

APPELLATE CIVIL.

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

1920.

August 4.

LAXMANRAO ALIAS DADASAHEB MADHAVRAO JAIHAGIRDAR
(ORIGINAL DEFENDANT), APPELLANT *v.* BHAGWANSINGH ADOPTIVE FATHER
NARSINGBHAI NAVALURKAR (ORIGINAL PLAINTIFF), RESPONDENT.^a

*Contract—Agreement for sale—Death of vendor before completion of sale—
Vendee put in possession of property by vendor's widow—Suit to recover
possession—Vendee can plead his contract of sale and possession delivered
under it.*

In January 1904, N, the owner of property in suit, entered into an agreement with the defendant for sale of the property and received a part of the consideration as earnest money. Before the sale deed could be executed N died, and his widow who was then a minor executed the deed in September 1904 in pursuance of the agreement of sale, and put the defendant in possession of the property on receipt of the balance of the consideration amount. Thereafter, the widow adopted plaintiff who in 1915 sued to recover possession of the property, contending that the sale was invalid on account of the minority of the widow. The Court of First Instance passed a decree in favour of the plaintiff for possession on his paying within six months Rs. 1,600 to the defendant as compensation for cancellation of the sale deed. On appeal,

Held, reversing the decision of the lower Court and dismissing the plaintiff's suit,

(1) that there was no objection to the widow putting the purchaser in possession and receiving the purchase price and thus carrying out the fiduciary obligation arising under the contract entered into by her husband.

(2) that the defendant by reason of his obtaining possession under a contract of sale could successfully resist the plaintiff's suit to eject him.

Bapu Apaji v. Kashinath Sadoba⁽¹⁾, followed.

FIRST appeal against the decision of H. V. Chinmugund, First Class Subordinate Judge of Dharwar, in Suit No. 56 of 1915.

Suit to recover possession.

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One Narsingbhau was the owner of the property in suit. On the 8th January 1904 he entered into an agreement with the defendant to sell the suit property at the rate of Rs. 175 per acre and received Rs. 100 as earnest money. Before the sale deed could be executed Narsingbhau was attacked by plague and died.

On the 30th September, Narsingbhau's widow Nandubai executed a sale deed in favour of the defendant and put him in possession of the property. Nandubai admitted having received the balance of the consideration amount in the sale deed.

In November 1904, Nandubai adopted plaintiff. He sued to recover possession of the property alleging that the defendant purchased the property from Nandubai for a small price by representing to her that it was encumbered and was about to be sold; and that Nandubai was a minor at the date of the sale.

The defendant contended that Nandubai was bound by law to carry out the contract made by her husband and passed a sale deed of the property in suit and had put him in possession; that he had become owner of the suit property; that the consideration paid was adequate and that Nandubai was major at the date of the sale.

The Subordinate Judge held that the plaintiff's adoption was proved; that Nandubai was a minor when the sale deed was passed, that the agreement to sell the land in suit by Narsingbhau was proved and the sale deed was passed by Nandubai in pursuance of the agreement. He, however, found that the sale deed was obtained by the defendant by misrepresentation as alleged by the plaintiff and that the sale deed was invalid on account of the minority of the defendant. He, therefore, passed a decree in favour of the plaintiff for possession, if he paid within six months Rs. 1,600

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to the defendant as compensation for the cancellation of the sale deed.

The Subordinate Judge's observations on the defendant's contention that possession having been delivered to him in pursuance of Narsingbhan's agreement to sell, the plaintiff had no right to eject the defendant, were as follows :—

The rulings relied on by Mr. Jog are: 24 Bom. 400, 18 Bom. L. R. 455 (at page 459) and 19 Bom. L. R. 100. In these cases the seller had put the purchaser in possession under the agreement of sale and in two of them he had received the purchase money and in one he had not. In one of them, viz., 18 Bom. L. R. 455, the transferee of the seller by a registered sale deed sought to evict the original purchaser on the ground that he got no interest in the property by the agreement or contract of sale in the absence of a regular registered conveyance. All these cases are distinguishable from the present case, in that in all the cases quoted the seller himself had put the purchaser in possession and there was no complication due to the minority of the seller's heir who put the purchaser in possession as in this case. In the cases quoted the seller (and in one case the transferee of the seller who bought with notice of the defendant's prior agreement to purchase and of his possession) was equitably bound to stick to his promise to sell and their Lordships of the High Court held that the later purchaser under the registered deed or the seller had no right to evict the original purchaser. But in this case the seller did not put defendant in possession. Not only that but defendant got a regular registered sale deed, Exhibit 26, in fulfilment of the agreement to sell from the widow of the seller and that widow was a minor at the date of the sale deed and her actio in delivering possession under the sale deed is alleged by plaintiff to be invalid in law and equity being that of an incompetent person and he, therefore, urges that such a possession is that of a trespasser not entitled to the support of the Equity Side of this Court like the purchasers in the cases quoted. I am of opinion that this contention should prevail because the delivery of possession cannot contain in it the equity which the delivery by the seller himself in the cases quoted possessed. For purposes of this suit under its particular facts the delivery of possession is to be considered as non-existent in the eye of law and such a possession cannot be retained by defendant as against the rightful heir of Narsingbhan.

The defendant appealed to the High Court.

Tyabji, with *K. H. Kelkar*, for the appellant :—Narsingbhan passed an agreement to the appellant and

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agreed thereby to sell the property in suit. I assume the correctness of the finding of the lower Court that the property remained in the possession of the vendor and that it was delivered over to the appellant after his death by his widow at the time of the execution of the sale-deed by the widow. I also assume that the widow was a minor at the date of the execution of the sale-deed. Yet the result will be that the agreement of sale was followed by subsequent delivery of possession. As to consideration for the sale, it was paid. If so, the case is governed by the decision in *Bapu Apaji v. Kashinath Sadoba*⁽¹⁾ and the appellant can resist the present claim successfully.

P. B. Shingne, with *G. R. Mudbhavi*, for the respondent:—The Full Bench case of *Bapu Apaji*⁽¹⁾ does not apply here. There the possession was delivered by the vendor in pursuance of the agreement of sale. In this case, the possession was delivered by the widow of the vendor in pursuance of a void sale. If the sale is void, anything done under it, is also of no effect and the element of delivery of possession vanishes in the eye of law. As to consideration, the whole affair is, as found by the lower Court, shrowded in doubt. The estate was mortgaged and the mortgage-money was to be paid off by annual instalments, and yet the amount was not paid and interest was allowed to accumulate down till after the institution of this suit. The sale is also bad owing to fraudulent misrepresentations made to the widow, as found by the lower Court. The deed was not explained to her and she could not understand its effect. She had no proper advice in the matter. The widow, moreover, had no power to alienate the property and plaintiff challenges the sale.

MACLEOD, C. J.:—One Narsinghbhau was the owner of the suit property. On the 8th of January 1904, he

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entered into an agreement with the defendant in this suit to sell the property at the rate Rs. 175 an acre and received Rs. 100 as earnest money and agreed to pass a regular sale deed. Thereafter he was attacked by plague and died before the sale deed could be executed. On the 30th of September his widow executed a sale deed in favour of the defendant putting him in possession of the property. The consideration for the suit property at the rate of Rs. 175 an acre was Rs. 1,367. Rs. 100 having been paid, the balance left was Rs. 1,267. The consideration paid by the defendant is said to have been made up as follows. He took over the mortgage due by the deceased in favour of one Anandibai for Rs. 1,000 and the interest then due amounting to Rs. 215 and a debt of Rs. 75 due to Government on account of *tagavi* making altogether Rs. 1,290, rather more than the actual balance due. The widow at that time was a minor and therefore under section 7 of the Transfer of Property Act not being competent to contract to sell the property, she was not competent to transfer title. Thereafter she adopted the present plaintiff who brought this suit in 1915 against the defendant to recover possession with subsequent mesne profits of the suit land and for other relief.

The learned Judge held that the plaintiff's adoption was proved, that Nandubai was a minor when the sale deed, Exhibit 26, was passed, that the agreement to sell the land in suit by Narsingbhau to the defendant was proved and that the sale deed was passed by Nandubai, his widow, in pursuance of the said agreement. But he found that the sale deed was obtained by the defendant by misrepresentation as stated by the plaintiff in the 2nd paragraph of the plaint, and he finally came to the conclusion that the plaintiff could contend that the sale was invalid on account of the minority of Nandubai and on account of the misrepresentation as

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alleged by the plaintiff. He passed a decree in favour of the plaintiff for possession if he paid within six months Rs. 1,600 to the defendant as compensation for the cancellation of the sale deed.

Now when the agreement to sell was passed by Narsinghbhau, the defendant acquired a right to a sale deed on payment of the balance of the purchase money, and if Narsinghbhau had put the defendant into possession of the property without giving him a sale deed, then under the Full Bench decision of *Bapu Apaji v. Kashinath Sadoba*⁽¹⁾ if at the time when the agreement was still capable of specific enforcement the vendor sued to recover possession it would be a valid defence that the vendee had been placed in possession of the property and was willing to perform his part of the agreement. The learned Judges considered that where a vendor, who has contracted to sell immoveable property and has under the contract put the prospective vendee in possession, repudiates the fiduciary obligation with regard to possession, he could not sue the latter in ejectment if the vendee was willing to complete the purchase. The learned Judges also stated as follows at page 112: "We are of opinion that a suit for specific performance is not the purchaser's only remedy, and that he may under the circumstances stated in the question, if there are no other facts operating to his prejudice, successfully plead his contract of sale and the possession acquired under it." I presume that means the vendee in possession under a contract of sale is not obliged to sue for specific performance and can resist any attempt by the vendor to eject him unless there are other facts such as fraud or misrepresentation which may operate to his prejudice. Then is the defendant's position in this case inferior to that of the defendant in the case I have cited, merely because he

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was put into possession by the widow of the vendor and not by the vendor himself. No doubt the sale deed cannot be considered as effecting a transfer of the property in the legal sense of the word. But there could be no objection to the widow putting the purchaser in possession and receiving the purchase price and so far carrying out the contract which had been entered into by her husband, and I cannot say that the widow herself could have successfully sued the present defendant for possession supposing she had not adopted. It must follow then that the present plaintiff, her adopted son, is in no better position than the adoptive mother, nor is he in any better position than Narsingbhau would have been if he had given possession to the purchaser in his life time. That appears to me to be the true answer to the question arising in this case and there is therefore no need to consider any of the points which have been dealt with by the learned trial Judge. In any case it cannot be said that there are any equities in favour of the plaintiff. We are dealing with a transaction which, apart from the validity of the sale deed, was completed in 1904. Although after his adoption the plaintiff was still of tender years, he must have known long before the suit was filed about this transaction, and it was only in 1915 when, as the learned Judge points out, the value of this property had increased to a considerable extent that he sought to take advantage of the fact that his adoptive mother passed a sale deed before she attained majority, in order to defeat the defendant's rights.

In my opinion the decree of the learned Judge must be reversed and the suit dismissed with costs through out.

The cross-objections are dismissed with costs.

FAWCETT, J.:—I think the main question in this appeal is whether the present case falls under the Full

Bench ruling in *Bapu Apaji v. Kashinath Sadoba*⁽¹⁾, or whether it has been rightly distinguished from that case by the lower Court. To satisfy the conditions of the principle laid down in that case it is first of all a requisite that the agreement to sell the property to the defendant shall still be capable of specific enforcement. On this point I think the contention that such a suit by the defendant would not be time-barred is correct. The case is of course governed by Article 113 of the Indian Limitation Act under which the prescribed period of three years begins to run from the date fixed for performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. In this case the written contract, Exhibit 26, fixed no date for the performance, and the oral evidence as to that important term of the contract is conflicting and must, I think, be excluded under section 92 of the Indian Evidence Act. Then the only question is, when was it that the defendant had notice that performance of this contract was refused? He had in fact a conveyance executed by the widow and he cannot, in my opinion, be said to have had any notice that performance was refused within the meaning of this Article 113 until the plea was raised that his conveyance was void as having been executed by a minor. There is no evidence that the defendant knew that the widow actually was a minor, and it would be giving a very inequitable meaning to the words if it were held, because the conveyance to sell was void, that, when the conveyance was executed, there was a refusal to perform the contract to sell. To that extent, therefore, I think the case must be held to fall within the Full Bench ruling.

The next question that arises is, whether the basis on which that ruling rests applies to the present case.

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It is held in the judgment of the Full Bench that "where... a vendor, who has contracted to sell immovable property and has under the contract put the prospective vendee in possession, sues the latter in ejectment, he repudiates, if the vendee is willing to complete the purchase, the fiduciary obligation arising out of the contract and annexed to the ownership of the property, and seeks to treat the vendee as a trespasser. Once it is recognized that the plaintiff is violating his fiduciary obligation, it is clear that the Court cannot grant him the relief which he seeks, for it will not aid him in committing a breach of trust and his suit must fail; the defendant is no trespasser, but is in possession under the contract which the plaintiff has bound himself to carry out". This fiduciary obligation is there specifically described as arising out of the contract and annexed to the ownership of the property, and if that is a correct description, that fiduciary obligation attaches also to any legal representative of the vendor who has contracted to sell. Also on principles of equity it seems to me that the legal representative should be under the same obligation and not escape it merely because the original vendor has died. Consequently I do not think that the lower Court was right in holding that this Full Bench ruling is distinguishable, because it was not the seller, but the seller's widow that put the defendant in possession. It is not, I think, right to say that delivery of possession by the widow was non-existent in the eye of the law. It was an actual delivery of possession and it was a delivery of possession under a fiduciary obligation annexed to the ownership of the property.

Therefore, I think the case falls under the Full Bench ruling and I agree in allowing the appeal.

Decree reversed.

J. G. R.