his front, that the first attempt on his part was to take advantage of the delay in the execution of a conveyance in consequence of the dispute with Vallaba Doss though he knew of it at the date of A, though it tended to cast no doubt on title and though time was not of the essence of the contract, that when this dispute terminated and a conveyance was tendered and not until then, his conduct assumed the phase of insisting on a complete proof of title, and that he has continued to retain possession and receive rents until now without depositing or setting apart the balance of the purchase money.

In this view of the facts, I have no doubt that neither party had section 55 of Act IV of 1882 before their minds when A was executed, that the respondent had then knowledge of material facts bearing on the title and that he since waived his right to the benefit of the implied covenant by his acts and that his subsequent assertion that he always relied on title being shown further back than the Sheriff's sale in 1876 is an after thought. Upon facts similar to these it was held that objections to the title were considered waived in *Margravine of Anspach* v. *Noel*(1). As my learned colleague has referred also to other authorities on the question of waiver, I do not desire to repeat them here.

As to the question of interest also I agree with him. As there was a waiver the appellant is *primâ facie* entitled to interest at 12 per cent., which is the rate mentioned in A, and there is no evidence to show what the rent actually received by the respondent was and that the interest claimed is excessive. It is also in evidence that the respondent intended to pay Agar Chand 12 per cent. if he lent him Rs. 12,000.

As regards the contention that there was no contract to pay interest subsequent to the 1st September 1885, the act of taking possession implies an agreement to continue to pay interest until the purchase money is paid. In *Fludyer* v. *Cocker*(2) Sir William Grant remarked with reference to a similar objection that "the act of taking possession is an implied agreement to pay interest,

(1) 1 Maddock, 310. (2) 12 Ves., 25.

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for so absurd an agreement as that the purchaser is to receive the rents and profits to which he has no legal title and the vendor is not to have interest as he has no legal title to the money can never be implied." The purchaser, it was observed in that case, might have said he would have nothing to do with the estate until he got a conveyance. But that was not the course which he took. "He enters into possession, an act that generally amounts to a waiver even of objections to title. He proceeds upon the supposition that the contract will be executed and thereby agrees that he will treat it as if it was executed." It is true that this general rule is subject to the exception that when the delay in the completion of the contract is imputable to the vendor and the stipulated interest exceeds the rent, the vendor ought not to be enabled to gain by his own wrong and he can only be entitled to the interim rent. Though in this case the appellant did not tender a conveyance before January 1886 owing to the dispute with Vallaba Doss and the respondent might not until then be liable to pay the vendor more than the rent actually received by him, yet there is no evidence to show that the rate of interest which is the rate current in the market exceeded the rent and was excessive.

For these reasons I concur in the decree proposed by my learned colleague.

Branson & Branson, attorneys for appellant.

Champion & Short, attorneys for respondent.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

1889. August 29.

RAMAKISTNAYYA

v.

KASSIM.*

Contract Act, s. 135—Negotiable Instruments Act—Act XXVI of 1881, ss. 37, 39, 66—Accommodation maker—Discharge of—Presentment of promissory note.

Suit by the endorsee against the maker of a promissory note, dated 9th August 1886. The plaintiff was aware that the note was made by the defendant for the accommodation of the acceptor, Watson and Co., with whom the plaintiff had large dealings. On the 4th August 1887, Watson and Co. executed in favor of the

* Civil Suit No. 231 of 1888.