

OFFICIAL
ASSIGNEE,
MADRAS

v.
NATESAM
PILLAI.

KUNHI
RAMAN J.

oral evidence shows that, when amounts were paid to the bank in current account or fixed deposit, generally pass books and cheque books used to be given and usually agreements used to be entered into regarding the interest payable on the deposits. This procedure was not followed when the plaintiff's moneys were received. Applying the principles of law laid down in the authorities quoted above we hold that the amounts were received by the bank in a fiduciary capacity and not as between a bank and its customer and that consequently the view taken by the lower Court is correct. The appeal therefore fails and must be dismissed with costs payable out of the estate.

G.R.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and Mr. Justice
Krishnaswami Ayyangar.*

KONA ADINARAYANA (FIRST DEFENDANT), APPELLANT

v.

DRONAVALLI VENKATASUBBAYYA AND TWO
OTHERS (PLAINTIFFS), RESPONDENTS.*

Specific performance—Contract for sale of land by members of joint Hindu family—Minor member attaining majority before date of suit—Suit, if maintainable by members.

In a suit by the members of a joint Hindu family for specific performance of a contract for sale of land, signed by the major members and by the managing member as guardian of the minor, the defendant contended that the suit did not lie as one of the vendors was a minor. At the time of the institution of the suit the minor member had attained majority.

* Letters Patent Appeal No. 75 of 1937.

Held, the suit was maintainable. The plaintiff in a suit for specific performance of a contract is entitled to a decree, if at the time of the hearing he can show a good title although he had not a good title at the time of the contract.

The principle of the decisions in *Hoggart v. Scott*(1) and *Salisbury v. Hatcher*(2), applied and followed.

APPEAL preferred under clause 15 of the Letters Patent to the High Court against the decree of VENKATARAMANA RAO J. in Second Appeal No. 726 of 1935 preferred against the decree of the Court of the Subordinate Judge of Masulipatam in Appeal Suit No. 27 of 1935 (Original Suit No. 272 of 1933, District Munsif's Court, Gudivada).

P. Somasundaram for appellant.

M. S. Ramachandra Rao for *P. Satyanarayana Rao* for respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—The appeal arises out of a suit for specific performance of a contract for sale of land tried in the Court of the District Munsif of Gudivada. The respondents were the plaintiffs. On 4th August 1930 by a contract in writing the respondents agreed to sell three quarters of an acre of land in the Kistna District at the price Rs. 1,095. The respondents are brothers and are members of an undivided family. The third respondent was a minor at the time the contract was entered into. The contract was signed by the major brothers and by the first respondent as the manager of the family and as the guardian of the minor. The appellant went into possession immediately after the execution of the contract and admittedly he has remained in possession and has enjoyed the rents and profits ever since. The suit for specific performance was filed on 4th August 1933.

LEACH C.J.

(1) (1830) 1 Russ & M. 293 ; 39 E.R. 113.

(2) (1842) 2 Y & C.C.C. 54 ; 60 R.R. 26.

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The appellant, although he was in possession and was treating the land as his own, set up the defence that the suit for specific performance would not lie as one of the vendors was a minor. His attitude in the circumstances can only be described as that of a very dishonest person. At the time of the institution of the suit the minor member of the vendor family had reached majority. The District Munsif granted the respondents a decree, but on appeal the Subordinate Judge of Masulipatam held that the major brothers alone were entitled to sue for specific performance. Accordingly, he limited the decree to two-thirds of the land on payment of two-thirds of the purchase consideration. The appellant then appealed to this Court and the first and second respondents filed a memorandum of cross objections. The appeal was heard by VENKATARAMANA RAO J. who restored the decree of the District Munsif, but gave a certificate permitting of this Letters Patent Appeal.

In holding that the respondents were entitled to maintain a suit for specific performance the learned Judge relied on the decisions in *Hoggart v. Scott*(1) and *Salisbury v. Hatcher*(2). In the first of these cases it was held that a plaintiff in a bill for the specific performance of a contract was entitled to a decree if at the time of the hearing he could shew a good title, although he had not a good title at the time of the contract. LEACH M. R. observed :

“ The defendant, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title ; and he was not bound to wait until they had acquired a title ; but, he not having taken that course, it is enough that at the hearing a good title can be made.”

(1) (1830) 1 Russ. & M. 293 ; 39 E.R. 113.

(2) (1842) 2 Y & C.C.C. 54 ; 60 R.R. 26.

In *Salisbury v. Hatcher*(1) KNIGHT BRUCE V.C. ADINARAYANA
said : v.

VENKATA-
SUBBAYYA.

LEACH C.J.

“ In cases of specific performance the want of mutuality is a consideration generally material, but it is contrary to principle and authority to say that perfect mutuality is requisite in order to call a Court of Equity into action. There are cases in which plaintiffs have had a decree for specific performance against defendants who, when the bill was filed, were not in a condition to enforce specific performance in their own favour. Where no legal invalidity affects the contract, the enforcement of it in this Court is matter of judicial discretion.”

In that case, the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor and the vendor later having acquired a perfect title, a decree for specific performance was passed.

As VENKATARAMANA RAO J. has pointed out, inasmuch as the appellant remained in possession of the land and did not repudiate the contract, the right to repudiate must be deemed to have been waived. There is nothing in the law of India which prevents the application of the principle applied in *Hoggart v. Scott*(2) and *Salisbury v. Hatcher*(1) and I consider that those principles have direct application here. It would indeed be regrettable if the Court could not give to the respondents the relief they asked against the injustice which they have suffered at the hands of the appellant. At no stage has he repudiated the contract but he has refused to pay the price of the land which he has enjoyed for over nine years.

The appeal will be dismissed with costs throughout. N.S.

(1) (1842) 2 Y. & C.C.C. 54; 60 R.R. 26.

(2) (1830) 1 Russ. & M. 293; 39 E.R. 113.