

APPELLATE CIVIL.

Before Sir Shah Muhammad Sulaiman, Chief Justice,
and Mr. Justice Banerji.

1932

June, 1.

SHAHZAD SINGH (PLAINTIFF) *v.* JIACHHA KUNWAR
AND OTHERS (DEFENDANTS).*

Specific Relief Act (I of 1877), section 27—Transfer of Property Act, (IV of 1882), section 40—Contract Act (IX of 1872) section 37—Obligation arising out of contract and annexed to ownership of land—Transferee without notice—Covenant not enforceable against him.

A contract, by which the parties agreed that in case of any future transfer by one party of the immovable property mentioned in the contract the transfer was to be made to the other party, is binding not only on the parties themselves but also on their representatives: but such a contract cannot be specifically enforced as against a *bona fide* transferee for value without notice of the contract.

The contract was entered into in 1874, before the coming into force of the Transfer of Property Act; but whether the principles embodied in section 40 of that Act, or general principles of justice, equity and good conscience, were deemed applicable to the obligation of the representatives, section 27 of the Specific Relief Act must apply and the contract could not be specifically enforced against a transferee for value without notice.

Messrs. *Haribans Sahai* and *S. N. Verma*, for the appellant.

Messrs. *P. L. Banerji*, *Janaki Prasad* and *A. P. Pandey*, for the respondents.

SULAIMAN, C. J., and BANERJI, J. :—This is a plaintiff's appeal arising out of a suit for specific performance of a contract entered in an agreement dated the 24th of January, 1874, between the predecessors of the parties. Two sets of persons agreed that in case of a contemplated transfer the property dealt with in

*Second Appeal No. 1372 of 1930, from a decree of S. Mairra, Additional District Judge of Ghazipur, dated the 6th of August, 1930, confirming a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 12th of July, 1929.

the agreement was to be transferred to the other party for a proper price.

On the 30th of July, 1928, a deed of exchange was executed between the representatives of one of the parties and Mst. Jiachha Kunwar. The representative of the other party brought a suit to enforce the previous agreement. Both the courts below have dismissed the claim. The lower appellate court has distinctly found that Mst. Jiachha Kunwar had no notice of this deed of agreement when she took the property for valuable consideration. * * * * * We think that the finding of the lower appellate court that she had no notice of the deed of agreement must be accepted in second appeal.

The learned advocate for the appellant relies on the Full Bench case of *Aulad Ali v. Ali Athar* (1). That case is undoubtedly an authority binding upon us that a contract of this kind not only binds the parties thereto but also their representatives. In that case one of the parties to the agreement was the defendant transferee who obviously had knowledge. The transferee from him did not apparently plead want of notice, and this point was not pressed before the Full Bench, which accordingly did not decide it.

In the present case the transferee has been distinctly found to have been a *bona fide* transferee for value without notice. It seems to us that whether section 37 of the Indian Contract Act or general principles of justice, equity and good conscience applied to the heirs of the promisor, the transferee for value was protected. If the principles embodied in section 40 of the Transfer of Property Act were applicable, even then the obligation cannot be enforced against a transferee for consideration and without notice of it, nor against the property in his hands. The contract in dispute was entered into in 1874, before the coming into force of the Transfer of Property Act, but after the Contract Act had been passed. It is clear that

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the specific performance of the contract can be enforced only under section 27 of the Specific Relief Act, which section makes an exception in favour of a transferee for value who has paid his money in good faith and without notice of the original contract. We therefore think that no matter what principle or statute governs the obligation of the representatives, the provisions contained in section 27 of the Specific Relief Act must apply, and the defendant who is a transferee for value without notice is protected and the contract cannot be enforced against him.

The plaintiff alleged that the transaction was one of sale, but the finding of the lower appellate court that it was a transaction of exchange is conclusive against him. The suit has therefore been rightly dismissed and we dismiss this appeal with costs.

FULL BENCH.

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King.

AFZALI BEGAM (APPLICANT) v. KANHAIYA LAL
(OPPOSITE PARTY).*

1932
June, 6.

Civil Procedure Code, order XLI, rules 10 and 11—Hearing under rule 11—Admission made conditional on appellant depositing decretal amount as well as costs—Ultra vires.

At the hearing of a first appeal under order XLI, rule 11, of the Civil Procedure Code the Court made an order that if the appellant deposited in Court, within a given time, the decretal amount as well as a sum by way of security for costs, the appeal was to be admitted, otherwise it was to stand automatically rejected.

Held, that apart from the discretion under order XLI, rule 10 to demand security for costs, there is no power in the appellate court under order XLI, rule 11 to make the order for issue of notice to the respondent conditional on payment of the decretal amount by the appellant. If the appeal has no merits, it should be dismissed; otherwise the court had to

*Application in First Appeal No. 372 of 1931.