ABDUL KADER ROWTHER. v. KRISHNAN MALAVAL NAIR.

SADASIVA AYYAR, J.

the next subsequent application in execution instead of the date on which the proceedings in the previous application for execution *terminated*, and I should be glad if the Limitation Act is amended so as to fix the latter date. But the harshness is mitigated to some extent by allowing the date of applying to take a step in aid to be also a starting point and I think that if even an oral application is really for an order which will be a step in aid (and not merely for an order which will be indifferent or retarding) a liberal interpretation should be put on the article 179 so as to enable a decree-holder to obtain the fruits of his decree.

In the result I would dismiss the appeal with costs.

SPENCER, J. SPENCER, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

1913. November 7 and 28 and December 23.

KRISHNAMMAL AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

M. SOUNDARARAJA AIYAR (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. II, r. 2—Previous suit for specific performance of an agreement to sell—Decree for specific performance—Deed of conveyance obtained in execution—Subsequent suit for recovery of possession against the vendors—Suit not barred.

Where the plaintiff, who had obtained in a previous suit a decree against the defendants for specific performance of an agreement to sell certain immoveable property to the plaintiff and had got a sale deed in his favour in execution of the decree, instituted the present suit for the recovery of possession of the lands from the defendants,

Held, that the suit was not barred by Order II, rule 2 of the Civil Procedure Code (Act V of 1908).

At the time the plaintiff brought the previous suit, the right to possession of the lands was not vested in him, as he acquired that right only on the execution of the deed of conveyance.

Narayana Kavirayan v. *Kandasami Goundan* (1898) I.L.R., 22 Mad., 24, disapproved.

---

* Second Appeal No. 1125 of 1912.

Rangayya Goundan v. *Nanjappa Rao* (1901) I.L.R., 24 Mad., 491 (P.C.), explained.

Nathu valad Pandu v. *Budhu valad Bhika* (1893) I.L.R., 18 Bom., 537, followed.

KRISHNAMMAL v. SOUNDARARAJA AIYAR.

SECOND APPEAL against the decree of J. S. GNANIYAR NADAR, the Temporary Subordinate Judge of Negapatam in Appeal No. 800 of 1911, preferred against the decree of T. K. SUBBA AYYAR, the District Munsif, Negapatam, in Original Suit No. 299 of 1910.

The facts of the case appear from the judgment of TYABJI, J.

K. V. L. Narasimham and *T. V. Gopalaswami Mudaliyar* for the appellants.

T. R. Venkatarama Sastriyar for the respondent.

SANKARAN NAIR, J.—The question is whether the suit is barred by Order II, rule 2 of the Civil Procedure Code. The plaintiff obtained a decree in his favour for the execution of the deed of sale in accordance with an agreement to sell property to him. Having obtained the sale deed in execution of the decree he now sues for possession on the strength of the sale deed. The defendant's contention is that having failed to claim possession also in the previous suit, the present suit is barred and they rely on *Narayana Kavirayan* v. *Kandasami Goundan*(1). It is true that it was open to the plaintiff to sue not only for the execution of a deed of sale but also for possession in the previous suit. But was he bound to do so? At the time he brought that suit the right to possession was not vested in him. He would acquire that right only on the execution of the deed of conveyance. Possession is not merely an incident or subsidiary to the sale deed. In a suit for a specific performance the parties to the contract alone need be parties. In a suit for possession all persons in possession are proper parties. I am therefore of opinion that the suit is not barred.

SANKARAN NAIR, J.

We dismiss the Second Appeal with costs.

TYABJI, J.—The plaintiff is the purchaser from the defendants Nos. 1 and 2 of the land referred to in the plaint. He sues for possession of the land on the strength of a conveyance executed in his favour by his vendors, the first and second defendants.

TYABJI, J.

The claim is resisted on the ground that the plaintiff had not included a prayer for possession in a previous suit which the plaintiff had instituted against his vendors, and in which he had

(1) (1898) I.L.R., 22 Mad., 24.

KRISHNAMMAL v. SOUNDARARAJA AIYAR.

TYABJI, J.

merely claimed specific performance of the agreement to convey the land, without claiming possession. It is argued for the defendants that in that suit the plaintiff ought to have claimed possession also, and having failed to do so, he is debarred under Order II, rule 2, from now claiming possession.

The plaintiff's reply to this contention is that the rule referred to can only apply if the cause of action in the earlier suit is the same as the cause of action in the later suit; and that in the present case the cause of action arises on the execution of the conveyance, whereas in the previous suit the cause of action arose on the agreement to execute the conveyance.

In answer to this contention, the defendants rely upon *Narayana Kavirayan* v. *Kandasami Goundan*(1), where SHEPHARD and BODDAM, JJ., held that the right to possession arose coincidently with the right to obtain the conveyance. With great respect, I am unable to follow their train of reasoning. If two rights arise coincidently, neither can be the cause nor the effect of the other. They must both result independently from some other cause: that other cause for the present purposes can only be either the agreement or the general law. If it had been meant that in accordance with the terms of the particular agreement, with which the learned Judges who decided *Narayana Kavirayan* v. *Kandasami Goundan*(1) were dealing, the purchaser was entitled on the one hand to claim execution of the conveyance (*i.e.*, transfer of the ownership of the property) and on the other hand to obtain possession, that the transfer of ownership and of possession were agreed to be made independently of each other, and that the right to claim each happened (under the terms of the agreement) to arise at the same moment—then I could have understood that the claims arose coincidently. It does not appear that the judges considered that any such special agreement existed in *Narayana Kavirayan* v. *Kandasami Goundan*(1). They proceeded on a proposition of general law that (apparently by operation of section 55 of the Transfer of Property Act) by every agreement to sell, "the right to possession arises coincidently with the right to the execution of a conveyance." But further they intended, it would appear, to hold, contrary to the opinion expressed by SARGENT, C.J., in

(1) (1869) I.L.R., 22 Mad., 24.

Nathu valad Pandu v. *Budhu valad Bhika* (1) to which I shall refer later, that the causes of action on the agreement and the conveyance are the same. With these propositions I am unable to agree.

It seems to me that the effect of section 55 (1) (*f*) of the Transfer of Property Act, when read with section 54 of the same Act, and with the Registration Act is that in the absence of any express agreement to transfer possession independently of the registered conveyance, the purchaser (or to be accurate, the person agreeing to purchase) has no right to the possession of the property until the conveyance is completed.

For section 55, clause (1) (*f*) of the Transfer of Property Act binds the "seller" of the property on being so required, to give possession to the buyer: under section 54 there is no "sale" until there is a transfer of the ownership of the property, and there is no such transfer, until there is a registered instrument. It is true that some of the clauses in section 55 (1) do not warrant its being said that there is no "seller" within the terms of that section until there is a complete "sale" as defined in section 54:—thus clause (*d*) speaks of the "seller" being bound to execute a proper conveyance to the "buyer," so that a person who has agreed to sell, but who has not completed the sale by transfer of ownership is referred to by the term "seller"—in clause (*d*). If the expression "seller" were interpreted in the same sense in clause (*f*) as in clause (*d*), then the person agreeing to purchase could immediately after the agreement demand possession. This would be going beyond what was held in *Narayana Kavirayan* v. *Kandasami Goundan* (2), and it is not suggested that that should be the interpretation of the clause. There seems to me to be nothing unreasonable in interpreting the various clauses of section 55, sub-section (1) so that the earlier clauses are taken to refer to the period between the agreement for sale and its completion, and clauses (*f*) and (*g*) to the time after the sale has been completed within the terms of section 54. It is difficult to hold on the other hand that the legislature intended to give the right to possession to a person who has agreed to have its ownership transferred to him, merely by reason of such agreement before or irrespective of the transfer being made.

(1) (1893) I.L.R., 18 Bom., 537. (2) (1899) I.L.R., 22 Mad., 24.

KRISHNAMMAL v. SOUNDARARAJA AIYAR.

TYABJI, J.

It may indeed be, that an agreement to sell the property contains not only a covenant to transfer the ownership of the property by a registered instrument, but also an independent and so to say, incidental, covenant to permit the vendee to take possession of the property, or to exercise other rights, which for brevity may, for the present, be referred to as obtaining possession.

Two cases were cited to us in which such independent covenants to give possession to the purchaser were alleged.

One of these cases *Rangayya Goundan* v. *Nanjappa Rao*(1), was relied upon by the appellant. There the purchaser in the first instance came into Court relying upon the agreement for sale and sued for possession under that agreement. For obtaining the relief claimed in his first suit, he had to prove the facts leading up to and including the execution of the agreement: when those facts were proved he became entitled to claim a decree for specific performance of the whole of the agreement, including the vendor's covenant to execute the conveyance; and yet after having proved the execution of the agreement—after having proved all that had to be proved for obtaining execution of the conveyance—he stopped short of claiming the latter relief, and prayed merely for one portion of his rights arising from the facts proved, viz., possession. In these circumstances it was held that he could not subsequently come into Court once more on the same cause of action (namely, proof of the execution of the agreement to convey), and ask for the execution of the conveyance, a relief which he could have asked in the previous suit, and for obtaining which he would have to prove over again the same set of facts that were proved in his earlier suit.

In the present case the circumstances are quite different. The plaintiff does not now sue for any right under the agreement to convey. In the previous suit he prayed for specific performance of the agreement; both the lower Courts have held that in the agreement there was no covenant on which the plaintiff could have sued for possession. Assuming (as was argued before us) that the agreement gave the right of possession apart from the right to obtain a conveyance, still possession under the agreement could only be for the period prior to the conveyance,

(1) (1901) I.L.R., 24 Mad., 491 (P.C.).

after which the purchaser's title would be completed, and he would then be entitled to possession not under the agreement, but on the basis of his title. The plaintiff's failure to ask for possession in the previous suit might therefore have been fatal to any claim he might have set up in the present case under the agreement. If for instance the plaintiff had alleged that he was entitled to possession under the agreement at some time previous to the conveyance, and had claimed in the present suit damages for being kept out of possession from that date, the answer might no doubt have been that the plaintiff's rights to such damages until the date of the conveyance were barred: *Venkoba* v. *Subbanna*(1). The plaintiff makes no such claim. His claim is on a distinct cause of action which had not arisen at the time when the first suit was instituted.

What I have just stated seems to me to have been the view expressed by SIR CHARLES SARGENT, C.J., in the second case to which I alluded above [*Nathu valad Pandu* v. *Budhu valad Bhika*(2)], though the very concise terms in which that great Judge has expressed the views of the Court, have perhaps prevented his judgment from having been availed of to the same extent as an expression of his opinion would otherwise be. In that case the contract for sale seems to have provided that the purchaser may take possession prior to the conveyance. This, it is true, is not explicitly stated in the judgment, or in the report. But in the first suit instituted by the purchaser he alleged that possession had actually been delivered to him at some time prior to 18th July 1889(3). At that time no conveyance had been executed. SARGENT, C.J., also refers in his judgment to the claim of possession on the contract for sale (as distinguished from the sale-deed). I take it therefore that it was conceded in that case that the purchaser could have claimed possession under the agreement for sale, even before the sale-deed was executed. The argument of Mr. Apte (who represented the vendor in the High Court) was that the right to possession could not be asserted in the second suit, inasmuch as possession could by virtue of the agreement for sale have been claimed in the first suit. The

(1) (1887) I.L.R., 11 Mad., 151. (2) (1893) I.L.R., 18 Bom., 537.
(3) *Ibid.* at p. 539.

KRISHNAMMAL v. SOUNDARARAJA AIYAR.

TYABJI, J.

purchaser's reply to this argument was twofold : *first* that possession could not have been claimed in the first suit because the purchaser had alleged that possession had already been given to him. This argument was not accepted by the Court. They held that as a matter of fact the purchaser had not been put into possession prior to the first suit and that therefore he could have sued for possession, and that his failure to do so in the first suit debarred him in the second suit from claiming such possession as he could have sued for in the first. But the Court accepted the *second* argument for the purchaser: that though possession could have been claimed in the first suit on the agreement, still the purchaser was not debarred from praying for it in the second suit on the conveyance or the deed of sale : for a new and distinct cause of action arose from the deed of sale itself : SIR CHARLES SARGENT, C.J., expressed this view quite definitely both during arguments and in his judgment. On the former occasion, he cited *Kalidhun Chuttapadhya* v. *Sheba Nath Chuttapadhya*(1), where GARTH, C.J., in expressing the view of himself, and PONTIFEX, MORRIS and MITTER, JJ., said : " It would indeed seem almost a mockery to empower a Civil Court to declare a plaintiff entitled to relief, and then, when the defendant refuses him that relief and disregards the Court's order, to tell the plaintiff that he is wholly without remedy, and that the Court has no power to assist him." GARTH, C.J., said this in deciding that as the law empowers the Courts to pass a merely declaratory decree without consequential relief, where such a decree has been passed, and the defendant disobeys that decree, so as to prevent the plaintiff from having the consequential relief flowing from the declaratory decree, in such a case the plaintiff may obtain in a subsequent suit the consequential relief, the right to obtain which had been declared in the earlier suit. This is certainly going much further than is necessary for the present case.

I am therefore clearly of opinion that the plaintiff's suit for possession on the basis of the conveyance to him was not barred by his previous suit to obtain execution of the conveyance, and that therefore the appeal should be dismissed.

It is argued on behalf of the appellant, however, that the plaintiff should not have the costs of these proceedings on the

(1) (1882) I.L.R., 8 Calc., 483 at p. 514.

ground that this suit was unnecessary, because the purchaser could have obtained in the previous suit the relief which he seeks in the present suit. That the two prayers can be joined in the first suit was decided in *Ranjit Singh* v. *Kalidasi Debi*(1). I concede that a purchaser ought to be permitted for convenience to claim both reliefs at once in order to prevent disregard of his rights by a vendor as bold as the present appellant. Yet in strict form the right to sue for possession on his title does not arise until the conveyance has already been executed, and unless thereafter the vendor refuses to give possession: prior to execution of the conveyance, there being no right to obtain possession, the denial of a right that has not arisen cannot furnish a cause of action. I allude to these purely technical considerations merely for the purpose of deciding the question of costs. It would have been entirely in keeping with the vendor's conduct to have raised this technical objection if the purchaser had added a prayer for possession in his first suit. The vendor cannot be permitted after he has opposed his purchaser's just claim through three Courts to turn round and say that these proceedings are unnecessary. He cannot now contend what he might have contended if he had been ready and willing to give possession without any legal proceeding. I am therefore of opinion that the defendants should be made to pay the costs throughout.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

MUNISAMY MUDALY (SECOND DEFENDANT), APPELLANT,

v.

ABBU REDDY AND SIX OTHERS, (PLAINTIFF AND DEFENDANTS NOS. 1 AND 3 TO 7), RESPONDENTS.*

1912. October 23 and 24. November 18 and 1913. January 20.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Cross-objections, memorandum of, by one respondent against another, maintainability of.

Under Order XLI, rule 22, Civil Procedure Code, one respondent can file a memorandum of cross-objections against another.

(1) (1909) I.L.R., 37 Calc., 57.

* Appeal No. 40 of 1909.