Before Mr. Justice Mitter and Mr. Justice Pigot.

MOKUND LALL AND OTHERS (DEFENDANTS) *v.* CHOTAY LALL (PLAINTIFF).*

1884 *September* 2.

Specific Performance—Delay in bringing the suit—Joinder of causes of action—Act XIV of 1882, *s.* 44*—Joinder of a person not a party to the Contract of which specific performance is sought.*

A plaintiff sued on the 28th February 1881 for specific performance of a contract entered into on the 1st March 1878 by defendant No. 1, and joined in that suit as a defendant a third person, who alleged that he was the owner of the property, the subject of the contract, seeking to obtain possession and other relief as against such third person, stating that he was a benamidar of defendant No. 1.

Such third person contended in his written statement that the suit was multifarious, but the point was not decided in the lower Courts.

On second appeal, *such third person* contended that the discretion given to the Court under s. 22 of the Specific Relief Act ought not to be exercised, as the plaintiff had slept on his rights for nearly three years; and also contended that the suit was multifarious, and that he ought not to have been made a party thereto.

Held, that although the principle of the objection, as to the delay of the plaintiff in bringing his suit, was an important one, and one which ought to be considered by the Courts, in the exercise of their judicial discretion under s. 22 of the Specific Relief Act, yet the point not having been taken in the Courts below, and there being nothing on the record to lead the Court to presume that the ordinary rule applicable to suits of this nature had been disregarded in the Courts below, the objection ought not under the circumstances to be allowed to prevail in second appeal.

Held also, per MITTER, J. (PIGOT, J. dissenting), that as regards the objection to the suit, for misjoinder, and under s. 44 of the Code of Civil Procedure, that the Appeal Court was precluded by s. 578 of the Code from reversing the decree of the lower Court, as the error (if an error at all) could not affect the merits of the decision.

Held also, that the principle laid down in the cases of *De Houghton* v. *Money* (1) and *Luckumsey Oorkerda* v. *Fazulla Cassumbhoy* (2), is only applicable where from the plaintiff's case it appears that a third party, not a party to the contract, has a distinct interest from that of the other parties to the contract, which interest is sought to be declared null and void.

* Appeal from Appellate Decree No. 920 of 1883, against the decree of H. Beveridge, Esq., Judge of Patna, dated 28th of February 1883, reversing the decree of Baboo Mahomed Nurul Hossain, Second Subordinate Judge of Patna, dated the 23rd of January 1882.

(1) L. R., 2 Ch. App., 166. (2) I. L. R. 5 Bom., 177.

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THIS was a suit for specific performance of a verbal contract for the sale of a certain house and land.

The plaintiff asserted that Mussamat Nanki, on the 1st March 1878, entered into a verbal contract with him to sell a certain house for Rs. 3,700, and that Nanki's son, Jaffir Hossein, received on her behalf Rs. 100 as earnest money on the contract, and granted a receipt for the same, Nanki promising to execute a regular conveyance of the house within one month's time. Nanki failed to execute any conveyance, and the plaintiff on the 28th February 1881 brought this suit against Nanki, her son Jaffir, and one Mokund Lall, who was alleged to be a benamidar of the plaintiff, and to whom the house was said to have been sold in 1873. The plaintiff prayed (1) for specific performance of the contract; (2) that he might obtain possession of the house; (3) that he might be registered in the Municipal Register as owner in the place of defendant No. 3; (4) that the deed of sale of 1873 might be cancelled. Nanki (defendant No. 1) denied the contract, and denied having authorized her son to receive the earnest money on her behalf; and further stated that she had sold the house in 1873 to Mokund Lall for Rs. 3,000, under a registered conveyance. Mokund Lall (defendant No. 3) contended (1) that the house belonged to him under the deed of 1873, and that the plaintiff was one of the witnesses to the conveyance; and (2) that the suit was multifarious.

The Subordinate Judge tried four issues, which issues are fully set out in the judgment of Mr. Justice Mitter, and found that the deed of sale to Mokund Lall was a mere contrivance, no consideration money having passed at the time of the sale; but that, although Nanki was not prevented by that deed from entering into a contract of sale with the plaintiff, yet the evidence did not satisfactorily prove that she had entered into a contract with the plaintiff, and that she, or any one properly authorized by her, had received Rs. 100 as earnest money, and he, therefore, dismissed the suit on these points without going into the question as to who was in actual possession of the property. The plaintiff appealed to the District Judge, who found that Nanki had entered into a contract with the

plaintiff, and that she had authorized Jaffir to receive the earnest money of Rs. 100; and, that the deed of sale to Mokund Lall was a mere paper transaction, he therefore reversed the decree of the Subordinate Judge, and ordered specific performance of the contract sued upon, and declared that as soon as the plaintiff should pay the purchase-money he should be entitled to eject Mokund Lall from the house.

The defendants, Nanki and Mokund Lall, appealed to the High Court.

Subsequently to the admission of the appeal, it appeared that Nanki, through an authorized vakeel, applied to withdraw from her appeal, and that an order was passed on her petition directing the matter to stand over to the hearing of the appeal. The Court at the hearing allowed Nanki to withdraw, but permitted the other defendant to appeal on all the points urged in the joint grounds of appeal.

Mr. *Pearson*, Baboo *Mohesh Chunder Choudhry* and Mr. *Gregory* for the appellant.

Mr. *Pearson* contended that the plaint distinctly stated that there were "other conditions" attached to the verbal contract which had not been set out in the plaint, and that the Court ought not to give specific performance of a contract the terms of which could not be found with reasonable certainty, s. 21 (cl. *c.*) of Act I of 1877.

That, the plaintiff having allowed nearly three years to elapse between the date of the alleged contract and the date of the institution of the suit, was, by reason of such delay, not in a position to ask the Court to give him relief. The jurisdiction to decree specific performance is in the discretion of the Court, s. 22, Act I of 1877; the Courts have always been unwilling to give discretionary relief to those who sleep on their rights.

That, the plaintiff had sued to obtain possession of the house from Mokund Lall, and for specific performance of his contract with Nanki, and for registration of his name in the Municipal Register, and had not obtained leave of the Court to join these causes of action; and that, therefore, under s. 44 of the Code the suit ought not to be allowed to stand; and that Mokund

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Lall being a stranger to the contract between plaintiff and the defendant Nanki, he ought not to have been made a party to the suit for specific performance. *Luckumsey Ookerda* v. *Fazulla Cassumbhoy* (1), *De Houghton* v. *Money* (2).

Baboo *Saligram Singh*, for the respondent, contended that there being a law of limitation, the plaintiff was entitled to bring his suit at any time within the period allowed by such law, and that any delay on his part within such period allowed would not debar him from succeeding in his suit. That the case of *Luckumsey Ookerda* v. *Fazullah Cassumbhoy* did not apply to this case, as the cause of action against the two defendants there was a separate one, *viz.*, against one of them for refusal to deliver up title deeds, and against the other for specific performance.

Judgments of the Court were delivered by MITTER and PIGOT, JJ.

MITTER, J.—This appeal arises in a suit for specific performance of a contract which was alleged to have been entered into on the 1st March 1878. The suit was brought on the 28th February 1881. The first defendant, according to the plaint, was the party who was in possession of the property in dispute, and who was entitled to it on the date when the alleged contract was entered into. The plaintiff further alleges that it was the said defendant who herself entered into the contract. The second defendant, who is the son of the first defendant, is alleged to have received Rs. 100 as part of the consideration money which was fixed according to the plaintiff at Rs. 3,700; and the plaintiff stated in the plaint that the second defendant received the Rs. 100 in accordance with the directions given by the first defendant for the payment of that amount to her son. There is another person who was made defendant, *viz.*, Mokund Lall. It was alleged in the plaint that the defendants Nos. 1 and 2, that is to say, the mother and her son, dissuaded by this defendant from fulfilling the contract entered into by the defendant No. 1 with the plaintiff. It was further alleged that, after the receipt for Rs. 100, which was

(1) I.L.R. 5 Bom. 177 (2) L.R. 2 Ch. App. 166.

granted by the defendant No. 2 to the plaintiff, was registered (which registration took place after a proceeding in the registration office taken between the plaintiff and the defendants Nos. 1 and 2), the defendant No. 1 caused a petition to be filed through her benamdar and dependent the defendant No. 3, Mokund Lall, in the Municipal office of the Municipality within which the disputed house lies, and caused the name of the defendant No. 3, Mokund Lall, to be registered in the Municipal office in respect of the house in suit. It was further alleged in the plaint that a kobala, dated 26th March 1873, which was executed by the defendant No. 1 in favour of the defendant No. 3 in respect of this house, was a benamee transaction, resorted to for certain reasons which are stated in the plaint, and not material to be mentioned here. Upon these allegations the plaintiff claimed specific performance of the contract, and asked also for a declaration against the defendant No. 3, that he was simply a benamdar for the defendant No. 1. The suit was defended both by Mokund Lall, the defendant No. 3, and by the defendant No. 1, and various objections were taken to the claim of the plaintiff. It will be sufficient here to notice the objection in the 9th paragraph of the written statement of Mokund Lall. That paragraph is to the following effect: "The plaintiff has in law no right to sue to have a deed of sale executed in respect of the disputed house in fulfilment of the contract, to recover possession, to register his name in the Municipal tax register, and to render this defendant's purchase null and void, as against this defendant the prior purchaser. The form in which the plaintiff has brought this suit is illegal." Four issues were framed by the Munsiff. These were:—

1*st*.—"Whether or no Mussamat Nanki has entered into a contract with the plaintiff, and whether or no she was competent to make such a contract?" (Mussamat Nanki is the first defendant).

2*nd*.—"Whether the deed of sale of 26th March 1873 is genuine, and whether, under and by virtue of it, Mokund Lall is in possession of the disputed property, or the deed of sale is a nominal transaction, and Mussamat Nanki is in possession?"

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3rd.—"Whether the stamp of the receipt is inadequate, and whether it was registered after the prescribed time or not;" and

4th.—"Whether or no, out of Rs. 3,700, the defendant has received Rs. 100 in cash, and Rs. 40 for purchase of stamp?"

The Subordinate Judge dismissed the plaintiff's suit. He came to the conclusion that the alleged contract was not established; but, with reference to the question, whether Mokund Lall, the defendant No. 3, was benamdar or not, the Subordinate Judge came to the conclusion in favour of the plaintiff, that Mokund Lall was a mere benamdar. On appeal to the District Judge, the judgment of the Subordinate Judge was reversed. The District Judge substantially found that the plaintiff's evidence with reference to the contract was trustworthy, and upon that ground he came to the conclusion that there was a valid contract of sale entered into by the defendant No. 1 with the plaintiff. He was further of opinion, in concurrence with the Subordinate Judge, that Mokund Lall, the defendant No. 3, was merely a benamdar. The District Judge gave a decree in favor of the plaintiff. Against this decree this second appeal was preferred by both Mussamat Nanki Bibee, the defendant No. 1, and Mokund Lall, the defendant No. 3, but subsequently an application was made by a vakeel, other than those who filed the second appeal, asking the Court's permission on behalf of Mussamat Nanki Bibee to withdraw from the appeal. The order passed was, that it should be considered at the time when the appeal would be heard. Now, we are satisfied upon the materials on the record that Mussamat Nanki Bibee has made a substantive application through a properly authorized vakeel to withdraw from the appeal, and it does not seem to me that there is anything in the Procedure Code that would disentitle her to withdraw from it. Therefore, we must try this appeal as if it was preferred by the defendant No. 3 only. That being so, it was contended on behalf of the respondent that any objection which upon the findings of the Court below Mussamat Nanki Bibee alone could take against the decision of the lower Appellate Court could not be urged by Mokund Lall in this case. With reference to that point we felt some doubt as to whether this contention is valid. The doubt arose in this way, that as

between Mussamat Nanki Bibee and Mokund Lall, the finding of the lower Appellate Court, that Mokund Lall was a mere benamdar, is not conclusive. It may be binding as between the plaintiff on the one hand and Mokund Lall on the other hand, but as the plaintiff, respondent, before us is relying upon some act of Mussamat Nanki Bibee in support of this contention, a doubt arose, whether the decision of the lower Court not being conclusive between Nanki Bibee and Mokund Lall, the plaintiff could shut out Mokund Lall from urging those points which he could have urged if his co-appellant had not withdrawn from the appeal. Entertaining this doubt, we have heard the case upon all the points urged in the petition of appeal, and after hearing the learned counsel and vakeel who appeared for Mokund Lall, we called upon the learned vakeel for the respondent to answer the appeal upon the following three points: First, whether having regard to the delay in bringing the suit, and it being discretionary under the Specific Relief Act to award a decree or not, as the Court thinks fit, whether this suit should not have been dismissed by the lower Court, and it not having been dismissed, whether or not this Court on second appeal should make that order. The second point was, that Mokund Lall, the defendant No. 3, being a stranger to the contract, whether in this suit the plaintiff could claim any relief against him, and if he could not, whether the suit as against Mokund Lall should not have been dismissed. The third objection with reference to which we called upon the learned vakeel for the respondent to answer the appeal, was that, supposing Mokund Lall was properly made a party, whether the causes of action upon which this suit was brought could not be properly joined together under the provisions of s. 44 of the Civil Procedure Code. As regards the first objection, it seems to me that we cannot lay down as a hard and fast rule of law, that a suit brought after the delay which has occurred in the present suit should be dismissed. There is no doubt that, under the Specific Relief Act, the Courts are vested with a certain amount of discretion in the matter of awarding a decree for specific performance; but I am not prepared to lay down as a proposition of law, that all suits brought after the lapse of time after which the present suit

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was brought are all liable to be dismissed. There may be circumstances under which a Court, exercising the discretion with which it is vested under the Specific Relief Act, may think it right to dismiss a suit brought nearly three years after the contract was entered into, and there may be also circumstances which may justify a Court in awarding a decree, even when the suit is brought after such a delay; each case must depend upon its own circumstances. In this case, I do not find that this objection was taken in the lower Courts, and, therefore, I am not in a position to say that there is any ground made out upon the materials on the record which would warrant this Court, in second appeal, in directing the dismissal of the suit. I am, therefore, of opinion that this ground must fail. As regards the other two objections, which I think may be taken together conveniently, it seems to me that even if they were well founded, we should be precluded by s. 578 of the Civil Procedure Code from reversing the decree of the lower Appellate Court, as it is clear from the facts found in this case that the error complained of, if it was an error at all, could not possibly affect the merits of the decision. But putting aside that matter, upon the merits of the objections themselves, I am of opinion that the special appeal should not succeed. In support of the objection that the suit against the defendant, appellant, should have been dismissed, two cases have been cited—*De Houghton* v. *Money* and *Luckumsey Ookerda* v. *Fazulla Cassumbhoy*. It seems to me that what is laid down in these cases is this, that, if on the face of the plaint, or of the plaintiff's case, it appears that a third party, who was not a party to the contract upon which the suit was brought, had a distinct interest, but which interest is sought to be declared null and void upon some equitable ground, such a claim against the said third party could not be made a part of the suit. In the case of *De Honghton* v. *Money* it was admitted by the plaintiff that there was a conveyance in favor of Money, but it was said that that conveyance was executed under such circumstances as would make it a voidable one; and in the case of *Luckumsey Ookerda* v. *Fazulla Cassumbhoy*, it was distinctly admitted by the plaintiff that the third party, who was not a party to

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the contract, had a distinct interest. That is not the case here. Referring to the plaint, I find that the plaintiff is really suing upon one cause of action. He charged the defendant No. 1 with having resorted to certain devices, in concert with the defendant No. 3, to defeat his rights arising out of the contract under which he was suing; he called the defendant No. 3 a mere benamdar, and there is no admission on the face of the plaint or in the plaintiff's case that the defendant No. 3 had a separate or distinct interest from that of the defendant No. 1. That being so, it seems to me that both the objections taken by the learned counsel for the appellant must fail, as there was only one cause of action upon which the suit was brought. It was found necessary to make the defendant No. 3 a party to the suit, because he was made use of as benamdar by the defendant No. 1 in setting up certain devices in order to defeat the right of the plaintiff. That is the distinction between this case and the cases cited. I am, therefore, of opinion that this second appeal must fail. It will therefore be dismissed with costs.

PIGOT, J.—I am of the same opinion. As to the question arising under the two points which my learned brother dealt with together, the case of *De Houghton* v. *Money*, and the point under s. 44, I must say that I should find a difficulty in considering that this Court was precluded under s. 578 from dealing with a case in which the principle acted upon in *De Houghton* v. *Money* was violated. I should hesitate to say that a violation of that principle would not, in itself, affect the merits (within the meaning of this section) of any case that was entered upon in disregard of that rule, but in the present case I confess, after hearing with much attention the argument of the learned counsel, that it does appear to me that the point at which the rule in *De Houghton* v. *Money* would be applicable would not be reached in this case. The question is: Are not the first and third defendants identical, and that question in itself, if answered in the affirmative, as it has been, precludes the application of these cases. I may add a word as to the first question, *viz.*, the delay. It does seem to me that that question, if properly raised, would be, as the learned counsel argued, proper matter of appeal, and might perhaps be, if properly raised, a proper matter for

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consideration even in second appeal; but if raised at all in this case in the Courts below it was very slightly raised, and it appears to me that we have no right to presume that the ordinary rule, applicable to suits of this nature, was neglected by the learned Judge in the Court below, or to hold, upon the presumption arising from the length of the delay condoned by him, that it was unduly disregarded. On reference to Lord Justice Fry's book on Specific Performance, ss. 1070 to 1079, where this subject is referred to, it will be noticed that the Lord Justice mentions several cases in which very considerable delay was held in England to be fatal, but in others not so. In s. 1078, a delay of fourteen months was held not to be such a bar. In another case, three and half years was considered fatal, and in more recent cases, a delay of one and half years, and a somewhat lesser delay, was held to be fatal. In this case, the time which was allowed to elapse was so long, that under ordinary circumstances specific performance would not be granted by the Court; but it is impossible for us to say in the form in which this case comes before us in second appeal, that there may not have been circumstances in the present case that would justify the grant of a decree even after the period which has elapsed. As the point has been raised before us, I have thought it desirable to refer to one of the authorities in which the subject is dealt with, because the principle is an important one, and under the new Specific Relief Act it is a principle which ought to be considered by the Court in the exercise of its judicial discretion under s. 22 of that Act.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Field and Mr. Justice Norris.

QUEEN EMPRESS *v.* RAM SAHAI LALL AND ANOTHER.*

1884
August 21.

Witnesses, Duty of the prosecution to produce.

Where a Sessions Judge gave it as a sufficient reason for the non-production of certain witnesses in Court on the part of the prosecution, that they had been examined by the Committing Magistrate against the express wish of the police officer in charge of the prosecution, *Held*, that that was not

* Criminal Appeal No. 441 of 1884, against the order and sentence passed by W. Verner, Esq., Sessions Judge of Monghyr, dated the 3rd July 1884.