

answered in the affirmative, the plaintiff's claim must be at once decreed; if it be answered in the negative, the remaining issues must then be tried. The 2nd issue will be, is the nuncupative will set up by plaintiff proved or not? If it be, the 3rd issue is, can the plaintiff, under the law current amongst members of the Roman Catholic Church in Chittagong, take under a nuncupative will or not? If she cannot take under such an instrument, the 4th issue will then be, to what is plaintiff entitled under the law regulating successions of intestates amongst members of the Roman Catholic Church? It will be observed that it is upon the law of that Church, and not upon Portuguese law, that the parties base their separate claims. Hence the necessity of the issues now laid down. In deciding the law point, the Judge will call before him parties who are cognizant of the law of the Roman Catholic Church, examine them as experts, and will obtain from them the authorities upon which their answers may be based, and pass whatever orders seem just and proper.

The 29th May 1865.

*Present:*

The Hon'ble E. Jackson and F. A. Glover,  
*Judges.*

**Registration (of contingent contract to sell)—  
Bona fide purchase without notice—Specific  
performance of contract—Damages.**

Case No. 2816 of 1864.

*Special Appeal from a decision passed by  
the Principal Sudder Ameen of Dacca,  
dated the 25th June 1864, reversing a  
decision passed by the Moonsiff of that  
District, dated the 10th July 1863.*

Ramtonoo Surmah Sircar (Defendant),  
*Appellant,*

*versus*

Gour Chunder Surmah Sircar (Plaintiff),  
*Respondent.*

*Baboo Womesh Chunder Banerjee for  
Appellant.*

*Baboos Nil Madhub Bose and Nuleet  
Chunder Sein for Respondent.*

The want of registration, not of a deed of sale or gift of land, but of a contract by A to sell land to B at some future time on receipt of balance of sum agreed on not then paid, is no bar *per se* to B's preferential claim over C, a subsequent purchaser, whose sale has been registered under Act XIX. of 1843.

If C purchased in good faith and without notice, and is in possession, his possession cannot be disturbed in consequence of A's non-fulfilment of his contract with B, but B's remedy is not by a suit for specific performance of contract, but by an action for damages.

THIS was a suit for specific performance of a contract under the following circumstances:—

Plaintiff, who is the special respondent before us, advanced 124 rupees to the defendant Ramtonoo, on a byenamah, dated Srabun 25th, 1269, B. S., in which it was stipulated that, on payment of a further sum of Rupees 800, the plaintiff should receive defendant's share of the talook. Instead, however, of carrying out his bargain, defendant (special appellant) sold the land to a third party.

The defence is a simple denial of the whole transaction.

The Principal Sudder Ameen, on appeal from the Moonsiff, considered that the contract was proved; and that the plaintiff was entitled, on paying the 800 rupees, to specific performance, and to possession of the defendant's share in the talook. He reversed the first Court's order accordingly.

It is contended in special appeal that, as the deed of sale to the third party was registered, whilst that of the special respondent was not registered, the former is, under Act XIX. of 1843, entitled to precedence over the latter; and that this is not a case for specific performance even if proved, but for damages.

With regard to the first objection, we observe that Act XIX. of 1843 refers to deeds of sale or gift of land; but the deed propounded by special respondent is not a deed of that nature; it is simply a contract to sell land at some future time on receipt of a certain sum not then paid. The want of registration, therefore, of the first deed is no bar, *per se*, to the special respondent's preferential claim.

But, on the second point, we think there must be a remand for enquiry into the *bona fides* of the second conveyance. It is not denied that the third party is in possession; and, from the special respondent's contract not being registered, there is no reason to suppose that he purchased the estate after due notice of the claim upon it.

If the party in possession can prove that he bought the share in good faith for a valuable consideration, without notice, we think that his possession cannot be disturbed, in consequence of the special appellant's non-fulfilment of his contract with the special

respondent; but that the latter's only remedy in that case will be an action for damages.

Costs will follow the result.

The 29th May 1865.

*Present:*

The Hon'ble H. V. Bayley and J. B. Phear,  
*Judges.*

Sale in execution of decree—What passes to purchaser.

Case No. 3126 of 1864.

*Special Appeal from a decision passed by the Deputy Commissioner of Kamroop, dated the 29th August 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 18th July 1864.*

Captain J. C. Barton (Defendant),  
*Appellant,*

*versus*

Brijonath Surmah and others (Plaintiffs),  
*Respondents.*

*Baboo Juggadunund Mookerjee for Appellant.*

*Baboo Poorno Chunder Mookerjee for Respondents.*

A sale in execution of a decree is simply what the sale notification expresses it to be, namely, a sale of the rights and interests of the judgment-debtor.

PLAINTIFF sued to recover possession of lands of which he alleges that he has been dispossessed by Captain Barton, a purchaser at a sale in execution. The admitted facts in the case are these:

One Mohessur was the recorded proprietor in the Collector's Register of 16 annas of a certain property. The rights and interests of Mohessur were sold in execution of a decree against him. At this period, and before the sale, plaintiffs, alleging that they were co-sharers to the extent of one-third in the property advertised for sale, entered a claim for that one-third, and alleged that Mohessur's name was allowed to be entered as proprietor of 16 annas, because he was manager for three co-parceners, of which, however, he was only one, with a one-third share; and that he had possession of no more. No other party, however, claimed the other one-third. The sale having proceeded, one Buloram became the purchaser. A decree having afterwards been given against Buloram, his rights and interests in the same property

were advertised for sale, and sold. Captain Barton, one of the defendants in this case, and the special appellant before us, became the purchaser. On this occasion, neither before nor after the sale till Captain Barton dispossessed them, did the special respondents in any way object to the sale? They urge that, as they were in possession, and as only the rights and interests of Buloram were sold, and those were only the rights and interests of Mohessur as originally sold, viz, after notice of the claim and possession of special respondents of their one-third share, it was not necessary for them to make any objection to the sale.

On the other hand, special appellant urges that he is a *bond fide* purchaser for valuable consideration of the whole 16 annas, as that was the recorded right and interest of Mohessur, and consequently of Buloram according to the Collector's Register; and as no declaration of right to the one-third claimed by special respondents followed their objection when Buloram bought; and as when special appellant bought, special respondent had given no notice whatever of any claim, which, it is urged, they ought to have done, if they wished to question Captain Barton being the rightful purchaser of 16 annas of Buloram and Mohessur.

In the first place, we may notice that it is admitted that Captain Barton only bought the rights and interests of Buloram, and that Buloram was *not* recorded as proprietor of 16 annas.

In the next place, the question is not to our mind that of the right of what is called a purchaser for valuable consideration without notice, but the simple one of whether Captain Barton obtained by purchase what the plaintiff now sues for. We think he did not. He purchased the rights and interests of Buloram, *whatever they might be*, so much, and neither more nor less. Now, Buloram was *not* the recorded proprietor of 16 annas; but, even if he had been, the fact for the purposes of a sale in execution is only a clue to title, not a title. The sale in execution is not of the 16 annas rights and interests of a party recorded in the Collector's Register to have 16 annas; still less is it a guarantee of 16 annas or any other amount of property. A sale in execution is simply what the sale notification in express terms says, it is "a sale of the rights and interests of a party, whatever they may be," in certain property.

This is most clearly laid down by the late Sudder Dewanny Adawlut, in page 486