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appeal subject to the due proportion of the money claimed being allocated to the 10 biswas in Husainalipur Mathra. This brings us to the question of apportionment. We have no materials on the record by which we can now make an apportionment.

We refer this question under s. 566 of the Code of Civil Procedure to the Subordinate Judge, who will ascertain and determine what the value of each of the properties was at the date of the suit.

On the materials so supplied we will give a final decree in this case. The question of costs will be dealt with when we are dealing with the final decree.

Issue remitted.

PRIVY COUNCIL.

P. C.
J. C.
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June 16 *and* 17.

BINDESHRI PRASAD (PLAINTIFF) *v.* MAHANT JAIRAM GIR (DEFENDANT).

[On appeal from the High Court of the North-Western Provinces.]

Specific performance of contract—Act I of 1877 (*Specific Relief Act.*)

Upon a contract for the sale of the proprietary right in land, the intending purchaser, insisting on a right to compel the vendor to give an absolute warranty of the title, withheld payment of the purchase money beyond the time fixed. He also sued for specific performance of the contract, requiring a guarantee from the vendor, until it appeared that the judgment of the appellate Court was about to be given against him on the ground that he was not entitled to what he claimed.

Held that certain reported cases where, apparently, the plaintiff had been willing to submit to have the agreement which was actually proved performed, were different from this; and that the decree dismissing the suit ought to stand. Here the plaintiff, insisting upon having that which he had no right to have, had delayed performing his part of the agreement on that account.

Appeal from a decree (23rd June, 1884) of the High Court (1) affirming a decree (9th June, 1883) of the Subordinate Judge of Allahabad.

The suit out of which this appeal arose was brought by the present appellant to obtain a decree for specific performance of a contract for the sale of the proprietary right in twenty-five mauzas forming taluka Dhobha, pargana Kiwai, in the Allahabad district. The plaint set forth that on the 3rd October, 1882, the defendant con-

Present.—LORD HOBHOUSE, SIR B. PEACOCK, SIR R. BAGGALLAY, and SIR R. COUCH.

(1) Weekly Notes, 1884, p. 169.

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tracted with the plaintiff, at Mirzapur, to sell to the plaintiff for Rs. 10,075, his whole zamíndári right in the above, the plaintiff paying Rs. 200 earnest-money, and Rs. 105 for the stamp; promising also to pay the remainder of the purchase money within fifteen days, at the time of the execution and registration of the sale-deed. Refusal to complete on the tender of a sale-deed for execution on the 18th October was alleged, and the relief sought was a decree for specific performance by execution and registration of a sale-deed, with terms involving a warranty of title.

The *satta*, or agreement, dated 3rd October, appears at the commencement of their Lordships' judgment. Its factum was not disputed; but the defence was that the plaintiff had not paid the purchase money within the stipulated time, and this notwithstanding that he had been informed when the *satta* was signed that the risk of claims on the property that possibly might be brought forward by persons claiming through the former owners, must be taken by him as purchaser; and that no warranty could be given. He had, however, afterwards insisted upon one.

The issues recorded by the Subordinate Judge raised questions whether the fact that the plaintiff did not pay the purchase money to the defendant within the stipulated time, affected his right to sue, whether, at the time of the agreement, it was stated that the defendant was not to be answerable for disputes as to the title to the property raised by other parties, and whether if the plaintiff should be found entitled to have the sale-deed executed, he would be entitled to have it executed with the warranty of title claimed by the plaintiff.

It appeared that the material facts about taluka Dhobha were that, prior to December, 1873, it belonged to Chedi Lal and other members of his family. Chedi Lal had three brothers Madho, Sheo and Sadho. Of these Madho, about 1869, separated in estate from Chedi Lal, and died some three years after, leaving a widow Ramdai. Sheo died in 1861, leaving a widow Lachmania. Sadho, and, after his death, his son, Kalka Prasad, continued joint with Chedi Lal; and against them in 1872 the respondent obtained a decree, in satisfaction whereof he caused to be sold in execution and purchased their right, title and interest in taluka

Dhobha, of which he obtained possession. In November, 1881, the appellant, through Chedi Lal, who acted for him, commenced the arrangements, with a view to purchasing the property, which ended in the execution of the *satta* of 3rd October, 1882. A dispute then arose as to an absolute warranty of title, which the appellant required, and after the interchange of proposed clauses in the sale-deed, this suit was brought.

Both the Courts below held that the plaintiff was not entitled to a decree for specific performance. The Court of first instance held: first, that the admitted fact of non-payment of the purchase money within fifteen days was a sufficient defence to the suit, the willingness of the defendant to have executed a sale-deed, without the guarantee of title insisted on by the plaintiff, after the expiration of the fifteen days, not barring him in this suit from relying upon the condition as to payment within that time; secondly, that the defendant was not under the contract between the parties bound to guarantee the title.

The High Court, (Straight and Oldfield, JJ.,) without expressing an opinion as to the correctness of the first ground relied on by the lower Court, concurred with that Court in substance as to the second. The material part of their judgment was as follows:—

"What we read the plaint to mean, and what we believe the plaintiff intended it to mean, was that the defendant should be compelled to execute a contract of sale, with a covenant therein guaranteeing an absolute and valid proprietary title to the whole of the villages in taluka Dhobha, and indemnifying the plaintiff against loss or damage in the event of his being hereafter ousted from the whole or any part thereof, by the subsequent assertion, on the part of any other person, of a title paramount to the vendor, whose position, it must not be forgotten, is that of an auction-purchaser and mortgagee. No doubt, under ordinary circumstances, it is an accepted principle of law, that "in every contract for the sale of land a condition is implied for a good title;" and the failure to mention it does not necessarily render such contract incomplete. And it is laid down "that the Court will carry into effect a contract framed in general terms, where the law will supply the

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details". (Fry, para. 349, p. 156). But, in the present case, it is patent, from the evidence of Chedi Lal, that the plaintiff was fully alive to, and well aware of, the precise character of the rights possessed by the defendant in the taluka of Dhobha; and we can only interpret the *satta* of the 3rd of October, 1882, as evidencing the preliminaries of a sale by which all that the defendant undertook to sell, and all that the plaintiff contracted to buy, was the rights and interests of the defendant, whatever they might be. The statements of Chedi Lal make it perfectly clear that the plaintiff knew of the existence of the two widows of Madho Prasad and Sheo Prasad, the deceased brothers of Chedi Lal, and that they had actual or apparent claims against the property proposed to be sold; indeed, it would seem that he at one time contemplated purchasing their interests, with a view to asserting them by litigation. Under such circumstances, while, on the one hand, it cannot be said that the plaintiff was in any way misled, on the other, the conclusion is irresistible that the defendant at no time either contemplated giving or agreeing to give such a guarantee of title as the plaintiff now seeks to put upon him. There is not a word in the *satta* from which we should be justified in drawing the inference that the defendant ever undertook to do more than to convey such rights and interests as he possessed to the plaintiff; and it seems to us that to accede to the prayer of the plaintiff's plaint would be to compel the defendant, by the coercive powers of a Court of law, to do something he had never agreed to do, and which could not legally be expected from him, having regard to the nature of the interest he was to be at the same time required to convey. In other words, upon the facts disclosed, the plaintiff virtually invites us to compel the defendant to vouch a title which, to his own knowledge, is, to say the least of it, doubtful, and to force him to sell to the plaintiff a higher estate than he ever undertook to transfer. The case does not appear to us one in which the discretion of this or any Court to enforce specific performance, under Act I of 1877, can properly be exercised; and for these reasons we hold that the decision of the Court below, dismissing the suit, should be maintained. The appeal is dismissed, with costs."

On this appeal,

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Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon* appeared for the appellant.

Mr. *R. V. Doyne*, for the respondent.

For the appellant it was contended that as the difference between the parties had not been cleared up when the litigation between them ensued, resulting in the Courts' finding what the contract, in fact, had been, there was no reason why a decree for the performance of the contract as found to have been actually entered into, should not be made. That the plaintiff had at one time insisted upon more than he was entitled to was no obstacle to this, nor did the lapse of the fourteen days, the position of the parties not having been altered by the delay, alter the case. Reference was made to *Joynes* v. *Statham* (1), *Lindsay* v. *Lynch* (2), *Ramsbottom* v. *Gooden* (3) and Dart's Vendors and Purchasers, ed. 1876, p. 1037.

Counsel for the respondent was not called upon.

SIR R. COUCH delivered their Lordships' judgment.

SIR R. COUCH :—The appellant in this case, and the respondent, on the 3rd of October, 1882, entered into an agreement for the sale of an estate which is described in the agreement as taluka Dhobha. The agreement is very short, and is in these words: —"Out of Rs. 10,075 (ten thousand and seventy-five) at which it has been settled by Mahant Jairam Gir to convey taluka Dhobha to Babu Bindeshri Prasad, Rs. 200 (two hundred) have been received as earnest-money, through Lala Chedi Lal and Mata Prasad Malwai. The balance, *viz.*, Rs. 9,875 (nine thousand eight hundred and seventy-five), exclusive of costs, will be received in cash within 15 days, and then I will execute the sale-deed and get it registered. The purchaser will bear the costs on account of the stamp paper and the registration and mutation fees. I will have nothing to do with them. I will take the entire amount in cash. If the balance is not paid within fifteen days the earnest-money will be forfeited, and the vendor will be at liberty to sell the ilaka or not."

On the 16th October the following letter was written to the appellant: "My dear Mahant Jairam Gir,"—After compliments—

(1) 3 Atkyns. 388. (2) 2 Sch. & L. 9.
(3) 1 V. & B. 168.

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"I beg to say that you contracted with me to sell the zamíndári of taluka Dhobha, pargana Kiwai, zilla Allahabad, for Rs. 10,075, and accepted Rs. 200 as earnest-money. The draft of the sale-deed is also ready. However, you make excuses in executing the sale-deed. It is 13 days since you were paid the earnest-money. You have also sent to me the stamp, but nobody appears on your behalf to write and complete the sale-deed. I have over and over again sent my man to you, but you have put the matter off from day to day. As I have some misgivings in the matter, and I am ready to pay the money and have the sale-deed executed by this writing, I request you to duly execute the said sale-deed in accordance with the corrected draft, and accept the money from me as soon after the receipt of this as possible." It is stated in the statement of the pleader who was examined by the Subordinate Judge before the settlement of the issues, that this notice was served on the 18th October, "and about three or four days after this, the aforesaid draft of the sale-deed was sent to Madho Chaubay, defendant's gomashta, at Mirzapur. The draft was not sent to the defendant's gomashta within the term of 15 days." It is stated afterwards that there was some mistake as to that date, and it would seem that the draft of the sale-deed was sent three or four days before the 18th, probably on the 14th October. As sent to the defendant, it contained this clause:—"Should a stranger now or hereafter acquire any other title in the property sold, or any kind of flaw arise, I, the vendor, my heirs and assigns, shall in every way be responsible therefor. The vendee shall, at all events, be at liberty, if any such contingencies arise, to seek his relief in the civil Court and realize his losses and damages from me, the vendor, from my person and property, and that of my heirs and assigns, together with interest and costs incurred in the Court; and to this I will have no objection whatever," thus requiring the defendant to give an absolute warranty of title to the property which was sold. The defendant objected to this, and struck out this clause, and it would seem that he substituted for it a clause to the following effect:—"Should any kind of dispute arise, whether now or hereafter on my part, or that of my heirs or assigns, in the property sold, I, the vendor, and my heirs will be responsible therefor," and the draft thus altered was returned to the plaintiff. The defendant appears

to have thought that the plaintiff was entitled to this, but their Lordships are not prepared to hold that such a contract of sale as this gave the purchaser a right to insist on any formal covenants such as the practice of English lawyers has attached to an English contract of sale, if that is what was in the minds of the parties.

The plaintiff, the purchaser, was not satisfied with this. After the 18th October there appears to have been some correspondence or negotiation between the parties with respect to the receipt of some outstanding rents, and it is said that a letter was written on the 30th October, but that letter does not appear in the proceedings. The plaintiff insisted upon having in the sale-deed the agreement or covenant which had been inserted being an absolute warranty of title; and on the 4th December he brought his suit in the Court of the Subordinate Judge of Allahabad, in which, after stating the contract and the payment of the earnest-money, he alleged that "the defendant did not perform the aforesaid contract, and when the plaintiff saw that the defendant delayed in the complete execution of the deed in question, he requested the defendant to have the deed completely executed and registered by means of a written and registered notice on the 16th October, 1882," and that he sent the draft on the 18th October, 1882, which, as has been stated, was admitted to be a mistake. Then he said: "the plaintiff has all along showed readiness to have the contract completely performed as far as he himself was concerned;" and prayed that a judgment might be passed ordering the defendant to execute and get registered a sale-deed in favour of the plaintiff in respect of the property claimed, by entering a guarantee of good valid title.

Now there he distinctly claimed to have the contract performed by having this warranty of title; and when he says that he was ready to have the contract completely performed, as far as he himself was concerned, it must be taken that he was ready to have it performed in that way.

The case went for trial before the Subordinate Judge of Allahabad, and he, in his judgment, came to the conclusion that the time fixed for the payment of the balance of the purchase money was material, and that the plaintiff had not paid the purchase money

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at the time fixed, and no valid excuse had been shown for his not doing so, and consequently he was not entitled to have a decree, and he dismissed the suit. It then went by way of appeal to the High Court, and it is important to see what the plaintiff insisted upon when he made his appeal to the High Court. In his memorandum of appeal, he said that he appealed because the appellant had done "all that lay in his power within the stipulated period to secure the due execution and completion of the sale contract which had been previously accepted in unqualified terms by the defendant, the respondent; because there is ample evidence to prove that the appellant could not deposit with the respondent the balance of the consideration money in consequence of the refusal of the latter to execute a proper conveyance with a warranty of good title," distinctly insisting then on his right to have a warranty of good title; and "because upon the facts admitted by the respondent himself, the plaintiff-appellant is entitled to an equitable decree for his claim," namely, the claim for a deed with a warranty of good title. It has been suggested that the plaintiff was willing to take a decree upon the terms which was said the defendant admitted he was liable to perform, namely, to have a sale-deed with a qualified covenant; but there is no evidence that at any time before this stage of the case the plaintiff had in any way submitted or shown his willingness to take any other sale-deed than one with a warranty of title. The pleader was examined, and there is no trace of any willingness to do this.

When the case came before the High Court, it went into a consideration of some evidence, which, in its opinion, showed that the agreement between the parties was different from that which was stated in the writing; that all that the defendant undertook to sell, and the plaintiff contracted to buy, were the rights and interests of the defendant whatever they might be; that it was known to them that the subject-matter of the agreement was the right and interest of certain persons, and that the vendor could not be expected to give any absolute warranty of title. Their Lordships have not gone into this evidence, and therefore express no opinion as to the ground upon which the High Court rested their judgment. They came to the conclusion, upon the oral evidence, that it was not a proper case for a decree for specific performance.

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The question which has now to be considered, is whether the decree of the Subordinate Judge dismissing the suit ought to stand, and the position of the parties appears to be this: that the plaintiff has all along, until he saw that the judgment of the High Court was likely to be given against him, been insisting upon having the sale-deed with the warranty of title; and it is admitted by his learned counsel at the bar, that he had no right to any such covenant. It has not been attempted to be shown that he had. Thus he was insisting upon having that which he had no right to have, and he delayed performing his part of the agreement for the payment of the purchase-money on that account. Under such circumstances as these, it certainly is not a case in which it would be right for this Committee to advise Her Majesty to make any decree for specific performance.

The cases to which their Lordships have been referred are very different from this. They are cases where apparently the plaintiff has been willing to submit to have the agreement which was actually proved performed. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed, and the decree of the High Court affirmed, and the appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant.—Messrs. *T. L. Wilson and Co.*

Solicitors for the respondent.—Messrs. *Pyke and Parrot.*

RAJESWARI KUAR AND ANOTHER (DEFENDANTS) *v.* RAI BAL KRISHAN, (PLAINTIFF).

[On appeal from the High Court for the North-Western Provinces.]

P. C. J. C. 1887, *July* 15th.

Evidence—Burden of proof.

In a suit for money due on a bond between the representatives of the original parties to it, the defendant attempted to reduce the claim on the ground that the money had not been received in full, the bond having been given partly in respect of an old debt, and partly in respect of a credit in account, upon which the debtor had not, in fact, drawn certain items.

The Judicial Committee concurred with the High Court, which had reversed so much of the decree of the Court of first instance as disallowed these items; the latter Court not having correctly adjusted the burden of proof, and having

Present.—LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, and SIR R. COUCH.