

to go on as upon an application, but it was not asked to do so. When the plaintiff entered this appeal to the first appellate Court, he took his stand upon various grounds, but entirely omitted to impugn the action of the first Court in defeating the suit as a suit and in dismissing it and not treating it and entertaining it as an application. It is impossible for us to say that either one or the other Court violated any rule having the force of law. We therefore, while finding that the plaintiff is a representative, and, as such, bound to proceed by application under section 244, and not by a suit, find ourselves unable to interfere in second appeal with the decree impugned. The appeal is dismissed with costs.

Appeal dismissed.

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GOBARDHAN
RAI
v.
BISHAN
PRASAD.

Before Mr. Justice Blair and Mr. Justice Aikman.

SARJU PRASAD SINGH (DEPENDANT) v. WAZIR ALI (PLAINTIFF).*

Agreement to lease—Subsequent lease to third party taking in good faith without notice of agreement—Specific performance—Act No. I of 1877 (Specific Relief Act), section 18.

S agreed to lease certain immovable property to W for a term of fifteen years and to execute and register the lease on a certain specified day. Before the day fixed for executing the lease arrived, S executed a lease of the same property for two years in favour of N and others, who had no knowledge of the agreement to lease to W. W thereupon sued S and his lessees, claiming cancellation of the two years' lease to N and his co-lessees, and specific performance of the agreement to lease to him for fifteen years. Held that S was, having regard to section 18 of the Specific Relief Act, in the position of a person who had agreed to lease "having an imperfect title," and who had subsequently acquired such an interest in the property as enabled him to carry out his agreement, and that, although the lease to N and others could not, under the circumstances, be set aside, the plaintiff was entitled to a decree for "specific performance" of the agreement to lease to him, to take effect after the determination of the lease which had been granted to N and others.

The plaintiff in this case came into Court alleging that one Sarju Prasad Singh had, on the 9th July 1897, agreed to lease to him, for a term of fifteen years and under certain conditions specified in the plaint, certain immovable property, which lease was to have been executed and registered at Jianpur on the 22nd July 1897; but that the said Sarju Prasad Singh had not carried

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December 5.

* Second appeal No. 531 of 1898 from a decree of H. D. Griffin, Esq., District Judge of Azamgarh, dated the 16th April 1898, confirming a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 12th January 1898.

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SARJU
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out his agreement, and had, on the contrary, completed a lease of the said property in favour of Nazir Ahmad and others for a term of two years, the said lessees being aware of the existence of the agreement with the plaintiff to lease to him. The plaintiff accordingly asked that the lease given to Nazir Ahmad and others might be set aside, and that Sarju Prasad Singh might be directed to execute a lease in favour of the plaintiff according to the terms stated by him.

The Court of first instance (Subordinate Judge of Azamgarh) found that the lessees had, as a fact, no knowledge of the agreement to lease to the plaintiff, and gave the plaintiff a decree against Sarju Prasad Singh for the execution of a lease in favour of the plaintiff after the expiry of the term of Nazir Ahmad's lease. On appeal the lower appellate Court (District Judge of Azamgarh) upheld that decree. The defendant Sarju Prasad Singh accordingly appealed to the High Court.

Messrs. *W. K. Porter* and *R. Malcomson*, for the appellant.

Mr. *Abdul Raouf* (for whom *Maulvi Muhammad Ishaq*), for the respondent.

BLAIR and AINMAN, JJ.—The plaintiff complained that defendant No. 1, having promised to execute to him a lease for 15 years, after that promise rendered himself unable to fulfil it by granting to other persons, the second class of defendants, a lease for two years. The plaintiff, alleging the defendants second party had taken their lease with notice of his claim, asked for specific performance of his contract with defendant No. 1 and the avoidance of the interest which, upon his own showing, subsequently accrued to the second set of defendants, who stood in his way. The Court below found that the defendants second party had no notice of his interest, and had taken their lease in good faith. Upon that finding the Court below maintained the rights of the second party of defendants to a two years' lease and decreed that at the termination of that period the plaintiff should obtain a lease from the first defendant for the period and on the terms originally agreed upon. It is that decree which is impeached in this appeal. It seems to us that the case is one within the meaning, if not within the words, of section 18 of Act No. I of 1877, and it is also consistent with the rulings of

the English Courts that when a party enters into a contract without power to perform that contract, and subsequently acquires power to perform the contract, he is bound to do so. In this case the defendant No. 1 by his own action rendered himself temporarily unable to perform the contract. Certainly his position, in our opinion, can be in no sense better than that of a person who laboured under the same disability before he entered into the contract. In the absence of authority to the contrary, and holding a strong opinion that the decree of the lower appellate Court is sound upon the principles of equity and justice, we dismiss this appeal with costs.

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SARJU
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v.
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Appeal dismissed.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

RAM PIARI (DEFENDANT) v. KALLU AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, sections 584, 568—Appeal—Admission of additional evidence in appeal—Discretion of Court.

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December 6.

The refusal by an appellate Court to exercise the discretion vested in it by section 568 of the Code of Civil Procedure with respect to the admission of additional evidence would be an error or defect in procedure within the meaning of section 584 of the Code, because section 568 distinctly implies that discretion must be exercised. But a refusal in the exercise of discretion to admit additional evidence is undoubtedly not such an error or defect.

THIS was an appeal under section 10 of the Letters Patent, 1866, from the following judgment of a Judge of the Court sitting singly.

“The sole ground taken in the memorandum of appeal in this case is that the lower appellate Court was wrong in refusing to admit additional documentary evidence, which was tendered at the hearing of the appeal. In my opinion such ground does not fall within any of the grounds set forth in section 584 of the Code of Civil Procedure. It is a matter in the discretion of the appellate Court to admit additional evidence. If it refuses to exercise that discretion, I do not think that such refusal is a substantial error or defect in procedure. It was held in the case of *Beckwith v. Kisto Jeebun Buckshee* (1) which was followed in *Golam Mukdoom v. Mussamat Hafeezoonissa* (2)

* Appeal No. 37 of 1900 under section 10 of the Letters Patent.

(1) (1863) Marshall, p. 278.

(2) (1867) 7 W. R., C. R., 489.