

S. 253 provides that whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same, or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. But this section contemplates that there shall be a suit pending at the time security is given for its performance, and would not seem to apply to a case like this, where no suit can be said to have been pending, as the litigation in the Court of first instance and Court of appeal had ended, and no second appeal had been instituted in the High Court when security was given.

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I do not therefore think that s. 253 will apply so as to allow the decree of the High Court to be executed against the surety.

I would decree the appeal, and set aside the order of the Court below with costs, and restore the order of the Court of first instance.

MAHMOOD, J.—I agree.

*Appeal allowed.*

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*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

ACHOBANDIL KUARI (DEFENDANT) v. MAHABIR PRASAD  
 (PLAINTIFF).\*

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 August 8.

*Vendor and purchaser—Non-payment of consideration money—Burden of proof.*

In a suit for possession of land alleged to have been purchased under a registered deed of sale, the defendant-vendor admitted the execution and registration of the deed, but denied receipt of consideration. The deed was dated in January, 1876, and the suit was instituted in 1884. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced no evidence in proof of the payment of consideration.

*Held* that although under ordinary circumstances the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed.

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\* Second Appeal No. 1509 of 1885, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 3rd August, 1885, modifying a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 26th December, 1884.

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*Held*, therefore, that in the absence of such evidence, and of evidence to explain the fact of the plaintiff being out of possession, the suit failed.

THE facts of this case are stated in the order of remand.

Babu *Baroda Prasad*, for the appellant.

Mr. *J. Simeon*, for the respondent.

TYRRELL, J.—The plaintiff brought this suit as heir to his brother, who, in January, 1876, is said to have purchased from the appellant and her mother and other persons a two annas and eight pies share in mauza Nagpur. The plaintiff alleges that his brother got possession after the purchase, and held possession until his death, and after his death, he held possession until (Asarih 1288) 1881, when he was forcibly ejected by the vendors, of whom appellant is one. He therefore sued for reinstatement and for mesne profits. The appellant defended the suit, admitting that the deed of January, 1876, had been executed and registered by the vendors, but alleging that the transaction stopped there, no consideration having been received, and no possession transferred, the plaintiff's allegation as to his possession being untrue. The first Court gave the plaintiff-respondent a decree, and the defendants appealed to the District Judge, who found that the appellant's allegation was true as to possession never having been given to the plaintiff-respondent or to his brother, the original vendee. On the plea as to consideration, the Judge found that execution of the sale-deed being admitted by the defendants, who also had acknowledged receipt of consideration before the Registrar, the burden of proving non-payment of consideration rested on them, and that they had failed to prove its non-payment. The Judge thereupon decreed the suit against the appellant in favour of the plaintiff, exempting Musammat Chundar Bai on the ground of minority.

It is doubtless true that the party to a deed duly executed and registered, who alleges non-payment of consideration, is ordinarily bound to prove his allegation; but we think the Judge has overlooked the peculiar circumstances of this case. He had found that possession had never been transferred, and that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years.

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This state of things, combined with the continuous possession of the vendors, favoured their allegation that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff-vendee to give evidence that consideration had in fact passed.

In order that an inquiry may be made on this point, we must remand this case for trial of the following issue :—

Did the brother of the respondent pay the consideration of the sale-contract to the appellant and the other vendors under the deed of January, 1876; and if he did, how does it come to pass that he has been kept out of possession till the present time ?

On return of the finding, ten days will be allowed for objections.

OLDFIELD, J.—I concur.

The lower appellate Court found on this issue against the respondent, as he produced no evidence to prove payment of the purchase-money. On the return of its finding the High Court delivered the following judgments :—

OLDFIELD, J.—We must decree this appeal. It was for the plaintiff-respondent, under the circumstances of this case, to prove that consideration-money passed on the sale-deed of January, 1876, and to account for being out of possession of the property since the alleged purchase. No evidence was adduced by him on this point in the first Court, nor in the lower appellate Court, although we remanded the case for that purpose. The Judge says that the respondent had ample opportunity afforded him of adducing evidence, but no evidence of any kind was adduced by him, and as he has not established that any consideration was paid, the suit fails.

The decisions of both the lower Courts must be set aside and the plaintiff's suit dismissed with costs in all the Courts.

TYRELL, J.—I am quite of the same opinion. We remanded the case in the interest of the respondent, to enable him to adduce proof of payment of consideration and explain the fact of being out of possession. In the absence of any evidence, the Judge was obliged to find the issue against him, and under these circumstances we have no alternative than to hold that his suit fails.

*Appeal allowed*