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In my opinion the plaintiffs had no legal right upon which to come into Court and claim recoupment or contribution to the extent of one-half the amount paid. I think the appeal should be decreed; that the judgment of the learned Judge should be set aside and that of the first Court restored. The defendants-appellants are entitled to their costs in all Courts.

MAHMOOD, J.—My opinion in this case coincides entirely with the views to which my learned brother has given expression. I need only add that any other of view of the law would amount to saying that the effect of s. 70 of the Contract Act is to enable a total stranger, without any express or implied request on behalf of a debtor, to put himself into the shoes of the creditor by the simple fact of paying the debts due by such debtor. I do not think that the section could have been intended to involve such results.

*Appeal allowed.*

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November 27.

*Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

SHIB LAL (DEFENDANT) v. BHAGWAN DAS (PLAINTIFF).\*

*Vendor and purchaser—Part payment of purchase-money—Execution, registration and delivery of sale-deed—Completion of sale—Right of purchaser to sue for possession—Act IV of 1882 (Transfer of Property Act), s. 54.*

Non-payment of the purchase-money does not prevent the passing of the ownership of the property sold from the vendor to the purchaser; and the latter, notwithstanding such non-payment, can maintain a suit for possession of the property, subject to such equities, restrictions or conditions as the nature of the case may require. *Mohan Singh v. Shih Koonwer* (1), *Goor Parshad v. Nunda Singh* (2), *Heera Singh v. Ragho Nath Sahai* (3), and *Umedmal Motiram v. Dava* (4) referred to.

The difference between an executed contract of sale and an executory contract to sell observed on. *Ikbal Begam v. Gobind Prasad* (5) dissented from.

A deed of sale of immovable property having been duly executed and registered, and delivered, and the purchaser having paid a portion of the purchase-money to the vendor's creditors—*held*, with reference to s. 54 of the Transfer of Property

\* Second Appeal No. 630 of 1887 from a decree of C. W. P. Watts, Esq., District Judge of Moradabad, dated the 22nd December, 1886, confirming a decree of Maulvi Zain-ul-abdin Khan, Subordinate Judge of Moradabad, dated the 31st August, 1886.

(1) N. W. P. H. C. Rep. 1866 p. 85.

(3) N. W. P. H. C. Rep. 1866 p. 30.

(2) N. W. P. H. C. Rep. 1866 p. 160.

(4) I. L. R. 2 Bom. 547.

(5) I. L. R. 3 All 77.

Act (IV of 1882) that these facts amounted to a full transfer of ownership, and the purchaser could maintain a suit for possession of the property sold, notwithstanding that he had not paid the balance of the purchase-money to the vendor or to a mortgagee of the property, as stipulated in the deed.

The facts of this case are stated in the judgment of Mahmood, J.

Pandit *Ratan Chand* and Babu *Jogindro Nath Chaudhri*, for the appellant.

*Kunwar Shivanath Sinha* and Mr. *Khushwahht Rai*, for the respondent.

MAHMOOD, J.—In order to explain the points of law which arise in this case, it is necessary to recapitulate the facts and the findings at which the lower Courts have concurrently arrived.

The defendant Sri Ram was the owner of a ten-biswas share in the village, and he executed a usufructuary mortgage thereof in favour of one Chajmal Das on the 1st June, 1861, and placed the mortgagee in possession. It has also been found that the aforesaid Sri Ram borrowed further sums of money from Chajmal Das and hypothecated the above-mentioned property as security for repayment of the loan. These sums are stated in the first Court's judgment to have amounted to about Rs. 2,338, but apparently this sum is not the result of any regular calculation, as no mortgage-account appears to have been taken, Chajmal Das being no party to this litigation.

The Courts below have also concurred in finding that the defendant Sri Ram owed Rs. 406 to one Hargo Lal on a bond dated the 10th June, 1884, and Rs. 900 to one Dalip Singh.

On the 3rd July, 1884, Sri Ram executed a registered sale-deed whereby he conveyed the above-mentioned ten biswas to Bhagwan Das, plaintiff-respondent, in lieu of Rs. 4,800. The sale-deed specifies these sums to be paid in the following manner.

- (1) Rs. 406 to be paid to Hargo Lal.
- (2) Rs. 900        "       Dalip Singh.
- (3) Rs. 622        "       Chajmal Das, on his mortgage of 1st June,  
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(4) Rs. 2,872, being the balance, to be paid in cash to the vendor Sri Ram, defendant, thus making up the total sum of Rs. 4,800 purchase-money.

It will be observed that the above-mentioned items take no account of the hypothecation charge of Chajmal Das on the property sold, and this circumstance appears to be the main cause of the present litigation.

On the 8th July, 1884, Sri Ram executed another sale-deed of the same property in favour of the defendant Shib Lal and registered it the next day. The consideration of that sale is also mentioned in the deed to be Rs. 4,800 made up of various items mentioned therein.

The words of the deed are :—

“That out of the said consideration-money, Rs. 622 for payment to Chajmal Das mortgagee, Rs. 134 for payment to Kanhya Lal, and Rs. 406 for payment to Hargo Lal *bania* of Jalalabad, in all Rs. 1,162, were left with the vendee, and Rs. 2,438, due by the vendor to the vendee were credited in the account, and the remaining sum of Rs. 1,200 was received in cash from the vendee and was applied to his use by the vendor.”

It will be observed that this specification mentions the sum of Rs. 622 due on Chajmal Das' mortgage and also the sum of Rs. 406 due to Hargo Lal, but mentions nothing as to the Rs. 900 specified in the sale-deed of the 3rd July, 1884 to be due to Dalip Singh. Further, it is to be noticed that in this latter sale-deed no specific mention is made of the hypothecation charge of Chajmal Das, and the other items mentioned in the sale-deed are different to those mentioned in the earlier sale-deed of the 3rd July, 1884.

The plaintiff Bhagwan Das relying upon his sale-deed of the 3rd July, 1884, applied to the revenue authorities for mutation of names in his favour, but his application was resisted by the defendant Shib Lal on the ground of the sale-deed which he had obtained from Sri Ram on the 8th July, 1884. The objections prevailed, and Bhagwan Das' application being disallowed, the name of Shib Lal

was entered in the Government revenue records on the 24th June, 1885, as the owner of the ten-biswas share above-mentioned.

Subsequently, Shib Lal executed a *theka* lease of the property on the 14th July, 1885, in favour of Ram Prasad, who has in consequence been impleaded as a defendant in this suit.

The above mentioned facts explain the position of the parties in this litigation. The dispute amounts to the question whether the plaintiff Bhagwan Das' sale-deed of the 3rd July, 1884, was a valid and perfected conveyance so as to render the defendant Shib Lal's sale-deed of the 8th July, 1884, null and void.

The plaintiff came into Court alleging that in accordance with the terms of his sale-deed of the 3rd July, 1884, he duly paid Rs. 406 to Hargo Lal and Rs. 900 to Dalip Singh on behalf of the vendor Sri Ram ; that immediately after the execution of the deed the plaintiff discovered that besides the sum of Rs. 622 mentioned in the sale-deed to be paid to Chajmal Das on his mortgage, the latter held further hypothecation charges on the property, to the extent of Rs. 2,200 ; that therefore the plaintiff instead of paying the sum of Rs. 2,872, which was to be paid in cash to the vendor Sri Ram, only paid Rs. 672 to him in cash and kept the balance of the purchase-money for payment of Rs. 622 due on Chajmal Das' mortgage, and the remainder due to him for his hypothecation charges ; that the defendant vendor Sri Ram in collusion with Chajmal Das and Shib Lal executed a fraudulent and nominal sale-deed in favour of the latter on the 8th July, 1884, and the latter fraudulently and in collusion with Chajmal Das obtained possession and mutation of names on the 24th June, 1885, and thereafter executed a *theka* lease in favour of the defendant Ram Prasad. Upon these allegations the plaintiff prayed for proprietary possession of the 10 biswas share by establishment of his right under the sale-deed of the 3rd July, 1884, and nullification of the sale-deed of the 8th July, 1884.

The suit was resisted by all the three defendants upon similar pleas. They urged that the plaintiff's sale-deed had been fraudulently obtained by him from the defendant Sri Ram ; that the plaintiff had

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paid no portion of the purchase-money to the defendant-vendor; that therefore the sale remained inoperative; and that the plaintiff having thus declined to carry out the terms of the sale, the vendor Sri Ram executed the sale-deed of the 8th July, 1884, in favour of the defendant Shib Lal, who had since redeemed the mortgage of Chajmal Das and had obtained possession.

The Courts below have concurred in finding that the plaintiff's sale-deed of the 3rd July, 1884, was a *bonâ fide* and valid transaction; that in accordance with its terms the plaintiff had paid on behalf of the vendor Sri Ram Rs. 403 to Hargo Lal and Rs. 900 to Dalip Singh; but that he had failed to prove the payment to Sri Ram of Rs. 672, and that he had not paid the mortgage-money due to Chajmal Das owing to the latter's collusion with the vendor Sri Ram and refusal to accept payment of the money. On the other hand, the Courts below have found that the sale-deed of the 8th July, 1884, in favour of the defendant Shib Lal was an entirely nominal and fraudulent transaction, being the result of collusion between him and Chajmal Das and Sri Ram; that the defendant Shib Lal was a tool in the hands of Chajmal Das and was in reality acting for him; that "Shib Lal did not pay a pice of the purchase-money or the mortgage-money of the disputed property," although he obtained a receipt of the mortgage-money from Chajmal Das, that "although Shib Lal is shown to be in possession of the disputed property, yet in fact the disputed property is up to this time in the mortgagee possession of Chajmal Das."

Upon these findings the Courts below have decreed the plaintiff's claim for proprietary possession against all the three defendants, subject to the condition that the plaintiff should take an account of what is due to Chajmal Das for his mortgage and hypothecation charges and pay the same to him, and after deducting such amount "whatever will remain out of the purchase-money due by the plaintiff to the defendant-vendor shall be formally recovered by the latter from the former."

From this decree the defendants Sri Ram and Shib Lal appealed, to the lower appellate Court, and the plaintiff appears to have pre-

ferred cross-objections in respect of so much of the decree as subjected the decree for possession to payment of mortgage-money to Chajmal Das.

The lower appellate Court, however, dismissed *both* the appeal and the cross-objections, thus confirming the first Court's decree.

This second appeal has been preferred only by the defendant Shib Lal on four grounds, of which the third which impugns the lower Court's finding that Rs. 900 were due by the vendor Sri Ram to Dalip Singh and were paid to the latter by the plaintiff as part of the purchase-money, cannot be entertained in second appeal, as it is a pure question of fact.

In support of the first and second grounds, it is contended that inasmuch as the lower Courts themselves have found that the plaintiff had not paid the full consideration of the sale-deed of the 3rd July, 1884, that deed could confer no ownership upon him and the suit was therefore unmaintainable. It is further argued that the plaintiff-respondent having refused to pay the vendor the amount due to him as purchase-money, the latter was entitled to execute the second sale of the 8th July, 1884, in favour of the defendant-appellant, Shib Lal.

In support of this contention the learned pleaders for the appellant rely upon the ruling of this Court in *Ikkal Begam v. Gobind Prasad* (1) where, under somewhat similar circumstances, it was held that a purchaser who had only paid a portion of the purchase-money could not maintain a suit for possession of the purchased property, as the contract of sale could not be regarded as complete as there had been "a manifest withholding of the purchase-money." In that case the purchase-money was Rs. 16,000, the sale-deed had been duly executed and registered, and out of the consideration money Rs. 2,000 had been paid in cash to the vendor and the remaining Rs. 14,000 were to be applied by the plaintiff-purchaser towards the payment and discharge of certain bond-debts due by the vendor and charged upon the purchased property. The plaintiff-vendee had not up to the date of the suit paid off those debts, and

(1) I. L. R. 3 All. 77.

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it was held that this omission rendered the sale incomplete so as to preclude the plaintiff from claiming possession as owner of the purchased property.

The Courts below have not followed that ruling, holding, as they seem to do, that it was distinguishable from the present case.

I am afraid I cannot take the same view; for if that ruling lays down any rule of law, it goes the length of holding that non-payment of a part of the purchase-money by the vendee prevents the passing of ownership to him and precludes him from suing for possession of the property which he has purchased, although the sale-deed has been duly registered and delivered to him and a portion of the purchase-money has been received by the vendor. If this is a correct interpretation of that ruling, its principle is directly applicable to this case; and here the plaintiff-respondent having distinctly failed to prove the payment of the entire purchase-money, his suit would stand dismissed if the above-mentioned ruling were followed.

I regret, however, with due respect, I am unable to follow that ruling, for it seems to me to proceed upon disregarding the distinction between a *contract of sale* and a *contract to sell*, the former being an executed contract and the latter appertaining to the class of executory contracts. Or, to use the technical language of jurisprudence, sale creates a *jus in rem*, as it passes ownership immediately when it has been executed; and a contract to sell is a *jus ad rem*, for it only creates an obligation attached to the ownership of property and does not amount to an interest therein.

This juristic distinction is fully recognised in s. 54 of the Transfer of Property Act (IV of 1882), and forms the basis of many a rule of law and equity, such as the doctrine of notice to *bond fide* transferees in connection with specific performance of contracts. I may say here that I have had the advantage of conferring with my brother Straight, who was one of the learned Judges who decided the case of *Ikbāl Begam v. Gobind Prasad* (1) with regard to that ruling, and he has authorised me to say that, so far as he is concerned, he has more

(1) L. L. R., 3 All. 77.

than once stated from the Bench that the case was always a very doubtful authority and that since s. 54 of the Transfer of Property Act came into force, it can no longer be considered as an authority.

Now, in the present case, the Courts below have found that the sale-deed of the 3rd July, 1884, was duly executed, registered and delivered to the plaintiff-vendee, who has paid a portion of the purchase-money to the vendor's creditors. I hold that these facts in themselves amount to a full transfer of ownership to the plaintiff-vendee, notwithstanding the circumstance of his having either omitted, refused or been unable to pay the balance of the purchase-money to the vendor Sri Ram or the mortgagee Chajmal Das. The plaintiff could therefore maintain this suit, which is in the nature, not of an action for specific performance of contract, but an action for ejectment. Such an action can be maintained by any one who, like the plaintiff in the present case, has acquired the ownership of immoveable property, though, of course, in a case such as this, in common with some other classes of cases, equities may exist in favour of the defendant, so as to subject the decree for possession to restrictions and conditions appropriate to the circumstances of each case.

In the present case, however, no such equities can exist in favour of the defendant-appellant Shib Lal, who, as I have already said, has been found by the Court below to have obtained the sale-deed of the 8th July, 1884, with knowledge of the plaintiff's earlier sale-deed of the 3rd July, 1884, and to have paid no portion of the purchase-money nor to have obtained possession of the property, but to have acted simply as a nominal vendee in the interests of the mortgagee Chajmal Das, who was in collusion with the vendor Sri Ram defendant.

It follows from what I have said that there is no force in the contention urged in the second ground of appeal, that in consequence of the non-payment by the plaintiff of a portion of the purchase-money of the sale-deed of the 3rd July, 1884, the vendor Sri Ram had any rights in the property to convey to the appellant by the sale-

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deed of the 8th July, 1884. This view is supported by the principle of the rulings of this Court in *Mohun Singh v. Musammam Shib Koonwer* (1), *Goor Prasad v. Nunda Singh* (2), and by the ruling of the Bombay High Court in *Umedwal Motiram v. Dava* (3), which was a much stronger case than the present, because there the vendee had paid no portion of the purchase-money, and having confessed his inability to pay the same, had returned the sale-deed to the vendor. These various rulings are not in full accord with each other as to the exact form of the decree which should be passed in such cases, but they are unanimous in laying down the principle that non-payment of a portion of the purchase-money does not prevent the passing of ownership from the vendor to the vendee, and that such vendee can maintain a suit for possession.

The ruling in *Goor Prasad v. Nunda Singh* (2), so far as it declares that a decree for possession in favour of a vendee who has paid only a portion of the purchase-money cannot be subjected to a condition of payment of balance of the purchase-money, is, as I respectfully think, scarcely consistent with the procedure and rules of the Courts of equity and the rulings which I have cited. But as I have already said, the present appellant Shib Lal is entitled to no equities such as would require any modification of the lower Court's decree, so far as he is concerned, and I need not dwell upon the matter any further.

It now remains only to dispose of the contention urged in the fourth ground of appeal which proceeds upon the assumption that Chajmal Das, the mortgagee, had transferred his rights to the appellant. Upon this assumption it is contended that the appellant was entitled to some kind of lien upon the property in suit.

As to this part of the case it is enough to say that the findings of fact at which the lower Courts have arrived contradict the assumption upon which the plea proceeds. They have found that the appellant paid nothing either to the vendor, Sri Ram, or to the mortgagee, Chajmal Das, and that his position in the matter was

(1) N.-W. P. H. C. Rep. 1866 p. 85. (2) N.-W. P. H. C. Rep. 1866 p. 160.  
 (3) I. L. R. 2 Bom. 547.

merely a nominal one in collusion with Chajmal Das, mortgagee, who was still in possession. The findings therefore indicate no such transfer of mortgagee's rights by subrogation or otherwise as would entitle the appellant Shib Lal to any modification of the lower Court's decree, and since Chajmal Das was no party to this litigation, and the other two defendants Sri Ram and Ram Prasad have not joined in this appeal, the case requires no further discussion, their rights not being involved in this appeal.

I dismiss the appeal with costs.

BRODHURST, J.—I concur in dismissing the appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Straight and Mr. Justice Mahmood.*

BHUPAL RAM (DEFENDANT) v. LACHMA KUAR AND OTHERS (PLAINTIFFS.)\*

*Hindu Law—Hindu widow—Alienation by widow to her married daughter—Reversioner—Declaratory suit—Act I of 1877, (Specific Relief Act), s. 42.*

The effect of a gift by a Hindu widow of her deceased husband's estate to her daughter, is merely to accelerate the latter's succession and put her by anticipation in possession of her life-estate, and therefore affords no cause of action to a reversioner to maintain a declaratory suit impeaching the gift.

*Per MAHMOOD, J.*, that in the exercise of the discretion allowed to the Court by s. 42 of the Specific Relief Act, a declaratory decree should be refused to the plaintiff in such a case, where the donee was a married woman and capable of bearing a son who would be the next reversioner to the full ownership of the estate of the donor's deceased husband.

*Indar Kuar v. Lalla Prasad Singh* (1) and *Udhar Singh v. Ranee Koonwar* (2) referred to.

THE facts of this case are stated in the judgment of Straight, J. The Hon. T. Conlan and Pandit *Ratan Chand* for the appellant.

Maulvi *Abdul Majid*, The Hon. Pandit *Ajudhia Nath*, and Mir *Zohur Husain*, for the respondents.

STRAIGHT, J.—This appeal relates to a declaratory suit brought by the plaintiff-appellant before us, in the Court of the Subordinate

\*First Appeal No. 29 of 1887 from a decree of Maulvi Mirza Abid Ali Khan, Subordinate Judge of Sháhjahánpur, dated the 10th November, 1886.

(1) I. L. R. 4 All. 532.

(2) 1 Agra, 234.

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