

## APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

GAFFUR VALAD IBRAHIM FAKI (ORIGINAL DEFENDANT No. 2), APPELLANT,  
v. BHIKAJI GOVIND AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.\*

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September 2

*Vendor and purchaser—Agreement to sell to A—Subsequent sale of same land to B under registered conveyance—Notice of prior agreement—Priority—Trust Act (II of 1882), section 21—Specific Relief Act (I of 1877), section 27.*

On 25th June, 1895, the first defendant entered into an agreement to sell certain land to the plaintiff, and six months later (19th December, 1895), he sold the same land to the second defendant and conveyed it to him by a registered deed. In 1896 the plaintiff sued the first defendant for specific performance of his agreement, and on the 8th March, 1897, obtained a decree, in execution of which a conveyance of the land was executed to him by the Court under section 261 of the Civil Procedure Code (XIV of 1882). The plaintiff then attempted to take possession, but was resisted by the second defendant. He thereupon filed this suit. It was found that the second defendant bought in December, 1895, with notice of the earlier agreement with the plaintiff of June, 1895.

*Held*, that the plaintiff was entitled to possession. The second defendant having bought with notice of the plaintiff's contract, he held the property for the benefit of the plaintiff to the extent necessary to give effect to that contract.

*Held*, also, that the form of the decree should be as follows :—There should be a declaration that the second defendant holds the property for the benefit of the plaintiff to the extent necessary to give effect to the contract of the 25th June, 1895; there should be a decree that the second defendant do execute to the plaintiff a proper conveyance of the *thikan*; and a decree for possession.

SECOND appeal from the decision of Ráo Bahádur Mahadev Shridhar, First Class Subordinate Judge of Ratnágiri, with appellate powers, reversing the decree of Ráo Sáheb G. D. Deshmukh, Subordinate Judge of Dápoli.

Suit for possession of land.

On the 25th June, 1895, the first defendant entered into an agreement to sell the land in dispute (with other land) to the plaintiff for Rs. 650, but on the 19th December, 1895, he sold the same land to the second defendant and conveyed it to him by a registered conveyance.

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In 1896 the plaintiffs sued the first defendant for specific performance of his contract of 25th June, 1895, and obtained a decree on the 8th March, 1897. In execution of that decree a conveyance was executed to the plaintiffs by the Court under section 261 of the Civil Procedure Code (XIV of 1882) on the 11th January, 1898. The plaintiffs, however, were unable to obtain possession, being resisted by the second defendant, and they accordingly brought this suit for possession.

The first defendant pleaded that he had sold the land to defendant No. 2.

Defendant No. 2 pleaded that he was in possession as purchaser from defendant No. 1 under a duly registered conveyance.

The Subordinate Judge dismissed the suit, holding that the second defendant's purchase having been duly completed by a registered conveyance and by possession prior to plaintiffs' purchase, the second defendant had the better title.

The plaintiffs appealed, contending that the second defendant at the time of his purchase had full knowledge of the prior agreement to sell the land to them, and that the purchase by the second defendant was fictitious. The District Judge, therefore, sent the case back to the lower Court for findings on the following issues :

- (1) Whether at the date of his purchase the second defendant had notice of the prior agreement with the plaintiffs.
- (2) Whether the second defendant's purchase was fictitious and intended to defeat the sale to the plaintiffs.

The lower Court found both these issues in the negative and against the plaintiffs. But on the return of the case to the District Court, the Judge found these issues in the affirmative, and he reversed the decree of the lower Court and passed a decree for the plaintiffs, holding that the second defendant had notice of the earlier agreement with the plaintiffs, and that his purchase was fictitious and without consideration.

Defendant No. 2 appealed.

*Gangaram B. Rele* for appellant (defendant No. 2):—The District Judge erred in allowing the plaintiffs to set up a case of fraud in appeal for the first time. There is no such allegation in

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the plaint. The first Court held there was no fraud. The District Court, no doubt, has held otherwise, but that finding is not based on the evidence and is not binding in second appeal. We rely on *Narayana v. Kardusami*<sup>(1)</sup>; *Advocate General of Bombay v. Bai Punja*.<sup>(2)</sup>

[JENKINS, C.J. :—What is there to show that when the plaintiffs sued the first defendant for specific performance they knew that he had sold the land to you ?]

We were then in possession, and our deed of conveyance was duly registered. The plaintiffs, therefore, had full notice. They ought further to have made the second defendant a party to their suit for specific performance. They could then have obtained the relief they now seek. Not having done so, they are barred by sections 13 and 43 of the Civil Procedure Code (XIV of 1882).

The right given to the plaintiffs by their agreement of the 25th June, 1895, was incomplete. It was never perfected. The conveyance to us was complete and was registered and gave us the better title.

*Purushotam P. Khare* for respondents (plaintiffs) :—It is true that in our suit for specific performance we did not make the second defendant a party, nor did we ask for the relief which we ask for now. But that was because we did not know of the subsequent sale to the second defendant. If we had known of it, we should have protected ourselves against the necessity of this second suit. In the former suit the present defendant did not plead or disclose the fact that he had sold to the second defendant. The lower Appellate Court has found that the second defendant had notice of our agreement of the 25th June, and that being so, he took subject to our rights under that agreement.

JENKINS, C.J. :—On the 25th of June, 1895, the first defendant agreed to sell to the plaintiff the *thikan* in suit (with others) for Rs. 650. On the 19th of December in the same year defendant No. 1 conveyed this *thikan* to defendant No. 2. In 1896 the plaintiff brought a suit for specific performance of his contract against defendant No. 1; a decree in his favour was passed on the

(1) (1898) 22 Mad. 24.

(2) (1894) 18 Bom. 551.

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8th of March, 1897; and on the 11th January, 1898, a conveyance was executed to the plaintiff by the Court under the provisions of section 261 of the Civil Procedure Code. The plaintiff, however, has been unable to obtain possession, as he was resisted by the second defendant; consequently he has brought this suit, whereby he seeks to recover possession.

It has been found by the lower Appellate Court that the second defendant bought with notice of the contract of the 25th June, 1895, and, as a result, he must hold the property for the benefit of the plaintiff to the extent necessary to give effect to that contract (Trust Act (II of 1882), section 91).

It has been argued, however, by Mr. Rele that this suit will not lie, as the claim made in it should have been made in the suit of 1896; but to this there is the complete answer that the plaintiff did not then know of the conveyance to the second defendant. Had he known of it then, no doubt he could have made the second defendant a party to it under section 27 of the Specific Relief Act.

The plaintiff then has a right to the *thikan* which must prevail against any title acquired by the second defendant by virtue of the conveyance to him: the only question is as to the proper form of relief. Had the second defendant's claim of title rested on contract only, then a simple decree for possession would have sufficed; but an actual conveyance was executed in his favour whereby the property in the *thikan* passed to him, though no doubt burdened in the way we have indicated. Therefore we think the decree should be in this form: there should be a declaration that the second defendant holds the property for the benefit of the plaintiff to the extent necessary to give effect to the contract of the 25th of June, 1895: there should be a decree that the second defendant do execute to the plaintiff a proper conveyance of the *thikan*: and a decree for possession. To this extent the decree under appeal must be varied; the decree as to costs will stand, but the appellant must pay the respondent's costs of this appeal.

*Decree varied.*