

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

SUTHERLAND v. SINGHEE CHURN DUTT.*

1884 *Code of Civil Procedure, Act XIV of 1882, s. 135—Affidavit of documents—*
June, 2, 9, 16. Production of documents—Inspection of documents—Specific perfor-
mance of contract to purchase—Refusal to allow inspection.

In a suit for specific performance of a contract to purchase an indigo factory, the defendant denied that the agreement relied on was final, and alleged that the plaintiff had induced him to sign the agreement by means of representations regarding the nature, the extent, the value, and the net income of the property, all of which representations the defendant charged were false and fraudulent to the knowledge of the plaintiff. The plaintiff in his affidavit of documents set out a list of title deeds evidencing his title to, and the books of accounts and other papers and documents relating to the property agreed to be purchased, and these he claimed to withhold from the defendant's inspection, on the ground that they were not sufficiently material at that stage of the suit.

Held, that the documents were not protected.

THIS was an application to consider the sufficiency of the plaintiff's affidavit in verification of his list of documents, made in a suit for specific performance instituted by the plaintiff against the defendant. The plaint stated that on the 6th of October 1883 the defendant had, in Calcutta, agreed in writing to purchase from the plaintiff the Ramnaghur Indigo Factory and Silk Filature situated in the districts of Moorshedabad and Nuddea for Rs. 1,25,000 as from the 1st of September 1883; that plaintiff guaranteed the net income to be Rs. 13,000 a year; and that the defendant was to take over the *dena-powna* and pay for the outlay made by the plaintiff on the concern since the 1st of September 1883. The plaint went on to state that the defendant refused to perform the agreement; that the defendant had laid out on the factory on the defendant's account, since the 1st of September 1883, a sum of over Rs. 15,000; and that the plaintiff was willing to perform his part of the contract. Certain correspondence which had passed between the parties and between their solicitors was annexed to the plaint.

* Original Civil Suit No. 99 of 1884.

The defendant pleaded that the Court had no jurisdiction to entertain the suit; he denied the agreement set out in the plaint, save so far as in the written statement admitted; denied a refusal to perform, or that the plaintiff was ready and willing to perform. He then stated that on the 6th day of October 1883, one Cozen, whom he charged to be the plaintiff's agent, came to him and asked him to buy a zemindari, called Ramnaghur, with indigo factory and silk filature attached, alleging that it contained from 13,000 to 14,000 bighas of land; that the Government revenue was from Rs. 40,000 to Rs. 42,000; that the net annual income was Rs. 13,000 (besides the profits of the indigo factories and silk filature); and that the owner wanted Rs. 3,00,000 for it. The defendant (who denied all knowledge of the existence of the property until informed by Cozen) offered to treat for the purchase if the price were reduced. Thereupon Cozen went away from the plaintiff's house, returned again in the afternoon of the same day, and took the defendant to the plaintiff's office, at No. 1 Commercial Buildings, where they saw the plaintiff, who, the defendant alleged, confirmed the representations regarding the property which had been previously made to the defendant by Cozen. The plaintiff also stated that the ryots on the property had no *mourosi* rights; that they paid a bonus of Rs. 5 a bigha on re-settlement; that the factory house had cost Rs. 40,000 to Rs. 50,000; and that he was prepared to prove by documents and by admission of the ryots that the net annual rental was Rs. 13,000. The defendant, in his written statement, further went on to say that "after some bargaining, which was conducted by the defendant on the basis of the information given to him by the said J. E. Cozen and the plaintiff as aforesaid, for no papers of any kind were produced or shown to him, and relying entirely upon such information and upon the assertion of the plaintiff, that the said zemindari, with the said factories and filatures attached, was worth more than Rs. 1,25,000, the defendant agreed to purchase the same for the said sum of Rs. 1,25,000, provided his attorney approved of the plaintiff's title thereto;" the defendant also agreed to purchase the zemindari as from the 1st September 1883, allowing the plaintiff all moneys laid out since that date on the factory, and also agreed to take over

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the *dena-powna* at a rate agreed on. Immediately after this interview (according to the defendant's work sheet) the parties proceeded to the office of the plaintiff's solicitors, where, at the instance of the plaintiff, a draft agreement was prepared by Mr. J. C. Orr, which draft was taken away by the defendant with the plaintiff's consent, for the express purpose of having it approved by his solicitors before he signed the agreement. Before leaving the office of the plaintiff's solicitors, the defendant, at the instance of the plaintiff, signed (without reading it) a letter then and there written by Mr. Orr, which the defendant believed contained the terms agreed on between the parties as aforesaid.

The defendant then submitted that (1) the letter of the 6th of October 1883 was never intended to be a final agreement; (2) that if the said letter were found to be a final agreement, then the defendant was induced to sign by means of false and fraudulent representations concerning the nature, value, extent, and net income of the property made by the plaintiff to the defendant; and (3) supposing the letter were final and there was no fraud, then that the plaintiff's conduct in withholding from the defendant all information concerning the property, and in refusing to produce or show to the defendant any deed or document concerning the same, disentitled him to the relief claimed. In support of the last ground of defence the defendant referred to the correspondence annexed to the plaint, from which it appeared that the plaintiffs were not willing the defendant should get possession of the deeds, documents, &c., until after he should have paid the earnest money, namely, Rs. 10,000.

On the 26th of May 1884 the plaintiff filed an affidavit verifying a list of documents set out in a schedule thereto. The material portions of this affidavit are as follows:

"(1.) That I have in my possession or power the documents relating to the matters in question in this suit set forth in the first, second, and third parts of the schedule hereto annexed.

"(4.) That I object to produce the said documents set forth in the third part of the said schedule hereto.

"(5.) That I do so object to produce the said last mentioned documents, on the ground, as I am advised and verily believe, that the defendant is not entitled to inspect the same, which consist of

the title deeds evidencing my title to, and the books of account and other papers and documents relating to, the indigo factory, silk filature and property in the agreement, dated the 6th of October 1883, in the plaint in this suit mentioned, until this Honourable Court shall have decided and determined in this suit whether the said agreement constitutes a valid and binding contract in law for the sale by me of the said indigo factory, silk filature and other property to the said defendant, which is the main question raised upon the pleadings in issue between the defendant and myself in this suit."

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Mr. *Bonnerjee* for the defendant contended that the affidavit was insufficient to guard the documents mentioned in the third part of the schedule from inspection by the defendant, regard being had to the issue raised by the pleadings in the cause.

Mr. *Phillips*, *contra*, cited *Kettlewell v. Barstow* (1); *Saull v. Browne* (2); *Heugh v. Garrett* (3); *Adams v. Fisher* (4).

Mr. *Bonnerjee* in reply.

PIGOT, J.—The defendant seeks inspection of certain documents of the plaintiff, which plaintiff claims that he is entitled, under section 135 of the Code, for the present to withhold.

This is a suit for specific performance in which several defences are set up; one, that no contract was ever entered into; another, that if such a contract was ever entered into, the defendant was induced to enter into it by the misrepresentation of the defendant.

The acts of misrepresentation alleged by the defendant are, perhaps, as to some of them, somewhat loosely indicated in the written statement. But as to one, which I must for the purpose of the present application at any rate treat as material, it is clear enough.

The defendant alleges that the plaintiff represented to him before the negotiation, or the contract, whichever it was, was entered into, that the property to be sold was of the net annual value of Rs. 13,000. The defendant's case is, that this was a false representation, and that at the outside the net annual value

(1) L. R., 7 Ch. App., 686.

(3) 44 L. J. Ch. N. S., 305.

(2) L. R., 9 Ch. App., 364.

(4) 3 M. & Cr., 526.

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was to plaintiff's knowledge very greatly below Rs. 13,000. Upon this question the parties are at issue.

Another question arises in the case with respect to the annual value of the property. In the letter of October 6th, which plaintiff alleges, and defendant denies, to have been a final agreement, it is recited that the plaintiff guarantees the net annual income to be not less than Rs. 13,000, and that if the annual income be less than Rs. 13,000, a proportionate reduction is to be made in the price.

The defendant alleges that the property offered to him was described to him as a zemindari, and that the net annual value meant the annual net rental derived therefrom over and above Government revenue, assessments and such like outgoings.

This the plaintiff denies, alleging that this stipulation referred to net annual income derived from all sources of income, including the income derived from certain mulberry cultivation carried on upon the estate; and also as I conclude the income derived from the indigo factory and silk filature on the property, that property being indeed described in the letter of October 6th, drawn up by the plaintiff's solicitor, and signed (though, as he alleges, not read) by the defendant, as the Ramnaghur Indigo Factory and Silk Filature.

The defendant in paragraph 21 of his written statement alleges that not merely did the property not yield the Rs. 13,000 net annual value in the sense attributed by him to those words, but that even as an indigo factory it had been carried on for years at a loss, as the plaintiff knew.

Those are the two chief points in dispute between the parties as to the question of greater or less money value, and the representation or guarantee said to have been made or entered into respecting it.

Then, there is another dispute closely connected with the above, namely,—what it was, which was offered to the defendant.

The defendant says what plaintiff offered him for sale was a zemindari with a profit rent; with, no doubt, a factory, &c., on it, combining this, with the previous contentions, he in result, alleges that he was offered, as a profitable zemindari, what was in truth a worthless trading concern.

The plaintiff says what he sold was, an indigo factory, &c., with rent-paying tenants on the land; and that it was a valuable property. There are no doubt other questions raised in the suit, but I do not think I need advert to them for the purpose of the matter now before me.

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The documents which the plaintiff claims to withhold from inspection are those set out in part III of the schedule to his affidavit, and consist of title deeds evidencing his title to and the books of account, and other papers and documents relating to the indigo factory, silk filature, and other property in the agreement, dated the 6th October, mentioned.

He says the defendant is not entitled to inspect these documents until it shall have been decided in this suit whether or not the agreement sued on in the suit was or was not binding on the defendant. It was argued for the plaintiff that defendant would not be allowed to go into the question of title at the hearing; that the question at the hearing would be simply, was there a binding contract; and that upon that being found, if it should be found in favor of the plaintiff, the Court would direct the usual reference as to title, until which time, the right to inspect those documents would not arise, the issue upon which their contents would be material not arising until then.

If the matter stood solely on that footing, I should accept the plaintiff's contention and refuse the discovery sought. The case of the defendant is not so framed (I will put it no further) in respect of the mere question of title, as to lead to a departure from the usual, though not absolutely invariable, practice of directing a reference.

But it is not upon a mere question of title that discovery of these documents is now sought. Upon one question, whether the contract, if made, is voidable on the ground of misrepresentation, they are or they probably are, or they may be, material to the defendant's case. So far as I can judge from the correspondence, I should think it probable that they are material. I do not like saying more than that; it is not the time to construe the letter of October 6th. But it is enough if they may reasonably be thought material to an issue which must be raised at the hearing.

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It is obviously a case, which it is better not to discuss, at this stage, a jot more than is necessary; else there are one or two further considerations to which I might perhaps refer. I shall only add that I am glad to think that the burden of inconvenience here is lighter than in some cases which might be imagined in which inspection of the title-deeds might be ordered. The documents which the plaintiff seeks to withhold would have been, as I gather from the correspondence, always open to the defendant's inspection, had he paid his deposit; yet even then the present defence would have been available for him if his case be true, and he had paid the money before discovering the facts on which it is founded.

I feel the objection to ordering discovery of a party's title-deeds, when it can be avoided, that if I saw my way to it, I should let the questions of misrepresentation and the one or two other questions to which I have not particularly referred, stand over until the question of the effect of the signature by the defendant of the letter of October 6th could be determined. But I cannot do it. It would be perhaps to order two distinct trials followed by a reference as to title.

The plaintiff must give the discovery sought for, costs to be costs in the cause.

Messrs. *Barrow & Orr* for the plaintiff.

Messrs. *Beeby & Rutter* for the defendant.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Miller, Mr. Justice McDonell, Mr. Justice Prinsap, and Mr. Justice Wilson.

GOSSAMI SRI 108 SRI GRIDHARIJI MAHARAJ TICKAIT
 (PLAINTIFF) v. PURUSHOTUM GOSSAMI AND OTHERS (DEFENDANTS.)

Civil Procedure Code, Act XIV of 1882, ss. 575, 597—Decision when appeal heard by two or more Judges—Letters Patent of 1805, cls. 15, 36.

Section 575 of Act XIV of 1882 does not take away the right of appeal which is given by clause 15 of the Letters Patent.

When the judgment of a lower Court has been confirmed under s. 575 of the Code of Civil Procedure, by reason of one of the Judges of the appeal Court agreeing upon the facts with the Court below, an appeal will lie

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