

1897.

KARDUNJI
M. BANAJI
v.
MITTIBAI.

The sale of the estate cannot under the above circumstances at once take place.

The debts mentioned in Schedule No. 5 should be paid at once.

The parties can draw up a decree, and if they cannot agree, the minutes can be spoken to. Costs out of estate to all parties.

Appeal allowed.

Attorneys for the appellants:—Messrs. Roughton and Byrne.

Attorneys for the respondents:—Messrs. Crawford and Co. Messrs. Ardesir, Hormasji and Dinsha; Messrs. Wadia and Ghandi; and Messrs. Jehangir and Seervi.

ORIGINAL CIVIL.

Before Mr. Justice Fulton.

PIHEROZSHA PESTONJI RANDERIA (PLAINTIFF) v. THE SULTAN MILLS, LIMITED (DEFENDANTS).*

Decree—Rectifying decree—Practice—Procedure.

By a written agreement the defendants agreed to purchase from the plaintiff a certain land comprising 5,280 square yards or thereabouts at the rate of Rs. 100 per square yard. The sum of Rs. 1,000 was paid on the date of the agreement in part payment of the price. The plaintiff sued for specific performance of the agreement. The plaint set forth the facts and the part payment, and prayed that the defendant might be ordered specifically to perform the agreement and to pay to the plaintiff the balance of the purchase-money, viz., the sum of Rs. 4,475. On the 9th September, 1897, judgment was given for the plaintiff ordering "specific performance as prayed and costs." The decree was accordingly drawn up in terms of the prayer of the plaint. It was afterwards ascertained that the sum mentioned in the prayer (viz. Rs. 4,475), and inserted in the decree, was incorrect and ought to have been Rs. 4,775, the latter being the sum due at the rate mentioned in the agreement after deducting the Rs. 1,000 as earnest. On 6th November, 1897, the plaintiff gave notice of motion to rectify the decree by altering the figure Rs. 4,475 to Rs. 4,775. On motion the decree,

Held, that the decree should be rectified.

APPLICATION to rectify the decree passed on the 9th November, 1897.

* Suit No. 235 of 1897.

The suit was for the specific performance of an agreement dated the 17th July, 1896, whereby the defendants agreed to purchase from the plaintiff a certain piece of land situate at Byculla in Bombay.

The material part of the agreement was as follows:—

"I, Phoroosha Pestonji Randeria, agree to sell and we, The Sun Mills, Limited, agree to purchase, the hereditaments described in the schedule hereto and the inheritance thereof in fee simple in possession at the rate of one rupee one anna and six pies per square yard.

"2. The purchasers have this day paid rupees one thousand to the vendors as earnest and in part payment of the purchase-money."

The schedule referred to was as follows:—

"All that piece or parcel of Government land or ground situate, lying and being on the Ferguson Road without the Fort of Bombay in the occupation of the vendor's tenants containing by admeasurement (5,280) five thousand two hundred and eighty square yards or thereabouts, registered in the books of the Collector of Land Revenue under Collector's old Nos. 654, 600 and Collector's new No. 12634, and bounded as follows, &c., &c."

The plaintiff set forth the facts and prayed as follows:—

"(a) That the defendant company may be decreed specifically to perform the said contract of the 17th July, 1896, and to pay to the plaintiff the balance of the said purchase-money, viz., the sum of Rs. 4,475."

The suit was duly heard, and on the 9th September, 1897, judgment was given for the plaintiff ordering "specific performance as prayed, and costs." The decree was accordingly drawn the terms of the prayer of the plaintiff.

It was subsequently discovered that the sum mentioned in the prayer of the plaintiff (viz. Rs. 4,475) and inserted in the decree was incorrect, and ought to have been Rs. 4,775, the latter being the balance of purchase-money due to the plaintiff under the agreement for 5,280 square yards at the rate of Re. 1-1-6 per square yard deducting Rs. 1,000 paid as earnest.

On the 14th October, 1897, the plaintiff's solicitors wrote to the defendants:—

"In referring to the decree herein, we observe that the decree directs the defendant company to specifically perform the contract and to pay to the plaintiff the balance of the purchase-money."

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In argument it was not alleged that the land was less than 5,280 square yards, though no admission was made as to its real area. The objections to the proposed amendment are of a technical nature. It was said that there was no error in the decree, which was according to the judgment and awarded the plaintiff all he asked for in the plaint. If the judgment was wrong, a review, it was urged, ought to have been applied for; but it was clear that the error, if any, was in the plaint itself.

The argument, I think, is not quite sound. The essential of the judgment was that the defendant was specifically to perform his contract; and it is clear that, if the decree contains more than a sum of rupees the payment of which will not amount to performance of the contract, it does not correctly represent the intention of the judgment. It seems to me to be of little consequence that the error arose from the plaintiff's own mistake in his plaint. A perusal of the contract which is referred to in the plaint shows that the prayer for the specific performance and the prayer for payment of Rs. 4,475 are inconsistent. Similar decree is inconsistent, and the portion of it directing payment of Rs. 4,475 is at variance with the judgment directing the specific performance of the contract.

The case seems to me to be somewhat analogous to that in *Karim Mahomed v. Rajamma*⁽¹⁾, and in the circumstances, I think the plaintiff has taken the proper course in moving for a revision of the decree. After all, procedure is merely subservient to justice, and to the present case, I think, I may appropriately apply the words of Lindley, L. J., quoted by Sir C. Sargant in the order as passed and entered does not express the real intention of the Court, it would, as it appears to me, be shocking to say that a party aggrieved cannot come here to have the record set aside.

In the present case there can be no question that my intention was to direct specific performance and that is the intention which must be given effect to by the decree. The prayer in the plaint for payment of Rs. 4,475 was really superfluous, and the direction in the decree to pay that precise sum.

(1) I. L. R., 12 Bom., 174.

(2) *In re Swire; Mellor v. Swire*, 30 Ch. D., 239, at p. 240.

The contract binds the defendants to pay for the land at the rate of Re. 1-1-6 per square yard and the decree must be amended by striking out the words "the sum of Rs. 4,475 being" in the last line of the first page of the decree. If the defendants really dispute the amount of the balance due and the plaintiff has to come to the Court for execution of the decree, the area will have to be measured, doubtless at the risk as to costs of the party who is found to be mistaken on the point.

Looking to the grounds on which the defendants have resisted any amendment of the decree, and their conduct in reference thereto as shown by the correspondence, I think that they must pay the costs of this motion.

Attorneys for the plaintiff:—Messrs. *Little & Co.*

Attorneys for the defendants:—Messrs. *Hiralal, Mulla and*

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PIEROZSHA
P. RANTHIA
v.
THE FIVE
MILLS.

pla
cause.

APPELLATE CIVIL.

before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosiing.

LAND OWNERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. MOTIRAM
AHADU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1896.

July 31.

On appeal from the decision of the Subordinate Judge of Thana with appellate powers, reversing the decision of the Subordinate Judge of Thana. The plaintiff's right to redeem beyond the time when the mortgagee can require redemption of the mortgage-debt—Redemption.

Decision postponing the mortgagee's right to redeem beyond the time when the mortgagee can call in his money is inoperative.

SECRETARY (M. H. H. v. Gulam Zilani) followed.

ANT), RESP

Irrigation Appeal from the decision of L. G. Fernandez, First Class Judge of Thana with appellate powers, reversing the decision of Rao Sahib G. A. Bhat, Subordinate Judge of Thana.

Where water is sold by deed, dated 5th December, 1882, for the defendants' father (deceased) for Rs. 300; that in 1893, they offered to redeem the lands, but the defendant's father (deceased) refused to accept the offer.

(1) Section 48 of Act (X of 1879), t

* Second Appeal, No. 301 of 1896.

(1) I. L. R., 20 Bom., 677.

48. If it shall of this section, t