

1908
JAN. 18.
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APPEAL
FROM
ORIGINAL
CIVIL.
—
32 C. 816.

This construction is supported by the letter of the plaintiff to the Standard Oil Company, dated March 25th, 1903.

I think it unnecessary to discuss the question as to the precise time the property passed, and the effect of section 78 of the Contract Act, because, if the property had passed on March 31st, the appellant's contention must fail. Putting, therefore, the case at its highest in favour of the appellant and assuming that the time of the passing of the property is to be ascertained from the terms of the contract, the appellant's contention fails.

The learned Judge has found that the fire took place at 6-10 P.M. on March 31st, and that the buyer had up to 5 P.M. on that day to make his payment and obtain a delivery order. His findings on these points have not been contested.

[831] In my view the parties agreed that, unless the buyer paid earlier, the date of the delivery order should be March 31st and that on that date the property in the oil should be deemed to have passed to the buyer. That being so, the property in the oil had passed to the buyer, at the time of the fire and was covered by the policy. The appeal must, therefore, be dismissed.

Attorneys for the defendant Company : *Orr Dignam & Co.*

Attorneys for the plaintiff : *Morgan & Co.*

32 C. 832 (=9 C. W. N. 1019=2 C. L. J. 6.)

[832] APPELLATE CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice,
and Mr. Justice Mitra.*

RASHMONI DASI v. SURJA KANTA ROY CHOWDHRY.*

[31st March, 1905.]

*Specific Performance—Contract relating to property of minor—Guardian. liability of
—Specific Relief Act (1 of 1877), s. 18.*

Where a contract to sell immovable property was entered into, without any legal necessity, by the defendant, not in her personal capacity and not on the representation that the property was her own, but as the next friend of her minor son, and the parties contemplated that, unless the sanction of the District Judge were obtained, the bargain was to come to an end, and before such sanction was obtained the minor died, leaving the defendant as his heir :

Held that the agreement could not be specifically enforced against the defendant.

Section 18 of the Specific Relief Act has no application where the defendant never contracted to sell property as if it were her own.

[Dist. 29 I. C. 489=29 M. L. J. 738; Ref. 35 M. L. J. 120=8 L. W. 100=49 I. C. 147.]

SECOND APPEAL by the defendant Rashmoni Dasi.

One Hari Nath, a minor, owned a third share in certain immovable properties.

The defendant as his mother and guardian executed a *bainapatra* or agreement to sell on the 3rd Jaista 1306, corresponding to the 18th May, 1899, in favour of the plaintiff Surja Kanta Roy Chowdhry, agreeing to

* Appeal from Appellate Decree No. 28 of 1903, against the decree of Jogendra Nath Mitter, Subordinate Judge of 24-Pergannahs, dated the 25th of September 1902, affirming the decree of Nabin Mohun Banerjee, Munsiff of Basirhat, dated the 1st of August 1901.

sell to him the third share of the minor Harinath in the aforesaid properties. The material terms of the agreement are set out in the judgment of his Lordship, the Chief Justice. Subsequently Harinath died and the defendant succeeded him as his heiress. The plaintiff brought the present suit for the specific performance of the said agreement and for possession of the property agreed to be conveyed. The defendant by her written statement denied having executed the *bainapatra* [833] and pleaded that there was no reasonable cause for her doing so. She also pleaded that the plaintiff had no cause of action and that the suit was not maintainable.

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The Munsif decreed the suit in favour of the plaintiff and his decision was affirmed on appeal by the Subordinate Judge, who found that the defendant had executed the *bainapatra* and had received Rs. 5; he also found that the statement in the agreement that the sale of the property was necessary to satisfy the debts left by Harinath's father was untrue and that no such debts were due. With reference to the contention of the defendant that the agreement contemplated that an order was to be taken from the District Judge sanctioning the sale and that no such sanction had been obtained, the Subordinate Judge observed as follows:—"The circumstances have now altered. The minor is dead, and no sanction is necessary. It may be that Rashmoni cannot sell more than her life interest. That may or may not be. I need not in this case enter into that question.

The defendant appealed to the High Court.

The appeal was in the first instance heard in the absence of the respondent.

Dr. *Rash Behary Ghose* (Babu *Jugat Chunder Banerjee* with him) for the appellant. The contract sought to be specifically enforced was entered into by the defendant Rashmoni on behalf of her infant son. Rashmoni was the guardian of her son and the agreement was made without the sanction of the District Judge. It is found that there was no legal necessity: an infant's contract relating to land cannot be specifically enforced: *Flight v. Bolland* (1) has been followed in India. Even if such a contract could in case be enforced, it cannot be enforced in the absence of legal necessity; under the Hindu law the powers of a natural guardian are very limited: *Hunooman Persaud Pandey v. Munraj Koonwaree* (2).

No one appeared for the respondent.

Their Lordships delivered judgment allowing the appeal. Subsequently on the application of the respondent an order was made for the re-hearing of the appeal in his presence.

[834] On the appeal coming on for rehearing, the Court called upon the respondent.

Mr. *S. P. Sinha* (Babu *Sarat Chunder Ghose* with him) for the respondent. The defendant, after she acquired by inheritance the estate of her son, is bound to carry out the contract, which she made to sell the property. By the agreement she agreed to sell the property and undertook to take out a certificate of guardianship and permission of the Judge and to execute the conveyance within five months: she undertook to sell and to do everything necessary to entitle her to sell. *Fry on Specific Performance*, p. 430, section 994; *Holroyd v. Marshall* (3); *Carne v. Mitchell* (4); *Clayton v. Duke of Newcastle* (5); section 18, Specific Relief Act; section 43 of the Transfer of Property Act. A guardian contracting to sell

(1) (1828) 4 Russ. 298; 28 B. R. 101.

(2) (1856) 6 M. I. A. 398.

(3) (1862) 10 H. L. C. 191.

(4) (1846) 15 L. J. Ch. 287.

(5) (1682) 2 Chan. Cas., 112.

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his ward's property and to get himself appointed guardian and to procure the sanction of the District Judge is not contracting on behalf of the minor ; she is necessarily acting on behalf of herself, although in the title to the *bainapatra* she is described as mother and next friend of her son. The minor died within the five months mentioned in the agreement. The defendant agreed by the contract to give the plaintiff a good title to the property, which then belonged to her minor son. If *A* contracts with *B* to sell the property of *C* and he expects to get the property from *C* by conveyance or by decree of Court and if afterwards *A* gets the property by will or inheritance I submit he would be bound to perform the contract.

Dr. *Rash Behary Ghose and Babu Jagat Chunder Banerjee* for the appellant were not called upon to reply.

MACLEAN C. J. In this case, we gave judgment on the 22nd February 1905 allowing the appeal. It was subsequently represented to us that the respondent had not been properly served and we consequently directed that the case should be re-argued in his presence. We have now had the advantage of listening to counsel for him and I must say that I see no reason to differ from the conclusion at which we arrived previously. The matter [835] to my mind, is an extremely simple one. It is a suit for specific performance of an agreement to sell a small portion of immovable property for a sum of Rs. 287 odd. The property belonged to a minor and the agreement, which was entered into on the 18th May 1899, was entered into by the present defendant who was the mother of the minor as his guardian. The minor is dead and the mother as his heiress has succeeded to the property and the suit is now brought against her for specific performance of this agreement.

We have had on this occasion an advantage which we lacked at the previous hearing, namely, we have a copy of the contract before us and, to my mind, that contract emphasises the correctness of our previous decision. It is quite clear that this contract was entered into by the mother, not in her personal capacity, not as representing that the property was her own, but as the mother and next friend of the minor. Both parties contracted upon that footing and both parties seem to have been conscious that it would be impossible to give the purchaser a valid title, unless the consent of the District Judge were obtained to the same. That this was so is clear from this clause of the contract: "I have agreed to sell the same for that consideration, and now having received Rs. 12-8 out of that price as earnest money to-day I execute and deliver this *bainapatra* and promise that within five months from this date I shall take out a certificate on behalf of the minor from the District Judge in respect of the property to be sold and permission to sell the same, and duly execute a *kobala* and deliver the same registered on receiving the balance of the consideration money." It is quite clear from this that it was in the contemplation of the parties that the mother must obtain a certificate of guardianship from the District Judge before the sale of the property could be effected and that she was to have five months within which to do that. The minor died within the five months. The consequence was that this clause became inoperative and the mother could not apply for guardianship or permission to sell after the death of the minor. Such an application would have been unnecessary and inoperative and the parties seem to have contemplated that such an event might happen, for the document contains this provision: "It should further be [836] mentioned here that, if I fail to obtain permission of sale from the District Judge, I will refund the earnest money and take back this

bainpatra." It looks as if the parties contemplated that, unless a certificate and the assent of the District Judge were obtained, the whole bargain was to come to an end. How in these circumstances can the plaintiff sue for specific performance against the mother. As was pointed out on the previous occasion, the mother had no power to sell as the natural guardian of her son, except for legal necessity and that has been found as a fact against the plaintiff; nor could she sell as a certificated guardian, because she was not such. It has been suggested that the case falls within section 18 of the Specific Relief Act and of section 43 of the Transfer of Property Act. But section 18 of the Specific Relief Act, which is based upon a series of authorities familiar not only to practitioners in England, but also in this country and which codifies the principles involved in those authorities, has no application to a case like the present. Here the defendant never contracted to sell any property, as if it were her own she only contracted to sell as the guardian of her minor son. No doubt, if she had contracted to sell the property as her own, it not then being hers, and the property had subsequently become hers by inheritance, section 18 of the Specific Relief Act would have assisted the plaintiff. But these are not the facts; nor do I see that section 43 of the Transfer of Property Act applies, for, there was no erroneous representation made by the mother here. The true state of affairs was disclosed to the intending purchaser and that section, therefore, has no application. On these grounds, I think that the appeal must succeed and the suit be dismissed with costs in all Courts.

MITRA J. I am of the same opinion.

Appeal allowed.

32 C. 837 (=1 C. L. J. 437.)

[837] APPELLATE CIVIL.

Before Mr. Justice Harington and Mr. Justice Mookerjee.

MAHESH NARAIN v. NOWBAT PATHAK.*

[18th April, 1905.]

Co-sharers—Co-sharer, right of—Lessee under a Co-sharer—Right to quarry—Suit by other owner—Liability to account.

B took a lease of a hill from certain co-sharers of an estate and worked a quarry.

A the other co-sharer brought a suit against B claiming an account of all the stones quarried and carried away by him.

Held that, inasmuch as there was no actual ouster or destruction of the common property by working a quarry, which was the proper and legitimate use of the hill, A was not entitled to an account in the absence of any proof that B received more than his just share.

Job v. Potton (1) distinguished.

[Dist. 24 C. L. J. 165=20 C. W. N. 1258=35 I. C. 86; Fol. 35 Cal. 961; 5 I. C. 171=11 C. L. J. 189; 4 C. L. J. 198; Ref. 41 Mad. 861; 35 Mad. 648; 51 I. C. 976=29 C. L. J. 504=23 C. W. N. 900.]

THE plaintiff Mahesh Narain appealed to the High Court, and the principal defendant, Nowbat Pathak, filed a memorandum of cross-objections under section 561 of the Civil Procedure Code.

*Appeal from Original Decree, No. 289, of 1901, against the decree of W. H. Thomson, Subordinate Judge of Rajmahal, dated the 12th June 1901.

(1) (1905) L. R. 20 Eq. 84.

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