

## APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Allen.

NAND GÖPAL AND ANOTHER (DEFENDANTS) v. BATUK  
PRASAD GUPTA (PLAINTIFF).\*

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June, 9.

*Specific performance—Covenant in sale deed—Enforcement against vendee's receiver in insolvency and latter's transferee—Specific Relief Act (I of 1877), section 27(b)—Receiver takes property subject to liabilities—Provincial Insolvency Act (V of 1920), section 28—Restrictive covenant for benefit of vendor's other property—Transfer of Property Act (IV of 1882), section 11.*

The plaintiff who had owned two houses separated by a blind lane, over which was built a two-storied chhatta connecting the two houses and resting on the walls of both, sold one of the houses to F. It appeared that the chhatta opened into this house and was an integral part of it. One of the covenants in the sale deed was that if and when the vendor wanted the vendee to remove the chhatta so as to leave the lane open and clear, the vendee would do so at his own cost. After the sale F became an insolvent and his property vested in the receiver, who sold the house to the defendants. The plaintiff then sued the defendants for removal of the chhatta. It was found that the defendants were purchasers with notice of the covenant.

*Held* that the property which vests in the receiver, under section 28 of the Provincial Insolvency Act, comes to him subject to the equities and liabilities which were binding on the insolvent, and the receiver can not have any greater rights in the property than the insolvent himself. The receiver was a person claiming under the insolvent within the meaning of section 27(b) of the Specific Relief Act and the covenant was enforceable against him, as also against the defendants who were transferees with notice.

*Held*, further, that in view of the proviso to section 11. of the Transfer of Property Act the covenant, although restricting the enjoyment of the house which was sold, was enforceable in law because it was for the beneficial enjoyment of the other house belonging to the vendor.

\* Second Appeal No. 1277 of 1928, from a decree of Hari Har Prasad, Subordinate Judge of Benares, dated the 24th of February, 1928, modifying a decree of Niraj Nath Mukerji, City Munsif of Benares, dated the 17th of June, 1927.

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Dr. K. N. Katju, for the appellants.

Messrs. P. L. Banerji, B. Malik, K. C. Mital

and H. P. Sen, for the respondent.

MUKERJI and ALLEN, JJ. :—The facts of the case are briefly these. There were two houses, one to the north of the other, with a blind lane running between the two. Both the houses belonged to the plaintiff respondent, Batak Prasad Gupta. The house to the north is still in possession of the plaintiff, but the house to the south was sold by him to one Fateh Chand, by a sale deed dated the 13th of January, 1920. It was agreed, among other matters, between the vendor and the vendee that if and when Batak Prasad wanted the vendee to remove the chhatta which had been constructed on the lane between the two houses and which opened into the defendant's house, it would be removed by the defendant at his own cost.

After the sale, Fateh Chand was declared insolvent and his property was sold by the receiver in insolvency and the house of Fateh Chand was purchased by the defendants who are the appellants before us. The plaintiff thereupon instituted the suit, out of which this appeal has arisen, for compelling the defendants to remove the chhatta built over the lane. The chhatta is in the shape of a building constructed over the lane all along the length of it and it appears that it consists of two storeys. The plaintiff asked for the removal of the chhatta and also for an injunction.

—The suit was decreed in its entirety by the court of first instance, but on appeal by the defendants the learned Subordinate Judge upheld the decree so far as it directed the defendants to remove the chhatta but dismissed the suit so far as the prayer for an injunction went. The defendants have appealed and the plaintiff has filed a cross-objection in respect of that portion of the claim which was dismissed by the lower appellate court.

We may at once dispose of the cross-objection. It is clear on the facts that there was no occasion for the plaintiff to ask for an injunction. If the chhatta was removed, the plaintiff would get all the relief that the case called for and it was entirely unnecessary for the plaintiff to ask for an injunction "restraining the defendants from making an encroachment hereafter on the space so opened" . . . We accordingly dismiss the cross-objection.

We now come to the appeal, in which several points of law have been raised. The first contention of Dr. *Katju* is that the defendants do not claim under Fateh Chand and are therefore not bound by the covenant contained in the sale deed. The argument is that the receiver is not bound by the covenant and therefore the defendants, who derive their title through the receiver, are not bound by the covenant.

Reliance has been placed on section 28 of the Provincial Insolvency Act of 1920, and it has been argued that all that vests in the receiver is the property of the insolvent and not any of his liabilities. This argument is fallacious. If the insolvent is under a liability, whether it arises out of an equity or as a matter of law, the receiver cannot have any greater right than the insolvent himself. It is said that if this were so, something would have been found within the four corners of the Insolvency Act to justify an inference like that. But the scheme of the Insolvency Act is to vest the property of the insolvent in a person called the receiver in order that that property may be distributed. Under that scheme, there is no reason why the receiver should be given a property of greater value than the insolvent himself possessed. It is clear to us that if the power which vested in the plaintiff to remove the chhatta be taken away from him, the property of the insolvent would go up in value, because, in that case, the chhatta would be always intact and cannot be removed.

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No authority has been quoted by the learned counsel for the appellants in support of his case. On the other hand the learned counsel for the respondent has quoted two cases before us, one of which is *Pearce v. Bastable's Trustee in Bankruptcy* (1). This case has been followed by the Madras High Court in *Purushotam Naidu v. Ponnurangam Naidu* (2). These cases are entirely in keeping with the view we take of the case, and we follow them.

The next argument of the learned counsel for the appellants is that the covenant is a purely personal one and it cannot be enforced against the heirs or representatives of either party thereto. This argument entirely ignores the provisions of section 27 (b) of the Specific Relief Act. That rule of law says that specific performance of a contract may be enforced against either party thereto and against any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. The receiver in this case is certainly a person claiming under the insolvent and by a title which has arisen subsequently to the contract. It is true that the title vests in the receiver not by virtue of any contract between the insolvent and himself but by virtue of law, but nonetheless the receiver is a person who gets all the interest which the insolvent had and therefore there is no reason to exclude him from the category of persons claiming under the insolvent.

It has been found that the defendants are persons who had notice of the provision in the sale deed, and that is a question of fact. The sale deed being registered, the registration would charge the defendants with notice of the covenant. The defendants, therefore, are bound by the agreement contained in the sale-deed.

(1) [1901] 2 Ch., 132.

(2) (1913) 21 Indian Cases, 576.

Then it was argued that under the provision of section 11 of the Transfer of Property Act the agreement is not enforceable. Ordinarily a contract like this would not be enforceable by the vendor. But the vendor in this case is interested in the adjoining house, and it is for the beneficial enjoyment of that house that he is enforcing this contract. Section 11 of the Transfer of Property Act contains a proviso in the following language: "Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immovable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner."

The chhatta rests partly on the plaintiff's wall. It imposes a burden on that wall. Further, it was agreed in the sale deed between the parties that each of the parties would be entitled to open sky-lights or clear-story windows in their respective walls and the other party would not be entitled to object to this. Unless the chhatta is removed the clear-story windows or sky-lights cannot be opened. For both reasons, it is for the beneficial enjoyment of the plaintiff's property that it is necessary that the defendants should be compelled to enjoy their property in a particular manner, namely, that agreed upon. Section 11 of the Transfer of Property Act, therefore, is no bar to the maintenance of the suit.

It was further contended that the grant of the relief is discretionary with a court, and as no probable damage has been established the decree should not be granted. But the discretion that is vested in the court is not arbitrary. The plaintiff and the predecessor in title of the defendants agreed with their eyes open that the chhatta might be, at any time, removed if Batuk Prasad, the plaintiff, so wished. When Fateh Chand was the purchaser it may have suited Batuk Prasad to allow Fateh Chand to maintain the

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chhatta, but when other people, who may be entire strangers to Batuk Prasad, have come into the house it may not suit Batuk Prasad to let the chhatta stand. This is a matter which should rest entirely on the discretion of Batuk Prasad and the court should not interfere with that discretion. Besides, as we have pointed out, there is the burden on the wall of Batuk Prasad of the weight of the chhatta; and the chhatta, if allowed to stand, would not enable Batuk Prasad to open the clear-story windows. In the circumstances we do not see how we can disallow the relief to the plaintiff.

Lastly it was argued that there should be some limit to the enforcement of the agreement contained in the sale deed. It was argued that it might be that in a far distant time a descendant of the plaintiff might want a descendant of the defendants to remove the chhatta and, in that case, to agree to the contention of the then plaintiff would be very hard on the then defendant. This case does not call for an answer to that contention but probably it is provided by the Full Bench case of this Court in *Aulad Ali v. Ali Athar* (1).

The result is that this appeal fails and is hereby dismissed with costs.

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

SAIFUL BIBI (DEFENDANT) v. ABDUL AZIZ KHAN  
(PLAINTIFF) AND INAYAT KHAN (DEFENDANT)\*

*Agra Pre-emption Act (Local Act XI of 1922), section 4(10)—  
Sale—Transfer in lieu of dower debt—Whether pre-  
emptible—Hiba-bil-ewaz—Transfer of Property Act  
(IV of 1882), section 54.*

A transfer of immovable property made by a husband to his wife in lieu of an existing dower debt due to her is a sale

\* Second Appeal No. 1307 of 1929, from a decree of Muhammad Taqi Khan, Subordinate Judge of Mirzapur, dated the 30th of July, 1929, reversing a decree of Niraj Nath Mukerji, Munsif of Mirzapur, dated the 11th of February 1929. °