

1931

GANGA RAM
MUFESRA.

In a recent Full Bench case, *Ram Karan Singh v. Nakchhed Ahir* (1) it has been held that in the circumstances of this case a second suit is not barred by the provisions of order II, rule 2, Code of Civil Procedure.

As regards the question whether the point could be raised in a first appeal, we are clearly of opinion that it could be raised. The point was a pure question of law to be argued on admitted facts, and went to the root of the case.

In the result we allow the appeal, set aside the decree of the court below and restore the decree of the court of first instance, with costs to the appellant throughout.

Before Sir Shah Muhammad Sulaiman, Acting Chief Justice and Mr. Justice Young.

BALKISHEN DAS (DEFENDANT) v. BECHAN PANDEY
(PLAINTIFF).*

1931
June. 22.

Specific performance—Contract to sell immovable property—Sale deed executed but not registered—Suit for compulsory registration of sale-deed—Decree defective and infructuous—Such suit not the only remedy of vendee—Registration Act (XVI of 1908) section 77—Res judicata.

Where a person enters into a contract to sell certain immovable property and executes a sale deed but wilfully abstains from getting it registered, section 77 of the Registration Act does not provide the only exclusive relief to the other party, and the latter is entitled to enforce specific performance of the contract and to obtain actual possession. So, where the decree in a suit under section 77 for the compulsory registration of the sale deed came to an infructuous termination, owing mainly to a defect in its form, it was held that the purchaser could maintain a suit for specific performance of the contract and for recovery of possession.

The mere failure of a suit under section 77 or its infructuous termination cannot operate as *res judicata* to bar a suit for specific performance of the original contract; that section is confined to a relief for the registration of a particular document which has been executed, and no other relief can be claimed under it.

*Second Appeal No. 887 of 1928, from a decree of Jagdishwar Nath Kaul, Additional Subordinate Judge of Benares, dated the 14th of April, 1928, confirming a decree of Bind Basni Prasad, Munsif of Haveli, dated the 23rd of November, 1927.

(1) (1927) I.L.R., 53 All., 951.

Dr. *K. N. Malaviya*, for the appellant.

Messrs. *A. Sanyal, K. Verma and Gadadhar Prasad*, for the respondent.

1931

 BALRISHEN
 DAS
 P.
 BECHAN
 PANDEY.

SULAIMAN, A. C. J. and YOUNG, J. :—This is a defendant's appeal arising out of a suit for specific performance. Under a registered agreement, dated the 18th of May, 1924, the defendant accepted earnest money and undertook to sell certain immovable property to the plaintiff. A sale deed was executed, and it was presented for registration by the vendee, but the defendant did not turn up on the day when it was to be registered. An application was afterwards made to the Sub-Registrar for the registration of the sale deed, but that was refused as the defendant did not again appear. An appeal to the District Registrar was also dismissed because the defendant did not appear to admit the document and the document was not proved. The plaintiff then brought a suit under section 77 of the Indian Registration Act for the compulsory registration of that particular document. The case was fought out and the finding was in favour of the plaintiff. The decree, however, was in the form directing the defendant to get the sale deed registered within thirty days. If the correct form had been adopted the learned Munsif should have allowed the plaintiff to take it to the registration office for registration. The defendant however appealed to the District Judge, but after the period of thirty days expired he withdrew his appeal on the ground that the decree had become a nullity as the sale deed was not produced for registration within thirty days. As a matter of fact he himself had made default, as the Munsif's decree had directed him to get it registered. The plaintiff had made an application to the Munsif within the thirty days for the return of the document in order that he might present it for registration. This application was dismissed as the decree of the Munsif did

1931

BALKISHEN
DAS
v.
BEGHAN
PANDEY.

not direct him to get the document registered. An infructuous appeal was filed to the District Registrar, but it also failed. In the result the plaintiff did not obtain the relief which he might have got under section 77 of the Registration Act. He then instituted the present suit for the specific performance of the original contract. Various defences were raised, but all the issues were found against the defendant and the suit was decreed by both the courts below.

It is contended before us that the only remedy which the plaintiff had was the one allowed to him under section 77 of the Indian Registration Act, and that the suit under that section having failed, his remedy was exhausted and he no longer had any further cause of action against the defendant. In support of this contention reliance is placed on certain Madras cases, among which *Satyanarayana v. Chinna Venkatarao* (1) may be mentioned. This case dissents from the view taken in this High Court in the case of *Amer Chand v. Nathu* (2). The view of this High Court has been followed by the Calcutta High Court as well as by the Patna High Court: *Nasiruddin Midda v. Sidhoo Mia* (3) and *Uma Jha v. Chetu Mander* (4).

It seems to us that the original contract substantially was for the sale of the immovable property by the defendant to the plaintiff and not for the mere signing of a particular document or of its presentation for registration. It cannot be said that the defendant has fulfilled his contract completely by merely signing the sale deed without getting it registered. The property admittedly is still in his possession and has not legally passed to the plaintiff. It is therefore impossible to hold that the contract entered into by the defendant has been fully carried out.

Section 77 of the Indian Registration Act permits

(1) (1925) I.L.R., 49 Mad., 302.

(2) (1910) 7 A.L.J., 887.

(3) (1917) 44 Indian Cases, 361.

(4) A.I.R., 1926 Pat., 89.

a suit for a decree directing the document to be registered. That obviously refers to a relief for the registration of that particular document which had been executed and the registration of which was refused. Under that section no other relief can be claimed. This has been clearly held by this Court in *Kanhaya Lal v. Sardar Singh* (1) and *Ram Ghulam v. Mst. Menda* (2). It is therefore obvious that the mere failure of a suit under section 77 or its infructuous termination cannot operate as *res judicata* in a suit brought for the specific performance of the original contract and for recovery of possession of the immovable property. The suit is based on the original cause of action which was independent and separate from the cause of action arising from the refusal of the vendor to register the sale deed. It is also quite clear that the remedy which the plaintiff claims in the present suit is for the specific performance of the contract by executing a new and fresh document and for recovery of actual possession. Such reliefs could not have been claimed in the previous suit. We are unable to hold that section 77 provides the only exclusive relief to the plaintiff, who has paid consideration and earnest money to the defendant who has promised the transfer to him of the immovable property. There is absolutely no reason why he should not be able to enforce the contract specifically and obtain actual possession.

The only point that remains for consideration is whether there has been anything in the conduct of the plaintiff which would disqualify him from obtaining the equitable relief of specific performance. No doubt such a relief is discretionary, but the ordinary presumption is that a contract for the transfer of immovable property cannot be compensated for by damages. The finding of the lower appellate court makes it quite clear that it was the defendant himself

1931

BALKRISHN
DAS
S.
BECHAN
PANDY.

(1) (1907) I.L.R., 29 All., 284.

(2) (1921) 19 A.L.J., 224.

1931

BALKISHEN
DAS
v.
BECHAN
PANDHEY.

who was to blame throughout. On two occasions he did not appear before the Sub-Registrar and he did not turn up before the District Registrar. † He also frivolously resisted the plaintiff's suit under section 77, and then although the decree was against him he did not obey that decree. The plaintiff has been knocked about from court to court but it cannot be said that he was in any way negligent. The Munsif had passed a decree in his favour and against the defendant, and although the form of it was not proper the plaintiff submitted to it, hoping that the defendant would be bound by it. In view of all the circumstances we agree with the view taken by the court below. We accordingly uphold the decree of the court below and dismiss the appeal with costs.

Before Mr. Justice Kendall and Mr. Justice Baijpai.

1931

June, 22.

GANGA NATH AND ANOTHER (APPLICANTS) v. ZALIM
SINGH AND ANOTHER (OPPOSITE PARTIES).*

Provincial Insolvency Act (V of 1920), sections 9(1)(c) and 16—Petitioning creditor withdrawing his application for adjudication—Substitution of another creditor to continue the proceedings—Not necessary that such creditor should have himself duly petitioned within three months of the act of insolvency.

In the wording of section 16 of the Provincial Insolvency Act the only condition laid down, as a requisite for the person to be substituted for the original petitioner who does not proceed with due diligence on his petition, is that such person must be a creditor to whom the debtor may be indebted in the amount required by the Act in the case of a petitioning creditor. It is not necessary that such creditor should have himself presented a petition for the adjudication within three months of the act of insolvency or that at the time of the substitution he should be entitled according to section 9(1)(c) of the Provincial Insolvency Act to present an insolvency petition.

*Second Appeal No. 7 of 1930, from an order of Rai Behari Lal, Additional District Judge of Aligarh, dated the 17th of March, 1930.