

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cargenven.

1932,
November 4.

AKSHAYALINGAM PILLAI (PETITIONER—FIRST
DEFENDANT), PETITIONER,

v.

AVAYAMBALAMMAL AND SIXTEEN OTHERS (RESPONDENTS
2 TO 6, LEGAL REPRESENTATIVES OF FIRST PLAINTIFF AND
RESPONDENTS 11 TO 22—DEFENDANTS 6 TO 17), RESPONDENTS.*

Specific Performance—Decree for—Enforcement of—Defendant's right of—Vendor and purchaser—Purchaser—Suit for specific performance by, against vendor and subsequent alienees from him with notice—Decree in—Enforcement by vendor of, against will of subsequent alienees—Specific Relief Act (I of 1877), sec. 35 (c).

The decree in a suit for specific performance of a contract to sell immovable property brought by a purchaser against his vendor and alienees from him of different portions of the property with notice of the contract provided, *inter alia*, that the plaintiff was to deposit a certain amount in Court within a specified period, that on deposit the vendor on his behalf and on behalf of his sons and of the subsequent alienees from him was to execute and register a conveyance in respect of their respective properties, the deed of conveyance being joint or several according as the plaintiff desired, and that the plaintiff was to get possession of the properties with mesne profits as from the date of deposit of the money.

The plaintiff made no attempt to carry the decree into effect. The vendor presented a petition praying for a final order in conformity with the preliminary decree already passed in the suit. He expressed his willingness to perform his part of the contract, and applied that the plaintiff should be directed to bring the purchase-money into Court. The subsequent alienees from the vendor did not join him in making that application. The vendor urged that the Court should execute the conveyance on their behalf and that the plaintiff should be called on to bring in the full price.

* Civil Revision Petition No. 1112 of 1929.

Held that, in the circumstances of the case, the vendor was not entitled to the relief prayed for by him and the only remedy open to him was to have the contract rescinded.

The vendor could not enforce the decree as regards his share only. He could not compel the subsequent alienees from him against their consent to join in the conveyance. However the equities might stand between them and the plaintiff, it would be repugnant to all principles of equity that the vendor should enforce the decree against their interests and without their consent, thereby depriving them of the title which he had himself conveyed to them.

Per VENKATASUBBA RAO J.—A decree for specific performance operates in favour of both parties and the defendant therefore can also enforce specific performance.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the order of the Court of the Subordinate Judge of Mayavaram, dated the 6th day of November 1928 and made in Interlocutory Application No. 344 of 1926 in Original Suit No. 70 of 1923.

C. A. Seshagiri Sastri for petitioner.

K. S. Desikan, R. Somasundaram Ayyar, K. S. Venkatramani, V. V. Chowduri and *G. S. Venkatarama Ayyar* for respondents.

Cur. adv. vult.

JUDGMENT.

VENKATASUBBA RAO J.—An important question has been raised as to the right of a defendant after judgment in a suit for specific performance.

The facts which gave rise to the application made in the lower Court, so far as they are relevant to the present purpose, may be briefly stated. The plaintiff-purchaser obtained in Original Suit No. 70 of 1923 (that was the suit in which the application was made) a decree for specific performance of the contract referred to in the pleadings, to sell immovable property. The

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first defendant was the vendor under the contract, and defendants 7, 8 and 13 are alienees of different portions of the property from the first defendant with notice of the contract. On the 31st March 1926 the following decree was made by the Subordinate Judge's Court of Mayavaram :—

“ That the plaintiff do deposit in Court within six months from this date Rs. 5,500 with interest at 11 annas per cent per mensem from 17th December 1913 to date of deposit.

That on deposit the first defendant on his behalf and on behalf of his sons, defendants 2 to 5, and defendants 7, 8 and 13 do execute and register a conveyance in respect of their respective properties in the plaint (less the items adjudged as lost to the plaintiff by reason of the finding on issue 16) ; that the deed of conveyance shall be joint or several according as the plaintiff desires and that all costs in connection with the execution and registration of conveyance shall be borne by the plaintiff.

That the plaintiff do get possession of the properties with mesne profits to be determined in execution as from the date of deposit of the money, defendants 1, 7 and 8 and 13 being severally liable for mesne profits according to the extent of property held by each.

That defendants 7, 8 and 13 do have a charge on the money in deposit according to their respective stake on the properties as per their sale deeds obtained by them or their predecessor, their remedies being left to be enforced in future proceedings ; and

That the plaintiff do pay first defendant Rs. 304-8-0 on account of his costs of the suit and the plaintiff and the other defendants do bear their own costs of the suit as noted below.”

It will be noticed that this decree is in some respects somewhat curious. By the time the decree was made, nearly thirteen years had elapsed from the date of the contract, and the plaintiff is directed by the decree to bring into Court the purchase-money with interest from

17th December 1913, the date of the contract. While the plaintiff was thus made liable for interest for over thirteen years, there was no corresponding liability imposed on the defendants, who remained in possession of the property, for mesne profits, as under the decree they were made liable only from the date of the deposit. Another curious feature is, that the amount payable to the defendants-alienees was left to be determined in future proceedings. It was felt, it is stated, that this judgment bore harshly on the plaintiff, but, as he had died even before it was pronounced, his legal representatives were unable to file an appeal. The amount which under the decree the plaintiff was directed to pay was found to be in excess of the value of the property, and no attempt was therefore made by his representatives to carry the decree into effect. The first defendant, finding it to his advantage to enforce this decree, presented a petition to the lower Court in the following terms:

“that this Hon’ble Court be further pleased to pass a final order in conformity with the preliminary decree already passed in the suit, so as to enable him to reap the fruits of the preliminary decree.”

By this petition the first defendant stated that he was willing to carry out his part of the contract, and applied that the plaintiff’s representatives should be directed to bring the purchase-money into Court. Defendants 7, 8 and 13, it must be noted, did not join the first defendant in making this application. The stand taken by the latter in the lower Court was that the plaintiff was bound to pay in return for the land in his possession which he was prepared to convey the proper proportion of the price. But the contention in that form has been abandoned in this Court, the first defendant’s case now being, that on behalf of the dissenting

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defendants the conveyance should be executed by the Court and that the plaintiff should be called on to bring in the full price. The learned Subordinate Judge, holding that the only remedy open to the applicant is to have the contract rescinded under section 35 (c) of the Specific Relief Act, made the following order :

“It seems to me, therefore, that the only final order which can be passed on this application is that the plaint contract, dated 17th December 1913, evidenced by Exhibit D, be rescinded and determined. I accordingly pass the said order.” It is against this order that the revision petition has been directed.

A question of general importance has been argued whether, when a decree for specific performance is made, it operates in favour of both parties, so that the defendant also can have it carried into effect. It is argued on the one hand that the defendant to the action does not enjoy the same privilege as the plaintiff, that, as regards the relief he can obtain in the suit itself, section 35 (c) of the Specific Relief Act prescribes a remedy and that he cannot obtain any other or further relief in the action than what is provided by that section. It is contended on the other hand that the decree in the suit enures for the benefit of both and each of the parties can after judgment claim specific performance. The question is, which of these two views is correct? The Specific Relief Act, it has been pointed out, is based on the rules and practice of the English Law in relation to the doctrine of specific performance; *Ardeshir Mama v. Flora Sassoon*(1). Their Lordships of the Judicial Committee have interpreted the sections of this Act, both as to substantive law and practice, in the light of the principles recognized by the English Courts. If there is an express divergence, then the Act will be strictly

(1) (1928) I.L.R. 52 Bom. 597 (P.C.).

adhered to, whatever be the English Law (*ibid.*, page 623). It seems to be well settled under the English practice that a decree for specific performance operates in favour of both parties. The usual form of a decree is to declare that the agreement ought to be specifically enforced without stating that it shall be so enforced at the instance of the plaintiff only. The form given in Seton on Decrees runs thus :

“Declare that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution and order and adjudge the same accordingly.”—seventh edition, Vol. III, pages 2136 and 2137.

In India also this view was taken in some cases—*Karim Mahomed Jamal v. Rajooma*(1) and *Bai Karimabibi v. Abderehman*(2). In a recent case the point was discussed at great length by RANKIN C.J. who, after an elaborate examination of the authorities, came to the same conclusion; *Herambachandra Maitra v. Jyotishchandra Singha*(3). In England a suit for specific performance is not deemed to come to an end by the passing of the decree. In Chapter IV of Fry's standard work on Specific Performance he discusses the various reliefs that may be obtained after judgment. The right to these reliefs is not possessed by the plaintiff alone. The learned author says :

“It may and not infrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part; as, for instance, where a vendor refuses or is unable to execute a proper conveyance of the property, or a purchaser to pay the purchase-money. The character of the consequential relief appropriate to any particular case will of course vary according to the nature of the subject-matter of the

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(1) (1887) I.L.R. 12 Bom. 174.

(2) (1922) I.L.R. 46 Bom. 990.

(3) (1931) I.L.R. 59 Calc. 501.

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contract and the position which the applicant occupies in the transaction; but in every case the application must, under the present practice, be made only to the Court by which the judgment was pronounced.”—Section 1170, sixth edition; and then again:

“There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself.”—Section 1171.

Then he goes on to describe at some length the various kinds of reliefs that are open to a vendor and those open to a purchaser. The nature of the relief depends upon whether the applicant is the vendor or the purchaser, not upon whether he is the plaintiff or the defendant. The chapter deals with varieties of reliefs, and some of them may probably not apply to India, the law and practice here being in some respects different; but there is no reason why the principle, which has been accepted by the English Courts, should be departed from in this country. The Specific Relief Act is defective in this respect, and we should turn for guidance to the English practice on the subject. Let us take the case where the defendant happens to be the purchaser. The plaintiff, who has obtained judgment, makes default. What then is the defendant's position? He is prepared to pay the purchase price and otherwise observe the decree, but, on the hypothesis that *it does not enure for his benefit*, he cannot compel the plaintiff to execute the conveyance. There is no provision in the Specific Relief Act which such a defendant can invoke. The decisions say that the plaintiff may obtain in certain circumstances an extension of the time originally granted. When then can the defendant feel that he is absolved from the contract? How long is he to keep ready in his hands the purchase-money? It cannot be that the intention of the law is that a defendant-purchaser should be subject to this

unmerited hardship. Therefore in the case of a defendant-purchaser at any rate, there being no provision in the Specific Relief Act, we must necessarily turn to the recognized English practice in that respect. Next, is there anything to show that, where the defendant is the vendor, the remedy provided by the Act is exhaustive? I may observe first, that section 35 applies to both the plaintiff-vendor as well as the defendant-vendor and is not confined to the latter case only. Supposing a vendor as plaintiff obtains a decree for specific performance but finds that the defendant is impecunious and cannot pay the purchase-money, why should it not be open to him to have the contract rescinded under that section? And secondly, the words "in the same case" in the final paragraph refer to the case mentioned in clause (c). I agree with the view taken on this point in *Kurpal Hemraj v. Shamrao Raghunath*(1), and by TIRUVENKATACHARIAR J. in *Mahmmadalli Sahib v. Abdul Khadir Saheb*(2). The opening paragraph of the section refers to the "following cases"; then three cases follow, case (c) being one of them. The words "in the same case" in the final clause of case (c) must therefore refer to that particular case. And further, why should it be assumed that a departure from the English Law is intended and the relief is restricted to the contingency mentioned in the penultimate clause, namely, where the purchaser is in possession? A contrary opinion has been expressed by Collett in his Specific Relief Act (see fifth edition, page 282), and there is a dictum of KEMP J. to the same effect in *Chaturbhuj v. Kalyanji*(3), but I must express my respectful dissent from this view. Section 35 thus, in my opinion, applies to both the plaintiff-vendor

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(1) (1922) I.L.R. 47 Bom. 589.

(2) (1927) 59 M.L.J. 351, 357.

(3) A.I.R. 1927 Bom. 239.

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and the defendant-vendor, and it enables them to have the contract rescinded in the very action in which the decree for specific performance was made. But is that any reason for holding that the other remedies open to them under the English Law are denied to them under the Act? We cannot overlook that the word used in the final clause of section 35 is "may" and not "shall". It therefore seems to me that a defendant, whether he be purchaser or vendor, must after judgment be in a position to require specific performance from the opposite party in the same action. If the principle on which the rule of mutuality is founded be accepted, the remedies open to the plaintiff after judgment must be equally available to the defendant and the varied nature of the remedies is set forth, as already noticed, by Fry in his work. Thus, the right of rescission recognized in section 35 (c) of the Specific Relief Act is not confined to a vendor, whether plaintiff or defendant, but must be equally open to a purchaser, it being immaterial whether he appears in the action as plaintiff or defendant. That the principle of reciprocity is not limited to the enforcing of the decree by requiring specific performance is the effect of the observation of SCHWABE C.J. in *Abdul Shaker Sahib v. Abdul Rahiman Sahib*(1). The learned Chief Justice gives a rough summary of the remedies enumerated by Fry, as they obtain in the English system, and assumes that they are equally available to either party in this country. This in my opinion is the necessary result of the acceptance of the dual principle recognized in the English Law; first, that the passing of the decree does not terminate the suit but that various reliefs may be obtained after judgment in the action itself (according to SCHWABE C.J. the

(1) (1922) I.L.R. 46 Mad. 148.

decree is in the nature of a "preliminary decree"), and secondly, that the decree enures not only for the benefit of the plaintiff but also of the defendant. Mr. Seshagiri Sastri suggested (though on the facts of this case it was not necessary for him to take up this position) that, in regard to limit of time, applications by a defendant to enforce the decree would be governed by the provisions of the Limitation Act. It is sufficient to point out that this does not seem to be the true principle on which relief is granted to either party; but this subject I need not pursue further.

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I have so far assumed that the decree that is passed has followed the proper form, i.e., that it directs the contract to be specifically enforced—the words being wide enough to apply to the plaintiff as well as the defendant. If as in the present case the decree has not followed that form, it is a matter of detail whether the Court before granting relief to the defendant would insist upon the decree being in the first instance amended. In any case it would be advisable for the Courts to follow the English form in framing specific performance decrees and further by way of caution to insert, as suggested by SCHWABE C.J., some such words as "further consideration reserved" at the end of the decree.

In the result, the contention of Mr. Seshagiri Sastri that a defendant can enforce specific performance is in my opinion well-founded. But the question still remains, can the first defendant in the circumstances of this case obtain such a relief? The plaintiff is neither in law nor under the decree bound to take a conveyance of the first defendant's share alone. Can the latter then compel defendants 7, 8 and 13 against their consent to join in the conveyance? They were not, it must be noted, parties to the contract, but the Court,

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giving effect to a rule of equity, held that they were bound at the instance of the plaintiff. The first defendant in violation of his contract with him alienated parts of the property to these defendants. As against the plaintiff, no doubt, they may have no equities, but surely the first defendant cannot be allowed to perpetrate a double wrong. His conduct towards the plaintiff was wrongful, and he now invokes the aid of the Court to undermine the position of the alienees to whom he professed to pass a good title. The lower Court by way of affording a relief to him rescinded the contract under section 35, and in my opinion he is not entitled to any higher or further relief.

I may mention that almost at the close of the case it was intimated to us that the thirteenth defendant had died subsequent to the appeal and his legal representatives had not been brought on the record. This, in the view I have taken, is immaterial.

In the result, the civil revision petition is dismissed with costs.

CURGENVEN J. CURGENVEN J.—I agree that this civil revision petition should be dismissed, but I would like briefly to put my reasons for that view in my own words.

Accepting the general proposition that a decree for specific performance may be enforced by the defendant where the plaintiff has not chosen to give effect to it, and even regarding the decree in the present case, in spite of its actual form, as amenable to such treatment, I have not been persuaded that, in such circumstances as the present, the Court would be bound to comply with the first defendant's (petitioner's) request. The agreement to sell was in 1913, and nearly six years later, in 1919, the first defendant parted with certain portions of the property to the seventh, eighth and thirteenth defendants. They were aware of the agreement, but

it seems to have been represented to them that the plaintiff had no intention of carrying it out. Now, since the first defendant cannot enforce the decree so far only as his own property is concerned, enforcement must entail deprivation, at his instance, of the property which these defendants acquired from him. However the equities may stand between these persons and the plaintiff, it appears to me repugnant to all principles of equity that the first defendant should now enforce the decree against their interests and without their consent, thereby depriving them of the title which he had himself conveyed to them. Had he himself sued the plaintiff for specific performance after making these alienations, I do not think that any Court would have given him a decree; and I am loth to believe that, now that the plaintiff has a decree, the first defendant may get indirectly what he could not get directly and the Court has no discretion to refuse to give it operation at his instance. Such enforcement may not technically amount to execution, but it appears to me that, where only one of several defendants applies, there must necessarily be a power in the Court such as, in execution, is supplied by Order XXI, rule 15, Civil Procedure Code, to safeguard the interests of the remainder. Were this not so, it would have been open to this petitioner to dispose of all but a few cents of the property and yet compel the unwilling holders of the remainder, not to speak of the equally unwilling plaintiff, to become parties to a sale. I do not think that, even had we in this case strictly to administer the law, the doctrine of the reciprocal enforceability of decrees for specific performance would need to be applied in so unqualified a manner. *A fortiori* it follows that this petition for revision must be dismissed.

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