

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

1869

June 4

GIRISH CHANDRA ROY CHOWDHRY (DEFENDANT.) v. SRIMATI
AMINA KHATUN (PLAINTIFF.)*

*Deed of Sale—Indorsement—Suit under Act XIV. of 1859, s. 15—Evidence—
Registration—Ground not taken in Court below—Onus.*

The plaintiff executed a deed of sale of a moiety and a lease of the other moiety of certain property to B. B. instituted a suit under section 5, Act XIV. of 1859, which was dismissed. B then returned the deed of sale and lease to A, with the following endorsement under his signature, viz., "returned, no claim." A instituted the present suit for recovery of possession of the said property, and the defendant set up in his defence that A had no right to sue for a moiety of the property, as the same has been conveyed to B; and that the endorsement of the deed of sale, "returned, no claim" was not a misssible in evidence, as the same had not been registered.

Held, that the entry was only of evidence that the transaction was inchoate, and not final, so as to require a reconveyance.

Held, that as the plea as to the inadmissibility of the evidence for want of registration was not specifically taken in the Court below, it could not be allowed in special appeal.

Held, that the *onus* was upon the defendant to prove his purchase.

THE plaintiff executed a bill of sale of a moiety of her *maurasi* tenure and an *ijara patta* of the other moiety, in favor of Mr. Wise.

On the strength of the bill of sale and *patta*, Mr. Wise sued the defendant, Girish Chandra, under section 15, Act XIV. of 1859, for possession of property in dispute; but the suit was dismissed on the 30th of May 1865.

On the dismissal of the suit, Mr. Wise returned the documents to the plaintiff, with an endorsement thereon, viz.: "Returned, no claim."

(Sd.) J. P. WISE.

This endorsement was neither stamped nor registered.

The plaintiff brought the present suit to recover possession of the *miras* tenure, and for a declaration that a *mooktearnama* and a *kabala*, alleged to have been executed by her, and under which the defendants claimed, were fraudulent.

The defendant set up, in his written statement, that the plaintiff had no right to sue, at least as regards a moiety of the property, in consequence of the sale to Mr. Wise; and that the *mooktearnama* and *kabala* were genuine documents.

The Principal Sudder Ameen of Dacca held that the plaintiff's suit was not barred, as Mr. Wise had not preferred any claim, and as there was evidence of the documents having been returned by Mr. Wise, and that the deeds set up by the defendants were fraudulent; and passed a decree in favor of the plaintiff.

* Special Appeal, No. 3233 of 1868, from a decree of the Judge of Dacca, dated the 9th September 1868, affirming a decree of the Principal Sudder Ameen of that district, dated the 4th November 1867.

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On appeal, the Judge held that the plaintiff had a right to sue, as the bill of sale and ijara patta had been cancelled and signed by Mr. Wise, and as there was evidence of the fact of Mr. Wise having relinquished the property. He accordingly confirmed the decision of the lower Court.

Girish Chandre Chowdry, one of the defendants, appealed to the High Court.

Baboo *Ramesh Chandru Mitter* (with him Baboo *Srinath Banerjee*) for appellant.

Baboo *Annada Prasad Banerjee* (with him Baboo *Chandra Madhub Ghose*) for respondents.

BAYLEY, J.—Plaintiff sues for possession of a miras tenure, and for a declaration that a mooktearnama and a kabala of Mag's 1263, set up by defendant, were so set up falsely and collusively.

Plaintiff's allegations are that she never executed such a conveyance or the power of attorney set up by defendant as her acts and deeds; that the whole was a deceitful arrangement by defendant No. 1, Kedar Meah, who prevailed on one Sheikh Haradhan, father of defendants Nos. 4, 5, and 6, and a servant of plaintiff, to get the above deeds executed; that the mooktearnama was in the name of Mooktarooddin, defendant No. 2, but was false; that the deed of sale which purported to make Abdul Hamid, defendant No. 3, the vendee was not executed by plaintiff; that plaintiff sold one-half and leased one-half to Wise, who sued for possession under section 15, Act XIV. of 1859, but abandoned the purchase; and that special appellant, defendant No. 8, Girish Chandra, purchased from defendant Abdul Hamid, and plaintiff was dispossessed. The answer of defendants substantially was that the power of attorney and conveyance were true; that legal possession passed under them; that as plaintiff admitted she had sold half to Wise and farmed half before the suit under Act XIV. of 1859, and that plaintiff never shewed how she was re-vested with her proprietary right, she could not sue.

The first Court gave plaintiff a decree considering on the evidence that the plaintiff's allegations were proved. The lower Appellate Court affirmed the decision of the first Court.

Some of the grounds of special appeal recorded in the petition, are as follows:

1. That inasmuch as the plaintiff had disposed of the property in dispute by sale and izara to Mr. Wise before the institution of this suit, the learned Judge is wrong to hold that plaintiff had any longer a right to bring this action.

2. That even if it be conceded for the sake of argument that the aforesaid cancellation had the effect of creating a title in favor of the plaintiff, it is submitted that the said cancellation not being registered was not admissible in evidence. The learned Judge was wrong to rely upon the said cancellation.

3. That the learned Judge's decision is erroneous in not making the plaintiff to start her case first by giving evidence of the false nature of the mooktearnama.

On the first plea I would observe that plaintiff's case is that Wise never completed the purchase, having returned the deed with an endorsement in English "returned, no claim, signed J. P. Wise," and a corresponding entry in Bengali; that, consequently there was nothing but an inchoate transaction, and nothing complete and final so as to require a reconveyance.

On the other hand it is urged that as this endorsement is not registered, it cannot be taken as evidence. Now there was no such objection taken below. There was, it is true, the general plea that as Wise has purchased half and farmed half from plaintiff, the latter could not sue without showing how she became re-vested with the property. But I do not think that a mere general plea of this kind, which no Court, or opposite party, could understand to mean that there was no reconveyance, because there was no registration, can be taken as the equivalent of the specific plea as to non-registration now put forward.

It is then urged in connection with this matter that the endorsement not being independently proved, oral evidence cannot suffice to prove that writing. *Sheikh Rahmatulla v. Sheikh Sariatulla Kagchi* (1) and *Roopa Koonwur v. Juggoolall Opaadhya* (2) are cited in support of this plea.

Now the lower Appellate Court has not decided the case solely on the endorsement but on all the facts of the case, based on the entire evidence, as showing that plaintiff's allegations are true, that she never executed the power of attorney and the deed of sale of Magh 1269 set up by defendants. When the endorsement was admitted as evidence by the Courts below, no objection was taken to its admissibility. Had there been, plaintiff might have given other evidence. I think then that this plea is too late.

* * * * *

The last plea is that plaintiff alleging fraud should prove it, and did not. Plaintiff's real case was that she has been dispossessed by the defendants who set up a title from her, whereas she denied ever granting them such title, and accordingly if they produced the power and deeds of sale, they were false and not given by her. Thus it was for defendants to prove their title, it being their affirmative plea that they had title.

On the whole then I think that there is no reason to interfere with the decision of the lower Appellate Court, in this case, on the ground of its being erroneous in law. I would therefore dismiss this special appeal with costs.

HOBHOUSE, J.—I agree in dismissing this special appeal with costs.

One objection raised is in regard to plaintiff's status by reason of the conveyance to Wise, the other as to the burden of proof being on plaintiff and not having been discharged by her.

(1) 1 B. L. R., F. B., 58.

(2) 11 W. R., 250.

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The first is really an objection which was much more in the mouth of Wise than of defendants, and when we have the title deeds given to Wise in plaintiff's hands, and Wise's agent admitting that Wise had returned those deeds, and when the plaintiff has thus fulfilled *prima facie* what defendants called on her to fulfil, *viz.*, has accounted for her being still the proprietor, the alleged conveyance to Wise notwithstanding, I think we have an answer to the issue which defendants raised in the Courts below, and sufficient to allow the case to proceed.

And on the second point I think that to what extent the burden of proof was on plaintiff, she has discharged that burden.

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 June 29.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

DWARKANATH HALDAR (JUDGMENT-DEBTOR) v KAMALAKANTH HALDAR (DECREE-HOLDER)*

Uncertainty in Decree—Execution

When a decree is so uncertain that it is impossible to ascertain what is decreed, a plaintiff cannot be put into possession of any other thing by execution than that which the decree describes. Evidence cannot be given in the execution department to amend any uncertainty in the decree. The law allows certain matters to be ascertained in execution, but beyond those it is the duty of the Judge to take care that his decree is so precise that it is capable of execution without leaving it to the Court of execution to decide what the Judge intended to decree.

The necessity of certainty in decrees discussed.

Baboo *Kedar Nath Chatterjee* and *Bhawani Charan Dutt* for appellant.

Baboo *Kali Mohan Das* and *Ramesh Chandra Mitter* for respondent.

PEACOCK, C. J.—In this case the plaintiff sued to recover a yearly palla, or turn of worship, in the month of Bhadra, immediately following that of Mahesh Chandra and others. His claim was founded on a mortgage of that palla, which he alleged had been foreclosed; and he obtained a decree to recover the palla claimed in his plaint. It appears that the claim in the plaint following the deed of mortgage entitled the plaintiff to recover a yearly palla in the month of Bhadra, following that of Mahesh Chandra and others. The Moonsiff, on an application for execution, in which the decree-holder asked to be put into possession of a palla falling in a different month from that of Bhadra, considered that he could not put the plaintiff into possession of such a palla; and that as Mahesh Chandra had several pallas in the month of Bhadra, it was impossible for him, as the case stood, to ascertain which of the pallas of Mahesh Chandra's the palla which the plaintiff had recovered was to be immediately following. He says, "when the decree-holder's vakeel

* Miscellaneous Special Appeal, No 197 of 1869, from an order of the Judge of 24 Pergunnas, dated the 20th February 1869, reversing an order of the Sudler Moonsiff of that district dated the 12th November 1868.