

PRIVY COUNCIL.

RANEE BHOBOSOONDRÉE DASSEAH (PLAINTIFF) *v.* ISSUR-
CHUNDER DUTT AND ANOTHER (DEFENDANTS).

P. C.*
1872
May 3.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Agreement to transfer—Deed of sale—Ejectment—Specific Performance—
Breach of Contract—Allegations.*

See also
14 B L R 308
13 B L R 499

Where it was agreed between *A.* and *B.* that, in consideration of certain proceedings to be instituted jointly by *A.* and *B.*, and payments to be made by *B.*, for the recovery of certain property claimed by *A.*, against *C.*, *A.* would make over the half of the property recovered to *B.*; but *A.*, contrary to the terms of the agreement without the consent of *B.*, compromised his claim with *C.*, and obtain possession.—*Held*, the agreement did not operate as a transfer of the property to *B.*; she could not sue to eject *A.*—

Seemle.—*B.*'s proper remedy was a suit for specific performance or for damages for breach of the contract to support which it would have been necessary to allege performance of her part of the contract, or at least readiness and willingness to perform, but prevention by *A.*

This was an appeal from a decision of the High Court (Loch and Mitter, JJ.) dated 10th June 1869, dismissing the appellant's action of ejectment.

One Ramnarain Dutt died, leaving a talook. The respondent Jogessur Ghose claimed it as his heir. The other respondent claimed under a deed of gift from Ramnarain, which Jogessur impeached as a forgery.

While these disputes were going on, the respondent Jogessur applied to the appellant, and asked her to assist him in litigating with the other respondent for the purpose of getting possession of all the property which had belonged to his maternal grandfather, and it was arranged between them that in the event of such litigation arising, she should advance the expenses to the extent of Rs. 3,000, and should protect Jogessur from a then impending execution, the consideration being a moiety of the property claimed.

Present :—THE RIGHT HONORABLE SIR JAMES COLVILLE, SIR MONTAGUE SMITH
AND SIR ROBERT COLLIER.

An agreement in writing was accordingly executed by Jogessur in favor of the appellant on the 14th Bhadro 1273 (29th August 1866), which, after reciting the object of the agreement, proceeded as follows :—

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“ It is now necessary to institute a suit in Court for the recovery of possession of the whole of the properties consisting of the aforesaid jote jummah, talook, &c., and mesne profits; and as I have not the means to institute a suit at my own expense, I have determined to sell you a moiety or 8 annas share of the 12 annas 6 gundas 2 cowrees 2 krants of the above jote jummah, being the share left by my maternal grandmother, to which I am entitled; an 8 annas share of the talook aforesaid and an 8 annas share of the mesne profits during the period of dispossession; and having fixed the consideration for the same at Rs. 3,000, and received the purchase-money in cash, I sell the same to you, and execute this deed of sale. The said amount is deposited with Dwarkanath Lahory, mooktear, the agent on your behalf, and all the expenses of the suit for dispossession and my lodging expenses shall be defrayed out of that sum. In the event of the suit being decided in my favor, we shall each of us take the costs, mesne profits, jote jummah, and the talook in the shares mentioned above. We will both of us institute the said suit in Court as plaintiffs. Neither of us shall be able, without consent of the other, to compromise, settle, or make any adjustment whatever of the case. One Ooma Churn Sircar, of Mullickpore, has obtained a decree against me for Rs. 600, on account of money advanced as a loan. If he in the mean time execute the decree, you will pay the amount of the debt from the aforesaid amount of deposit. Whatever sums shall be spent till the final decision of the suit, in excess of the said amount of deposit, you are to pay. You shall never be able to make any demand or claim against me on account of those sums, or the amount of the debt due to the said Ooma Churn Sircar; even if you do, it shall not be admitted. In whatever way the suit is decreed, I will give and receive 8 annas thereof as aforesaid, that is in half shares. The 14th Bhadro 1273.”

Nothing more was done under the agreement, no money passed, and Ooma Churn Sircar in the agreement mentioned having taken out execution against Jogessur Ghose, Jogessur applied to the appellant's mooktear to deposit the money, but this was not done.

Thereupon Jogessur, instead of instituting the intended

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proceedings against Issur Chunder, agreed, to an amicable partition, which was embodied in a document dated the 26th Pous 1273 (January 9th, 1867), satisfied Ooma Churn Sircar's decree, and saved his estate.

On the 20th September 1867, the appellant commenced the present suit by filing a plaint against these respondents, and some persons holding as lessees under them, seeking to have the deed of sale executed by Ramnarain declared a forgery, and all the proceedings taken thereunder since his death declared to be fraudulent, and claiming possession of half of the property under the deed executed by Jogessur, together with the mesne profits.

On the 20th July 1868, the Subordinate Judge dismissed the plaintiff's case on the ground that she could not sue alone.

On the 10th September 1868, the plaintiff appealed to the High Court, and on the 10th June 1869, a Division Court (Loch and Mitter, JJ.) held that the Subordinate Judge was wrong in dismissing the suit on that particular ground; but as both parties admitted that the evidence had been given, and the case was ready for hearing on the merits, the Court proceeded to examine the evidence and decide the case on the merits.

After deciding that the deed of gift from Ramnarain was a true document, and that the property claimed under it by the respondent Issur Chunder was properly so claimed, the judgment proceeded as follows:—

“It is urged that the plaintiff has a right to the moiety of whatever property remains to Jogessur, who admits the sale to plaintiff, and whose witnesses prove the execution by him of the bill of sale. Jogessur, however, denies that any consideration passed to him: the plaintiff brings three witnesses to prove that payment in cash was made to Jogessur. Their evidence appears to us inconsistent with the terms of the bill of sale, and highly improbable when considered with that document. The deed sets forth (*recites*). Now it is clear that the money was to remain in deposit with plaintiff, though nominally under the charge of her mooktear, Dwarkanath Lahory, for she bound herself to pay out of that money the amount of Ooma Churn's decree, should he execute it against the vendor, and yet we are told by the witnesses that the

money was paid to Jogessur, and that before the deed was registered. But it is said that it was part of the bargain that Jogessur was to take the money and deposit it with Dwarkanath Lahory, as if it is likely that the plaintiff or her servants would pay over the money to a man in Jogessur's needy position, and trust him to deposit it with another servant of the plaintiff. It appears to us that the evidence of payment is unworthy of credit, and that no consideration actually passed, and that the contract is consequently not a valid contract.* The plaintiff has done nothing to fulfil her part of the contract, and we think, therefore, that, under the late ruling of the Privy Council, in the case of *Raja Sahib Prolad Sen v. Baboo Budhu Sing* (1), the present action must fail. We think it very probable, as stated by the witnesses for the defence, that Jogessur having for some cause quarrelled with his relatives, did execute the deed to the plaintiff, who was quite ready to assist him, in hopes of getting an interest in the defendant's property, which she might use to her own advantage. Under this view of the case, we think it unnecessary to determine whether the plaintiff did or did not ask Jogessur to join her in carrying on the suit. No evidence has been given on this point. We dismiss the suit with costs in both Courts."

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The plaintiff then appealed to Her Majesty in Council.

Mr. *Doyme* and Mr. *Mortimer* for the appellant contended that the Court were in error in finding the deed by Ramnarain to be genuine, but even if it were, the plaintiff was entitled to recover one-half of a third. No objection could be taken as to this being champerty—*Fischer v. Kamala Naiker* (2). The suit was properly framed for the purpose of impeaching the proceedings taken by Jogessur, and the High Court were wrong in dismissing the suit.

Mr. *J. D. Bell* for the respondents.—The action is misconceived: whatever right the appellant might have to sue for specific performance or to recover damages, she cannot sue in ejectment—*Raja Sahib Prolad Sen v. Baboo Budhu Sing* (3). Even a suit for specific performance or for damages would not have

(1) 2 B. L. R., P. C., 111, see 116 and (3) 2 B. L. R., P. C., 111, see 116 and 117; S. C., 12 Moore's I. A., 301. 117; S. C., 12 Moore's I. A., 301, see

(2) 8 Moore's I. A., 170.

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been successful in the absence of a tender on the part of the plaintiff of performance on her part.

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Mr. *Doyne* in reply.

Their LORDSHIPS gave the following judgment :—

This suit was based upon a deed executed by Jogessur Ghose, in favor of the plaintiff, in August 1866. The effect of that deed, as far as it is material, may be thus stated: it recites that Jogessur Ghose was entitled to certain properties from his maternal grandmother, that he had been dispossessed of the whole of those properties, and thus proceeds (as above, *ante* page 37).

It appears that a short time after, in September 1866, Jogessur Ghose entered into a deed, which may be termed one of compromise, with Issurehunder Dutt, who was the claimant and in actual possession of the greater part of the property referred to in the previous deed, and that by this deed of compromise, a portion of the property was divided between them. Thereupon this suit was brought by the plaintiff. It is material to observe that it is not a suit claiming specific performance, or damages for breach, of the contract entered into with the plaintiff by Jogessur Ghose, but that it is in the nature of an action of ejectment. It is a suit to recover possession of the property mentioned in the first deed brought not only against Jogessur Ghose, but against Issurehunder Dutt, the plaintiff seeking to recover possession of the property by virtue of the title acquired under that deed, not only against Jogessur Ghose, but also against Issurehunder Dutt, whom he alleged to have obtained possession of the property under forged conveyances.

The Court below dismissed the suit upon a technical ground, namely, that the plaintiff could not sue Issurehunder without joining Jogessur Ghose as a co-plaintiff. The High Court decided, in their Lordships' opinion rightly, that this was not a proper ground for dismissing the suit, and hearing it upon its merits, determined it in favor of the defendants.

The principal question is the effect of the first deed, whether it operated as a present transfer of the property, or only as an

agreement to transfer it upon certain contingencies which did not happen. In support of the latter contention, the case was referred to of *Rajah Sahib Prolad Sein .v Baboo Budhoo Singh* (1). Without referring at length to that case, the circumstances of which are in many respects similar to those of the present, it may be enough to quote a passage wherein their Lordships say :—

“ The Court below seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespective of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case is in their Lordships’ opinion very questionable. It is certainly not supported by the two cases cited in the judgment under review ” (which are there referred to) “ in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title ? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro* and upon the happening of a contingency of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do ” (2). Having regard to this case and to the provisions which have been referred to of the deed, their Lordships are of opinion that it did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be instituted to which both Jogessur Ghose and the plaintiff were to be parties.

This construction of the deed disposes of the case ; for even if the plaintiff be entitled to complain of breach of contract by Jogessur, she cannot recover under it possession of the property against Jogessur, *a fortiori* cannot she recover against Issur-chunder Dutt, who was no party to the deed. It may be

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(1) 2 B. L. R., P. C., 111; S. C., 12 (2) 2 B. L. R., P. C., 117; 12 Moore’s Moore’s I. A., 275. I. A., 306.

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observed that, even if this were a suit for specific performance of the contract, or damages for the breach of it, it would have been necessary for the plaintiff to have alleged either performance of her part of the contract, which was the payment of Rs. 3,000 to Dwarkanath Lahory, and such further sums as might have been necessary to the maintenance of the action, or at all events that she was ready and willing to perform this condition, but was prevented by the wrongful act of the defendant. There are no such allegations, and if there had been, it does not appear that they would have been sustained by evidence, for the case set up on the part of the plaintiff was not the performance of this condition, but something very different, namely, the payment to the defendant himself of this sum of money,—a statement which is disbelieved by the High Court, in which disbelief their Lordships concur.

“ On these grounds their Lordships are of opinion that the judgment of the High Court is right, and they will humbly advise Her Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Agent for appellant : Mr. Mortimer.

Agent for respondents : Mr. Wilson.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Mitter.

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 April 24.

NOJABUT ALI CHOWDHRY (PLAINTIFF) v. SHEIKH MOHA
 BUSEEROOLAH CHOWDHRY AND OTHERS (DEFENDANTS).*

*Execution of Decree—Limitation—Sale—Separate Suit—Act XXIII
 of 1861, s. 11.*

A. sued for possession of certain lands to which he alleged he was entitled as wussee (executor) under a wusseeutnamah (will), and which B. had fraudulently, during the minority of himself and his brother, caused to be put up for sale under a

* Special Appeal, No. 755 of 1872, from a decree of the Subordinate Judge of Chittagong, dated the 7th February 1872, reversing a decree of the Munsif of that district, dated the 30th September 1871.