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which can be disposed of by any means known to law. It will be sufficient for the purposes of this case if we amend the decree of the lower Court by giving the plaintiff an injunction restraining the defendant from taking possession of the property or interfering with the plaintiff's possession or enjoyment thereof during her lifetime.

Each party to bear her and his own costs.

Decree accordingly.

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APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

HIRALAL RAMNARAYAN (ORIGINAL PLAINTIFF), APPELLANT v. SILANKAR HIRACHANI (ORIGINAL DEFENDANT), RESPONDENT^a.

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January, 14.

Contract—Specific performance of contract—Agreement of sale executed on an unstamped paper—Part performance by delivery of possession of part of the property and execution of stamped but unregistered sale deed of the rest of the property—Secondary evidence of the agreement of sale not permissible—Suit for specific performance competent.

The defendant agreed in writing (unstamped) to sell two of his lands and a house to the plaintiff in consideration of an adjustment of accounts between the parties. In pursuance of the agreement, the defendant handed over to the plaintiff possession of the lands, and executed a stamped but unregistered sale-deed of the house. On the plaintiff subsequently suing for specific performance, the written agreement of sale abovementioned was not forthcoming :

Held, that secondary evidence of the unstamped agreement of sale was not admissible, even on payment of penalty.

Raja of Bobbili v. Inyanti Ulina Sitaramasami Garu⁽¹⁾, followed.

Held, further on the facts, that the agreement of sale having been confessed and in part carried into execution, the matter had advanced beyond the stage of contract, and the equities which had arisen could not be administered unless the contract was regarded. Specific performance was, therefore, decreed.

^a First Appeal No. 176 of 1919.

(1) (1899) 23 Mad. 49.

FIRST appeal from the decision of G. L. Dhekne, Additional First Class Subordinate Judge at Dhulia.

Suit for specific performance of contract.

There were dealings between the plaintiff and the defendant, which when settled found the latter indebted to the former in a sum of Rs. 7,025-2-0.

The defendant had no cash to pay. He, therefore, agreed, in consideration of this amount, to sell two of his lands and a house called the Sonarwalla house. The agreement was reduced to writing but was not engrossed on a stamped paper.

In pursuance of the agreement, the defendant placed the plaintiff in possession of two of his lands. The title to the Sonarwalla house being a little obscure the defendant agreed to substitute another house of his called the Dukanwalla house and actually, executed a sale deed of the house. The deed, however, though engrossed on a stamped paper, was not registered.

The plaintiff next filed the present suit against the defendant to compel him to execute a sale deed of the land and to deliver up possession of the house.

The trial judge being of opinion that as the plaintiff was not at liberty to adduce secondary evidence of the agreement of sale which was on an unstamped paper and which was not forthcoming the plaintiff was unable to prove the agreement of sale. He was accordingly held not entitled to the reliefs claimed by him.

The plaintiff appealed to the High Court.

P. B. Shingne, for the appellant.

D. W. Pilgaokar and *D. S. Mandlik*, for the respondent.

MACLEOD, C. J. :—The plaintiff sued to obtain specific performance of a contract of sale of the suit properties consisting of two agricultural lands and a house.

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It is admitted that there were dealings between the plaintiff and the defendant of which an account was taken in 1916 when it was found that over Rs. 7,000 were due by the defendant to the plaintiff, and it is alleged by the plaintiff that in satisfaction of that claim the defendant agreed to transfer to him two lands Survey Nos. 160 and 74 and a house called the Sonarwala house. The plaintiff also alleges that he was put into possession of the two pieces of land and that afterwards it was agreed that instead of the Sonarwala house the defendant should convey to the plaintiff what was called the Dukanwala house, and as a matter of fact the defendant executed a sale deed of the Dukanwala house to the plaintiff on the 14th of July 1916, but unfortunately that deed has not been registered. It is also in evidence that a promissory note for Rs. 2,000 signed by the defendant in favour of the plaintiff was cancelled by the defendant with the consent of the plaintiff and in the cancellation it is mentioned that a written document had been executed. The plaintiff's difficulty was that he could not produce the contract on which he sued. He said he had given the document to one Davlat. Davlat denied that any document had ever been given to him. The defendant denied that any written document had been signed by him; in face of the endorsement on the promissory note that denial must be false. But further the plaintiff had to admit that the missing written document was unstamped and in *Raja of Bobbili v. Inuganti China Sitaramasami Garu*⁽¹⁾ it was held by the Privy Council that secondary evidence cannot be given of a document which has not been properly stamped, as under the provisions of the Indian Stamp Act such a document is only admissible in evidence when the Collector has assessed and charged the penalty on the production

(1) (1899) 23 Mad. 49.

of the original writ and when he has written an endorsement upon the writ submitted to him. Therefore it would not be open to the plaintiff in this case to adduce secondary evidence of the written agreement even upon payment of the penalty. But the plaintiff contends that the agreement has been partly performed as he is in possession of the lands Survey Nos. 160 and 74 and that would be a sufficient ground to enable a Court of Equity to order further execution of the agreement by directing the defendant to execute the sale deed. In *Mahomed Musa v. Aghore Kumar Ganguli*⁽¹⁾ there had been a compromise in a suit whereby it was agreed that a certain mortgaged property should be released from two mortgages, and that the mortgagor should execute deeds of absolute sale or transfer of the proportions allotted to the respective mortgagees. A decree was made in pursuance of the compromise, but the compromise was not registered, nor were the transfers executed. The parties, however, had acted as if the transfers had been made and had afterwards acted as if the agreement was in full force, and it was held that "whatever defects of form there might be in relation to the compromise agreement as a transfer of the equity of redemption were cured by the conduct of the parties in continuously acting upon it, and that the right to redeem the mortgages was extinguished." Now with regard to these properties, Survey Nos. 160 and 74, they had been conveyed to the plaintiff by the defendant by two sale deeds of 1910 and 1912. The defendant, however, contended that these sale deeds were in the nature of mortgages and before this suit was filed he had filed suits against the plaintiff to have that established. Clearly on the authority of the case I have just cited the defendant's suit to redeem the mortgages would stand a very good chance of being

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dismissed on the ground that both the plaintiff and the defendant had acted upon the agreement of 1916 by which the plaintiff had got possession of these two lands and had been given a sale deed, although it was unregistered, of the Dukanwala house. The question is whether in the suit now brought by the plaintiff for specific performance the same principles could be applied so that justice might be done between the parties.

The learned Judge in the Court below, although he was entirely in sympathy with the plaintiff, came to the conclusion that the law helped the dishonest defendant and the Court could not give the plaintiff relief. He thought that if the contract in suit had been proved, then the evidence of this part performance would have influenced him in regarding this case as one in which the Court should exercise discretion in enforcing specific performance. Undoubtedly, if the contract in suit had been proved, it would not have been necessary to prove part performance in order to enable the Court to enforce it, and the learned Judge does not appear to have noticed that fallacy in his reasoning. But if the Court can give relief on the ground of part performance, then the Court is giving relief upon the equities resulting from an act done in execution of a contract and not upon the contract itself. In *Maddison v. Alderson*⁽¹⁾, the question was very fully discussed by the House of Lords in what circumstances a Court of Equity would give relief where the contract had been partly performed and where the contract itself could not be proved under the Statute of Frauds, and the conclusions which were arrived at are referred to in *Mahomed Musa v. Aghore Kumar Ganguli*⁽²⁾. Their Lordships say: "Many authorities are cited in support of these propositions from English and Scotch

⁽¹⁾ (1883) 8 App. Cas. 467.

⁽²⁾ (1914) L. R. 42 I. A. 1 at pp. 8, 9.

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Law, and no countenance is given to the proposition that equity would fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange (*Potter v. Potter*⁽¹⁾) may be here repeated: 'if confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity'. Their Lordships do not think that the law of India is inconsistent with these principles."

Now, on the 30th of May 1916, the defendant executed what is called a Kararpatra from which it appears that the defendant was in occupation of the lands,

rvey Nos. 160 and 74, by reason of a written document of the 7th of July 1915. The document, after reciting that agreement, states that the property is returned and given into the plaintiff's possession that day, the defendant having no right or interest whatever pertaining to the said lands. I think it may be taken, therefore, that considering that the document was signed on the 30th of May 1916 it was a part of the general settlement which was arrived at on that day and that the plaintiff got into possession of those lands as part performance of the settlement. It also appears that the defendant recognized his obligations to convey under the settlement the Sonarwala house and that he agreed to substitute the Dukanwala house for the Sonarwala house and finally executed the sale deed in respect of the Dukanwala house. It cannot, therefore, be said that the settlement has not been confessed or in part carried into execution. Therefore, 'the matter', to quote the words of the Lord Chancellor, 'has advanced beyond the stage of contract; and the

⁽¹⁾ (1750) 1 Ver. Sen. 437 at p. 441.

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equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded'.

I think, therefore, this is a case in which the Court is enabled to relieve the plaintiff from the difficulties which have arisen owing to his not having been able to produce the written agreement. It certainly would be a very extraordinary thing, if the Court on the facts of this case could not grant relief to the plaintiff, considering that it is admitted that the defendant has got released from a debt of Rs. 7,000, and that the plaintiff has not succeeded in getting himself firmly established with regard to the consideration which he was to receive from the defendant in place of giving up his claim to that sum.

I think, therefore, the appeal must be allowed and that the defendant must be directed at his own cost to execute conveyances to the plaintiff of the suit lands, Survey Nos. 160 and 74, and also a sale deed of the Dukanwala house. We decree accordingly and also order possession of the Dukanwala house to be given to the plaintiff.

The plaintiff is entitled to his costs throughout.

SHAH, J :—I concur.

Appeal allowed.

R. R.
