

## APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Chandavankar.

LALCHAND MOTIRAM AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS,  
v. LAKSHMAN SAIADU (ORIGINAL PLAINTIFF), RESPONDENT.\*

1904.

April 15.

*Transfer of Property Act (IV of 1882), sections 54, 56 (a) (b)—Contract of sale—Decd. of sale not registered—Rights and remedies of the contracting parties.*

The plaintiff executed a conveyance of immoveable property of the value of upwards of Rs. 100 which was not registered according to law, received the purchase-money and delivered possession of the property to the vendee (defendant 1). For a specific performance of this contract, the defendant 1 brought a suit which was dismissed. The plaintiff then sued to recover the possession of the property as its owner.

*Held*, that the suit should be decreed in plaintiff's favour and that all that the defendant 1 was entitled to was the benefit which he could claim under section 56 (6) (b) of the Transfer of Property Act (IV of 1882).

*Kardia Nanubhai v. Mansubhram* (1) explained.

SECOND APPEAL from the decision of F. X. DeSouza, Acting District Judge of Khândesh, confirming the decree passed by V. N. Rahurkar, Subordinate Judge at Bhusáwal.

Suit to recover possession of land.

On the 13th March, 1898, the plaintiff sold Survey Nos. 318, 385 to defendant 1 in consideration of a previous debt of Rs. 300, and put him into possession of the fields; but the sale-deed was not registered as required by section 54 of the Transfer of Property Act (IV of 1882).

The plaintiff brought Suit No. 468 of 1901 to recover possession of the said fields, alleging that he had leased them to defendant 1 for a period of three years. This suit was dismissed on the 24th June, 1902.

The defendant thereupon brought Suit No. 9 of 1902 for specific performance and execution of a valid conveyance. This suit was dismissed as time-barred on the 12th March, 1903.

The plaintiff then instituted the present suit to recover the possession of the fields as owner. Defendant 2 was made a

\* Second Appeal No. 726 of 1903.

(1) (1900) 24 Bom. 400; 2 Bom. L. R. 220.

party as he was in possession of Survey No. 385 as purchaser from defendant 1.

The Subordinate Judge decreed the suit in the plaintiff's favour, and passed the following order :—

Plaintiff do recover possession of Survey No. 318 from defendant 1 and Survey No. 385 from defendant 2. Defendant No. 1 is entitled to get Rs. 300 and interest on this sum at Rs. 12 per cent. per annum from the 13th March, 1898, till the delivery of possession to plaintiff. During the same period he is liable to render the account of profits to plaintiff. If there be any balance in favour of defendant No. 1 he shall have a charge on the disputed lands in respect of it.

This decree was on appeal confirmed by the District Judge whose reasons were as follows :—

Under section 54 of the Transfer of Property Act, a registered sale-deed is essential for the transfer of ownership, and in the absence of such sale-deed, the ownership still vests in the vendor, who is therefore entitled to recover possession from the vendee, defendant 1 (*vide Papireddi v. Narasareddi*, I. L. R. 10 Mad. 465). Mr. Khare argues that a rigid application of section 54 to the present case operates as a great hardship to defendant and that the equities between the parties require that they should be left *in statu quo*; or that at any rate, plaintiff coming into Court should have done so with clean hands with an offer to repay the purchase-money Rs. 300 and not with a false case based on a fictitious lease. This argument would no doubt have been sound in the English Courts where the vendee is entitled to say that the property belongs to him as from the date when the contract is capable of being enforced specifically—see *Edward v. West*, 7 Ch. D. 858. But in this country, the Legislature, both in the Transfer of Property Act and in the Trusts Act, has abrogated the doctrine of equitable ownership. The contract for sale, it is expressly provided by section 54, does not create any interest in or charge on the land in favour of the vendee.

But the vendee is, however, not without his remedy for the purchase-money which he has paid in advance. Section 55, clause (b), creates a charge on the property in his favour to the amount of the purchase-money with interest, and the Subordinate Judge has in this case rightly declared such charge to exist in favour of defendant 1. True consideration was not paid in cash; but the antecedent debt has been wiped off, and this is equivalent to the payment of purchase-money within the meaning of section 55 (b), and this charge which is known to English lawyers as the vendee's lien for prematurely paid purchase-money, is enforceable in every case when as in this case the purchase goes off through no fault of the purchaser—*Dinu v. Grant*, 5 De G. and Sm. 451.

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The defendants appealed to the High Court contending, *inter alia*, that the lower Appellate Court erred in holding that the plaintiff continued to be the owner of the lands in dispute, although he had received the consideration and had transferred the possession of the same to defendant No. 1 according to the contract of sale; and that the Court erred in assuming that the provisions of section 54 of the Transfer of Property Act were exhaustive, and that the doctrine of equitable ownership had been abrogated by the said section.

*L. A. Shah*, for the defendants (appellants):—The plaintiff had received the full consideration and had transferred the possession of the lands to defendant No. 1 according to the contract of sale. The provisions of section 54 of the Transfer of Property Act (IV of 1882) are not exhaustive. The doctrine of equitable ownership has not been abrogated by that section. Equitable ownership passed to defendant 1. See the case of *Karalia Nanubhai v. Mansukhram* <sup>(1)</sup>, which is followed in *Ram Bahsh v. Mughlani Khanam*. <sup>(2)</sup> A vendor who has given possession to the purchaser is not entitled to rescind the contract of sale and recover possession because the purchase-money is not paid: *Trimatray v. The Municipal Commissioners of Hubble*. <sup>(3)</sup> Though there is no registered conveyance, yet as we are defendants in possession, we are entitled to rely on our possession in defence to a suit for the plaintiff for possession. The Court ought to take an equitable view of the rights of the parties. The plaintiff's suit for possession must be dismissed.

*S. S. Patbar*, for the respondent (plaintiff):—In *Karalia Nanubhai v. Mansukhram* <sup>(1)</sup> a registered conveyance was subsequently executed so that the purchaser's title was perfected. Under clause 2 of section 54 of the Transfer of Property Act (IV of 1882) the ownership in the case of tangible immovable property of the value of Rs. 100 and upwards can pass only by a registered instrument. The important fact in the present case is that defendant No. 1 brought a suit (No. 9 of 1902) for specific performance and execution of a valid conveyance, but

<sup>(1)</sup> (1900) 21 Bom. 400; 2 Bom. L. R. 220. <sup>(2)</sup> (1904) 24 Allahabad Weekly Notes 8.  
<sup>(3)</sup> (1878) 3 Bom. 172.

it was dismissed as being time-barred on the 12th March, 1903. Defendant No. 1 is bound by the decree in that suit. He has failed in his suit for specific performance and therefore is in possession practically without any defence to the plaintiff's suit. Under similar circumstances the Madras High Court has held in *Papireddi v. Narasareddi* <sup>(1)</sup> that the sale was not complete and possession could not take the place of the registered deed required by section 54. It has been held in *Ramasami Pattar v. Chinnan Asari* <sup>(2)</sup> that "the Transfer of Property Act in so far as it insists upon registration as essential to certain transfers in addition to a written instrument goes further than the Statute of Frauds, the policy of the Indian Legislature being gradually to secure a public register of title to landed property. Under the English Law a covenantee has an equitable title or interest in the property; but under the Transfer of Property Act, the covenant does not itself create any interest in or charge on the property." The deed not being registered, the sale-deed is inadmissible to prove the sale and does not affect immoveable property comprised therein, and oral evidence is inadmissible to prove the sale. The defendant's suit for specific performance being dismissed, he is practically without any defence and plaintiff is entitled to possession. Defendant No. 1 is entitled to the relief given by the lower Courts, *viz.*, that under section 55 (6) (b) of the Transfer of Property Act he is entitled to a charge on the property to the extent of the purchase money.

*L. A. Shah*, in reply :—The case in *Papireddi v. Narasareddi* <sup>(1)</sup> was cited in the argument of the case of *Karalia Nanubhai v. Mansukhram* <sup>(3)</sup>, but it was not followed. In the latter case, it was held that from September, 1893, Jivanlal was nothing more than a bare trustee and had no attachable interest. The subsequent execution of a registered conveyance was not a ground of decision in the case. The fact that the suit of defendants for specific performance was dismissed as time-barred is not material because the defendant's defence is not barred. The remedy may be barred but the right subsists and defendant No. 1 can successfully plead his title and possession under the sale-deed to the plaintiff's present suit.

(1) (1892) 16 Mad. 464.

(2) (1901) 24 Mad. 449 at p. 462,

(3) (1903) 24 Bom. 460; 2 Bom. L. R. 220.

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CHANDAVARKAR, J. :—The argument of Mr. Shah in support of this second appeal is based mainly upon the support which he seeks to derive from the decision of this Court in *Karalia Nanubhai v. Mansukhram*.<sup>(1)</sup> But that decision is clearly distinguishable from the present case. The facts there were that the vendor had not only received the purchase money and delivered the property, but had perfected the title of the vendee by a registered conveyance as required by clause 2 of section 51 of the Transfer of Property Act. Under these circumstances the learned Chief Justice of this Court, who delivered the judgment, held that there were two things in favour of the vendee, one that at the date of the attachment of the property by a third party as the property of the vendor, the vendee had a lien on the property for the amount of his purchase money paid to the vendor, the other that the subsequent execution and registration of the sale-deed perfected the vendee's title, and that such title related back to the date when before the attachment the vendor had agreed to sell the property. Moreover, in that case the vendee had obtained a decree for specific performance against the vendor. In the present case the facts, on the other hand, are that the vendor received the purchase money, delivered the property to the vendee and executed a conveyance which, however, cannot be admitted in evidence because it is not registered as required by law. The period for registration has expired and, besides, the suit for specific performance brought by the vendee has been rejected. The decree in that suit is binding upon the parties. All that, therefore, the vendee can claim is the benefit of section 56 (6) (b) of the Transfer of Property Act. The decision in *Karalia Nanubhai v. Mansukhram*<sup>(1)</sup> is so far but no further in his favour, and that benefit he has got under the decree of the lower Court. The Allahabad decision in *Ram Bahsh v. Mughlai Khanam*<sup>(2)</sup> no doubt applies to a state of facts not dissimilar to the present, but the judgment shows that the Court there simply followed the decision of this Court in *Karalia Nanubhai v. Mansukhram*<sup>(1)</sup> as an authority which had gone the length of deciding that where there is a contract of sale followed by delivery of property and receipt of purchase money by the

(1) (1900) 24 Bom. 400 ; 2 Bom. L. R. 220.

(2) (1904) 24 All. W. N. 8.

vendor, a registered deed of conveyance is not necessary to pass ownership to the vendee, though clause 2 of section 54 of the Transfer of Property Act says that ownership can pass only by such a deed and not otherwise in the case of tangible immoveable property of one hundred rupees and upwards. The decision in *Karalia Nanubhai v. Mansukhram* <sup>(1)</sup> does not go and was not intended to go that length; nor was it necessary for the purposes of that decision to do so since there was a registered conveyance in the case. Were we to follow the Allahabad decision, we should be overriding the plain provisions of the Transfer of Property Act.

But then it is further urged by Mr. Shah that though there is no registered conveyance to give his client a title by sale, yet as he is a defendant in possession he is entitled to rely on it in defence, and that the Court ought to take an equitable view of his rights. But the question is: What are his rights? The Legislature says in plain terms that in such a case he has no right of ownership but only a lien for his purchase money; and such a right cannot be extended unless the defendant brings his case within the principle of estoppel against the plaintiff, but no estoppel is pleaded or suggested. Nor is there any equity in defendant's favour, for he could have himself got the deed registered, the plaintiff having executed it. This contention can be allowed, if at all, on the principle of part performance, as to which the decisions of the Courts of law in England have been, under the Statute of Frauds, that though there be no writing as required by the Statute, yet if there has been part performance of a parol contract, a Court of equity will assist the person who has got into possession under that contract. But that principle proceeds upon the fact as pointed out by Lord Selborne in *Maddison v. Alderson* <sup>(2)</sup> "that the 4th section of the Statute of Frauds does not avoid parol contracts but only bars the legal remedies by which they might otherwise have been enforced." As said by Lord Ellenborough cited there by Lord Selborne, "the statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of

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(1) (1900) 24 Bom. 400; 2 Bom. L. R. 220.

(2) (1883) 8 App. Cas. 467 at pp. 474, 475.

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actions to enforce them." But the Transfer of Property Act provides otherwise and says that no title of ownership can be created to tangible immoveable property of Rs. 100 and upwards in any other manner than by a registered conveyance. That excludes all considerations of equity based on part or whole performance and makes the law laid down in the Act applicable whether a vendee is suing or is sued.

We must, therefore, confirm the decree with costs.

*Decree confirmed.*

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Batty.*

1904.

June 8.

MOHOLAL MAGANLAL SHA (ORIGINAL DEFENDANT), APPELLANT v  
BAI JIVKORE (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Damage—Trenches for foundations—Percolation of rain-water through the trenches—Injury to the neighbouring house.*

The defendant dug a trench on his land for the foundation of a superstructure on his land. This trench was close to, and in a line with, the back wall of the plaintiff's house. The rain-water collected in the trench and percolating into the foundations of the plaintiff's house, caused the back wall of the plaintiff's house to subside and caused other damage. The plaintiff brought a suit to recover damages.

*Held* (1), that the defendant had a right to build on his land and for the purpose of building to make ditches for foundations.

(2) that the effective cause of the damage being the percolation of the rain-water which collected in the trenches and caused the shrinkage of the house, the defendant was not liable.

Before a person can be held liable in damages for injury caused to his neighbour's land by water either flowing from the former's land to the latter's or percolating from the one into the other, it must be shown that the water was brought or collected on his land by him voluntarily for his own purposes in a non-natural user of it. Otherwise, he is not liable.

SECOND APPEAL from the decision of P. E. Pereival, Joint Judge of Ahmedabad, confirming the decree passed by Vadilal T. Parekh, Joint Subordinate Judge at Ahmedabad.

Suit to recover damages.

\* Second Appeal No. 502 of 1903.