REVISIONAL CIVIL.

1934.

September, 21, 25.

Before Courtney Terrell, C. J. and Agarwala, J.

GULAB RAY GHUTGHUTIA

v.

MAHENDRA NATH SREEMANY.*

Specific Performance—rule of justice, equity and good conscience—Sontal Parganas, whether remedy of specific performance available in—Code of Civil Procedure, 1859 (Act VIII of 1859), section 192—effect of repeal—Specific Relief Act, 1877 (Act I of 1877), whether abrogates the remedy in any area to which the Act does not apply.

The remedy of specific performance is one of the oldest remedies granted by Courts of Equity in England and it was one of the first to arise out of the Chancellor's jurisdiction. The old Courts at Common law could not grant the remedy and merely gave damages for breach of contract. Very early, however, in the history of the Chancellor's jurisdiction, the remedy of specific performance emerged and has been for centuries administered by the English Courts. It is amongst those principles which are administered by Courts in India by way of justice, equity and good conscience.

Where for the first time a remedy is afforded by means of a statute, and if that statute is either repealed with regard to a certain area or if those portions of the statute which grant that remedy are not allowed to have effect in any particular area, then, there being no foundation on which the grant of the remedy can be built which ex hypothesi is of a statutory character, the condition is that the remedy is not available in that particular area. If, however, the remedy is one which had been all along obtainable in the courts of that particular area and if an Act is passed to define that law, then within the area to which the Act is to apply the remedy is hedged about with the limitations which are imposed by that piece of legislation, and as to areas where the legislation is not applicable, the remedy still exists as it did before the limitations imposed by the Act were established, and the remedy is to be granted as though these restrictions had not existed.

* Civil Revision no. 401 of 1934, from an order of Babu S. N. Sen, Subordinate Judge of Jamtara, dated the 28th July, 1934.

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The first statutory reference to the remedy by way of specific performance was contained in section 192 of the Code of Civil Procedure of 1859 which was repealed in 1877 in which year was passed the Specific Relief Act which replaced section 192 of the old Code. The Specific Relief Act, 1877, is by its express terms made not to apply to the Sontal Parganas.

Held, therefore, that the mere fact that the Specific Relief Act, 1877, does not apply to the Sontal Parganas does not affect the law that the remedy of specific performance is available in that territory as part of the law of justice, equity and good conscience: in other words, the new restrictions upon the grant of the remedy imposed by the Act do not apply in the Sontal Parganas and the remedy is to be granted in that area as though these restrictions had not existed.

Janardan Mahato v. *Bhairab Chandra Mondal*(1) and *Jagannadhasahu* v. *Deenabandhu Radho*(2), followed.

Lal Shaha v. *Kado Mahto*(3), *Kumar Satya Niranjan Chakravarty* v. *Dwarkanath Sadhu*(4) and *Saukhi Sah* v. *Rai Mahamaya Prasad Singh Bahadur*(5), distinguished.

Per Agarwala, J.—Courts in India have always claimed the right to grant relief by way of specific performance apart from the statute.

There is no authority for the view that where a non-statutory remedy is made the subject of legislative enactment, the effect is necessarily to abrogate the non-statutory remedy. Whether it does so or not depends on whether the statute discloses an intention to abrogate the non-statutory remedy.

Where the statute expressly abolishes the non-statutory remedy, or where the statutory remedy is repugnant to the pre-existing non-statutory remedy, it must of course be held to abrogate that remedy.

The Code of 1859 did not create a remedy nor was there anything in section 192 repugnant to any remedy that was then in existence; the Act merely empowered the courts to grant the existing remedy in unusual circumstances. The

(1) (1915) 30 Ind. Cas. 365.
(2) (1917) 63 Ind. Cas. 114.
(3) (1921) 6 Pat. L. J. 85.
(4) (1917) 2 Pat. L. J. 379.
(5) (1934) 15 Pat. L. T. 469.

effect of the repeal of that Act was merely to deprive the Courts of the power of granting the remedy in those circumstances. The Specific Relief Act of 1877 does not in terms expressly purport to re-enact the provisions of section 192 even for those parts of British India to which the Act applies, nor does it expressly purport to abolish the remedy by way of specific performance in any part of India to which it does not itself apply.

Application in revision by defendant no. 3.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C. J.

Sir Sultan Ahmad (with him *Baldeo Sahay* and *Ch. Mathura Prasad*) for the petitioner.

P. R. Das (with his *M. N. Pal* and *S. S. Bose*), for the opposite party.

COURTNEY TERRELL, C. J.—This is a petition for the civil revision of a decision by the Subordinate Judge of the Santal Parganas; it raises the question as to whether the Courts of the Santal Parganas have power to grant the remedy of specific performance of a contract.

The plaintiff in this case alleged that he had contracted with one of the defendants to purchase a house; that the defendant declined to carry out the purchase and had in fact sold the house to another of the defendants and the plaintiff, therefore, sued for specific performance of the contract. In the Court of the Munsif the suit was decreed. When the matter came before the Subordinate Judge on appeal the point was taken, as it had been before the Munsif, that in the Santal Parganas the remedy of specific performance could not be granted and the Subordinate Judge, therefore, proceeded to deal with that issue of law in a preliminary way and decided that he had jurisdiction only. The actual merits of the case have in civil revision for a decision upon the point of jurisdiction only. The actual merits of the case have not yet been determined.

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Now the remedy of specific performance is one of the oldest remedies granted by Courts of Equity in England and it was one of the first to arise out of the Chancellor's jurisdiction. The old Courts at Common Law could not grant the remedy and merely gave damages for breach of contract. Very early, however, in the history of the Chancellor's jurisdiction, the remedy of specific performance emerged and has been for centuries administered by the English Courts. Now, therefore, it may be said to be amongst those principles which would be administered by Courts in India by way of justice, equity and good conscience. The direction to follow those principles is contained in the second sub-section to section 37 of the Bengal, Agra and Assam Civil Courts Act and Mr. Das has referred to the judgment of Lord Hobhouse in the case of *Waghela Rajsanji* v *Shekh Masludin*(1) where His Lordship pointed out that the phrase "equity and good conscience" is "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances". There is nothing in the nature of Indian society and circumstances which would render such a salutary remedy as specific performance inapplicable, and therefore the remedy may be considered to be administered by Courts in India even if they have no statutory guide for the administration of that remedy. But it is said on behalf of the petitioner that the remedy has been taken away from, even if it were ever administered by, the Courts of the Santal Parganas, and the argument is put in this form.

The first statutory reference to the remedy by way of specific performance was contained in section 192 of the Civil Procedure Code of 1859, which reads as follows:

"When the suit is for damages for breach of contract, if it appears that the defendant is able to perform the contract, the Court, with the consent of the plaintiff, may decree the specific performance of the contract within a time to be fixed by the Court, and in such case shall award an amount of damages to be paid as an alternative if the contract is not performed."

(1) (1887) L. R. 14 Ind. App. 89.

Similarly there was a reference to the remedy of a declaratory suit in section 15 of the same Code. For reasons, which I will attempt presently to explain, the remedy of a declaration differs fundamentally from the remedy by way of specific performance. Nevertheless both of these remedies are provided for in this earlier Civil Procedure Code.

In the year 1877 two important pieces of legislation took place. In the first place, the Civil Procedure Code was re-drafted and re-enacted with certain alterations, additions and omissions and the remedy formerly provided for by section 15, that is, for declarations, and the remedy by way of specific performace mentioned in section 192 were omitted from the new Code of 1877. The old Code of 1859 was repealed. In the same year there was passed the Specific Relief Act and these remedies now find place in that Act. Section 15 re-appeared as section 42 of the Specific Relief Act and other sections of the Specific Relief Act replaced section 192 and the new Civil Procedure Code, therefore, contained no reference to these remedies which were now accommodated in the Specific Relief Act. The Specific Relief Act is by its express terms made not to apply to the Santal Parganas. It is argued, therefore, that there can be no provision either for declaratory relief or for specific performance in the Santal Parganas and that those remedies even if they had ever existed no longer exist in that territory.

Now to deal first with that part of the argument which is involved in the repeal of the Act of 1859 in so far as it relates to specific relief and in so far as the deliberate withholding by the legislature of the effect of the Specific Relief Act from the Santal Parganas is concerned, the principles applicable to the circumstances are, to my mind, as follows.

Where for the very first time a remedy is afforded by means of a statute, then if that statute is either

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repealed with regard to a certain area or if those portions of the statute which grant that remedy are not allowed to have effect in any particular area, then there being no foundation on which the grant of the remedy can be built which ex hypothesi is of a statutory character, the condition is that the remedy is not available in that particular area. If, however, the remedy being one which had been all along obtainable in the Courts of that particular area, and if, as in this case, an act is passed, the Specific Relief Act (Act I of 1877), the preamble of which says "to amend and define the law of specific relief", then it is clear that within the area to which the Act is to apply, the granting of the remedy is hedged about with the limitations which are imposed by that piece of legislation, and as to areas, such as, in this case, the Santal Parganas where the legislation is not applicable, then the remedy still exists as it did before the limitations imposed by the Act were established, that is to say, the new restrictions upon the grant of the remedy imposed by the Act were established, that is to say, the Santal Parganas and the remedy is to be granted in the Santal Parganas as though those restrictions had not existed. Now it being clear that the remedy was an ancient one and to be administered as part of the law of justice, equity and good conscience, it follows that the mere fact that the restrictions imposed by the Specific Relief Act do not apply in the Santal Parganas does not affect the law that the remedy is applicable as part of the law of justice, equity and good conscience.

But there is another part of the argument on behalf of the petitioner which seems to me to have no logical foundation. It was argued that if a remedy is available as part of the general law and if subsequently a piece of legislation, such as the earlier Civil Procedure Code, is passed which regulates and absorbs that remedy into its own machinery and if that

Code is repealed as it was indeed by the Civil Procedure Code of 1877, then the remedy having been absorbed into a statute and that statute in so far as the Santal Parganas is concerned not being applicable, then whether or not those in the Santal Parganas originally had the right to the remedy the repeal of the statutory enactment has deprived them of it. To my mind this is an illogical proposition.

Now the granting of this remedy has been contemplated by the High Courts in India—*see* the case of *Janardan Mahto* v. *Bhairab Chandra Mondal*(1). In that case the specific performance was treated as part of the law governed by the rules of justice, equity and good conscience notwithstanding that the section of the Civil Procedure Code of 1859 was not applicable to the Santal Parganas and the plaintiff was in that case granted that remedy. A similar course was taken by the Madras High Court in *Jagannadhasahu* v. *Deenabendu Radho*(2). There a series of cases was relied upon which it is true were all cases subsequent to the year 1859 and in that case the grant of the remedy by way of specific performance was made and treated as though it were a remedy available as part of the ordinary remedies obtainable under the rules of justice, equity and good conscience. I have no hesitation, therefore, in coming to the conclusion that specific performance being of this character it existed in the Santal Parganas quite independently of any statutory basis.

A remark by Wort, J. in the case of *Saukhi Sah* v. *Rai Mahamaya Prasad Sinah Bahadur*(3) has been cited to us as a basis for the contention that specific performance is of the nature of a statutory remedy. But a more careful examination of that judgment of the learned Judge inclines me to the belief that he meant not that the right for specific performance was

(1) (1915) 30 Ind. Cas. 365.
(2) (1917) 63 Ind. Cas. 114.
(3) (1934) 15 Pat. L. T. 469, 471.

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created by statute but rather that its administration was governed and controlled by the Specific Relief Act.

A considerable discussion took place on the series of cases in which specific relief by way of a declaratory suit was sought, and it was argued that there was an analogy but in my opinion no such analogy exists. The remedy of a pure declaration does not emerge from the English Common Law or from the English system of Equity Jurisprudence. As was pointed out by Jwala Prasad, J. in *Lal Shaha* v. *Kado Mahto*(1), the remedy of a declaration which was dealt with in section 15 of the Civil Procedure Code of 1859 was borrowed from a specific English Statute *15 and 16 Vict.* Ch. 86, section 50—and it was introduced into India in the year 1854 for the first time and that the subsequent history shows that it had a passage through section 15 of the Act of 1859 and was ultimately defined in section 42 of the Specific Relief Act. In those cases there was some ground for contending that whereas section 42 brought into existence a statutory form of relief and whereas that statutory form of relief was not applicable to the Santal Parganas, therefore that remedy did not exist in the Santal Parganas. To my mind that series of cases, that is to say, that which I have just cited—*Lal Shaha* v. *Kado Mahto*(1)—and the case of *Kumar Satya Niranjan Chakraverty* v. *Dwarkanath Sadhu*(2) have no application to the circumstances of this case. Indeed in the case of *Kumar Satya Niranjan Chakraverty* v. *Dwarkanath Sadhu*(2) Mullick, J., in delivering the judgment of the Court, clearly contemplated that the remedy by way of specific performance was of a kind entirely different from the remedy by way of declaratory relief. In that case [*Kumar Satya Niranjan Chakraverty* v. *Dwarkanath Sadhu*(2)], where the case of *Janardan Mahto* v. *Bhairab Chandra Mondal*(3),

(1) (1921) 6 Pat. L. J. 85, F. B.
(2) (1917) 2 Pat. L. J. 379, 382.
(3) (1915) 30 Ind. Cas. 365.

above referred to, was dealt with, Mullick, J. did not dissent from the view of the Calcutta High Court that specific performance was a remedy which was to be administered as part of the principles of justice, equity and good conscience. He declined to apply the same reasoning to the law relating to the granting of a declaration. Whether his view was right or not, the matter of declaration we have not at present to consider. The point to be noticed is the learned Judge's approval of the principle that specific performance is of a different character.

In my opinion the Courts of the Santal Parganas have jurisdiction to grant the remedy by way of specific performance and this petition in revision should be dismissed with costs.

AGARWALA, J.—The argument addressed to us on behalf of the applicant may be divided into two branches. The first part of the argument is that the right by way of specific performance did not exist in India at all before 1859 and that it was a remedy created by the Civil Procedure Code of that year. It is, therefore, contended that the remedy being created by statute and the statute having been repealed, the remedy has been abolished. The second branch of the argument is that if there were a non-statutory remedy by way of specific performance prior to 1859, then the effect of substituting for that non-statutory remedy a statutory remedy by the Code of 1859, was to abrogate the non-statutory remedy. From this point of view also it is contended that the repeal of the statute of 1859 had the effect of abolishing altogether the remedy by way of specific performance. The case law as reported in the reports of the High Courts of this country shows that the Courts have always claimed the right to grant relief by way of specific performance apart from the statute: *see* the decision of the Calcutta High Court in the case of *Janardan Mahato* v. *Bhairab Chandra Mondal*(1) and of the Madras Court

(1) (1915) 30 Ind. Cas. 365.

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in the case of *Jagannadhasahu* v. *Deenabandu Radho*(1) and the cases referred to in the decision of the Madras High Court. The Patna High Court did not dissent from that view in the case of *Kumar Satya Niranjan Chakravarty* v. *Dwarka Nath Sadhu*(2) where the Calcutta decision was cited. The claim of the Courts of this country to grant relief by way of specific performance on the principle of justice, equity and good conscience was tacitly recognised by section 192 of the Code of Civil Procedure of 1859. That section authorised the Court, in a suit for damages for breach of contract, to decree specific performance of a contract if the plaintiff consented to that course. It did not purport to create a right to specific performance but merely to empower the court to grant the relief in a particular class of cases in which the remedy would not ordinarily have been granted, namely, in cases where the plaintiff had not sued for specific performance but only damages for breach of contract. The contention, therefore, that the remedy of specific performance is a creature of statute fails.

With regard to the second branch, there is no authority for the view that where a non-statutory remedy is made the subject of Legislative enactment, the effect is necessarily to abrogate the non-statutory remedy. Whether it does so or not depends on whether the statute discloses an intention to abrogate the non-statutory remedy. Where the statute expressly abolishes the non-statutory remedy, or where the statutory remedy is repugnant to the pre-existing non-statutory remedy, it must of course be held to abrogate that remedy: but, as I have already pointed out, the Act of 1859 did not create a remedy nor was there anything in section 192 repugnant to any remedy that was then in existence; the Act merely empowered the Courts to grant the existing remedy in unusual

(1) (1917) 63 Ind. Cas. 114.
(2) (1917) 2 Pat. L. J. 379.

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circumstances. The effect of the repeal of that Act was merely to deprive the Courts of the power of granting the remedy in those circumstances. The Specific Relief Act of 1877 does not in terms expressly purport to re-enact the provisions of section 192 even for those parts of British India to which the Act applies, nor does it expressly purport to abolish the remedy by way of specific performance in any part of India to which it does not itself apply.

I, therefore, agree with my Lord the Chief Justice that the application in revision fails and should be dismissed with costs. We assess the hearing fee at ten gold mohurs.

Rule discharged.

FULL BENCH.

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October, 29.
November, 16.

Before Macpherson, James and Varma, JJ.

BALARAM MAHATA

v.

LAHABAT MAHATA.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *section* 46—*sale of occupancy holding without the consent in writing of the landlord, whether binding on the landlord*—*section* 46(2), *scope and significance of.*

Section 46 of the Chota Nagpur Tenancy Act, 1908, lays down :—

" (1) No transfer by a raiyat of his right in his holding or any portion thereof,—

(a) by mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, or

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* Appeal from Appellate Decree no. 1298 of 1931, from a decision of Khan Bahadur Najabat Hussain, District Judge of Manbhum-Sambalpur, dated the 10th June, 1931, affirming a decision of Babu Nandkishore Choudhuri, Munsif of Purulia, dated the 24th May, 1928.