

certificate. It was also urged that interest ought not to be allowed at the stipulated rate after the due date mentioned in the bond. We do not think this argument is valid. The bond provides that interest should run at the rate stipulated until the money is actually paid off.

The result is that this appeal will be decreed, and the decree of the lower Appellate Court will be reversed and that of the first Court restored with costs in this Court and the Court below.

J. V. W.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, and Mr. Justice Pigot.

COHEN (DEFENDANT) v. SUTHERLAND (PLAINTIFF)*

1890
July 1.

Contract—Specific performance—Vendor and purchaser—Approval of title by purchaser's solicitor—Evidence Act (I of 1872), ss. 91, 92.

In a suit for specific performance of a contract for the sale of a house, the entire contract being contained in letters which provided that entry was to be given to the purchaser by a fixed date, and that the title deeds were to be sent to the purchaser's solicitors, and "on approval of the same the purchase money to be paid prompt."—

Held, that the carrying out of the contract was in no way conditional upon the approval of the solicitors, but that their approval was a condition precedent to the prompt payment of the purchase money without waiting for a conveyance, and that the title was to be investigated and approved in the ordinary way.

This case distinguished from *Sreegopal Mullick v. Ram Churn Nusker* (1).

THIS was a suit for the specific performance of an agreement for the purchase by the defendant from the plaintiff of a house and premises No. 5, Chowringhee Lane, in the town of Calcutta, and the furniture and effects therein for the sum of Rs. 54,000. The agreement was embodied and contained in certain letters dated the 18th and 19th November 1888, and written respectively by the defendant to one F. Siddons, the plaintiff's agent, and by Messrs.

* Original Civil Appeal No. 7 of 1890, against the decree of Mr. Justice Wilson, dated the 7th of February 1890.

(1) I. L. R., 8 Calc., 856.

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Dignam, Robinson, and Sparkes, the plaintiff's solicitors and agents, to the defendant. The first of these letters was as follows:—

"MEMORANDUM.

"FROM

AARON COHEN & Co., 219, Old China Bazaar Street,

"TO

F. SIDDONS, Esq.

"DEAR SIR,

WITH reference to the telegram No. 413 from Mr. A. B. Sutherland—'Split difference. Accept 54,000. Reply'—I hereby agree to purchase the house No. 5, Chowringhee Lane, in the city of Calcutta, for the sum of Rupees fifty-four thousand, including the furniture and fittings as per list handed over to Major McArthur, you having the right to remove family pictures, books, and such articles as were presented to Mr. Sutherland (these articles not to be of much value).

"It is also agreed between us that I shall have entry during the first week of December and not later. The title deeds to be sent to Messrs. Gregory and Moses, and on approval of the same the purchase money to be paid prompt. I agree also to pay you a brokerage of 1 per cent. on the transaction.

18th November 1888.

Yours faithfully,

(Sd.) AARON COHEN.

"The telegram referred to is in my possession.

(Sd.) A. C."

On receipt of the above letter Messrs. Dignam, Robinson, and Sparkes wrote to the defendant accepting his offer on the terms mentioned in the letter of the 18th November. The defendant was let into possession on or about the 7th December 1888, previous to which date the deeds and documents of title relating to the premises had been forwarded by the plaintiff's solicitors to the defendant's solicitor. On the 22nd December 1888 Mr. Gregory, who had dissolved partnership with his former partner, Mr. Moses (on the 1st December), forwarded requisitions on title to the plaintiff's solicitors, who on the 2nd January 1889 made their replies thereto in writing.

On the 8th January 1889 the defendant refused to carry out the agreement on the ground that the plaintiff had not made out a clear marketable title to the premises, and he alleged that the contract was subject to the title being approved by his solicitors, Messrs. Gregory and Moses, and contended that it was expressly agreed between Mr. F. Siddons, acting on behalf of the plaintiff, and the defendant that the decision of Messrs. Gregory and Moses on the title was to be conclusive.

The judgment of the lower Court (WILSON, J.) was as follows:—

“This is a suit brought to enforce specific performance of a contract for the sale of a house, No. 5, Chowringhee Lane, from the plaintiff to the defendant. The contract is embodied in two letters, of which the first is dated the 18th November 1888, addressed to the plaintiff’s agent, Mr. Siddons, and signed by the defendant, and the second accepts the terms stated in the first. The essential parts of the first letter are, ‘I heroby agree to purchase the house No. 5, Chowringhee Lane, in the city of Calcutta, for the sum of Rs. 54,000, including the furniture and fittings as per list handed over to Major McArthur.’ Then there is an exception as to certain things which the plaintiff was to be at liberty to remove. Then the letter goes on—‘It is also agreed between us that I shall have entry during the first week of December and not later. The title deeds to be sent to Messrs. Gregory and Moses, and on approval of the same the purchase money to be paid prompt.’ Now the plaintiff claims specific performance of that agreement, and in the ordinary course of things, upon proof of the contract, there would be a reference to investigate the title. But by the defendant’s written statement and the opening of his learned Counsel at the hearing, a question was raised, not only as to what was the effect of the written contract contained in the letters standing by itself, but also as to whether those letters really embodied the whole of the terms agreed upon by the parties. It was said that first by the words of the letters themselves, and secondly by reason of the evidence to be given, it had become a term of the contract that the whole carrying out of the contract was to be subject, as a condition precedent, to the approval of the title by the defendant’s attorneys, Messrs. Gregory and Moses, or rather one of them; and that inasmuch as that gentleman

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rejected the title, that was conclusive, and the case could go no further. It was arranged that issues should be settled for the purpose of trying that matter now, and this was done.

“I have to say whether the view contended for is the true view of the contract. Oral evidence was given, and I admitted it because it was said that the effect of the oral evidence would be to show that the letters did not contain the whole of the contract between the parties. I may say at once that the oral evidence in my opinion conclusively shows that the letters contained the whole of the contract between the parties, and that the defendant himself, his attorney, and everybody else concerned in the case, acted on that view of the matter. That being so, all I have to do is to construe the written documents.

“In this case the contract is a very peculiar one. In the majority of cases a certain course is followed in sales of land. The title is investigated and is approved or rejected by the purchaser’s solicitor. If the title is accepted, the conveyance is prepared and in due course executed, the purchase money is paid at the time of execution, and when all that has been done the purchaser is entitled to possession ; but this particular contract reverses the order of things. First, it is an express bargain that entry is to be given by a fixed date irrespective of the question whether the investigation of title was completed by that date or not. Then come the words upon which reliance is placed—‘The title deeds to be sent to Messrs. Gregory and Moses, and on approval of the same the purchase money to be paid prompt.’ What is said in this sentence is that the prompt payment of the purchase money without waiting for conveyance is to take place upon the approval of the title. To give them a further extent than that, and to construe them so as to make the carrying out of the contract in any form conditional upon the approval of Messrs. Gregory and Moses, would certainly be making them mean more than they actually say. The words do not appear in that part of the contract in which the principal terms are contained. The purchaser does not say ‘I hereby agree to take the house subject to the approval of the title by my solicitors.’ There is not a word about approval anywhere except in this particular passage. I think, therefore, the meaning of the contract is that the approval of the solicitors is, as stated

in that sentence, a condition precedent to the prompt payment of the purchase money without waiting for a conveyance. The case differs from the class of cases which have been relied on for the defendant, that is to say, from such cases as *Hudson v. Buck* (1), in which the purchase was made 'subject to the approval of the title by the purchaser's solicitor,' and *Hussey v. Horne Payne* (2), in which the bargain again is made 'subject to the title being approved by our solicitors.' And it differs from a case in which I followed these two cases, *Sreegopal Mullick v. Ram Churn Nusker* (3), where again it was expressly said that the sale and purchase should be subject to the approval of the title by the purchaser's solicitors. I entertain no doubt as to the true construction of this contract. That being so, it is unnecessary to consider other questions which have been raised. Had I taken another view, I should have had to consider how far the clause which made anything subject to the approval of Messrs. Gregory and Moses could apply in the event that has happened, *viz.*, the dissolution of the partnership between those two gentlemen. I should further have had to consider whether the subsequent communications between the parties removed any difficulty arising from this circumstance. And, further, it is admitted that, if this clause were to be construed in the way contended for by the defendant, still the rejection by his attorney must be *bonâ-fide*, and his objections to the title reasonable; so that, if I had taken another view of the contract, I should have had to say whether, under the circumstances of this case, the objections were *bonâ-fide* and not unreasonable. But under the circumstances, and in the view I take, it is unnecessary for me to express any opinion on these points. The result is that there must be the usual reference to the Registrar as to title. The question of the costs will be reserved."

From this decision the defendant appealed.

Mr. *Evans* (with him Mr. *Bonnerjee* and Mr. *Acworth*) for the appellant.—If there is a separate oral agreement apart from the agreement in writing, and not inconsistent with its terms, that may be proved; Evidence Act (I of 1872), s. 92, prov. (2). The

(1) L. R., 7 Ch. D., 683.

(2) L. R., 8 Ch. D., 670; I. R., 4 App. Ca., 311.

(3) I. L. R., 8 Calc., 856.

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defendant says that it was a term of the contract that the rejection of the title by his attorney should be conclusive. If this is so, the Court will not decree specific performance without a rectification of the contract in order that the real intention of the parties may be ascertained; Specific Relief Act (I of 1877), ss. 26 (d), 31 (2). The lower Court has treated these words "and an approval of the same, etc.," as fixing a *punctum temporis* for the payment of the purchase money. The question is, whether the defendant's evidence, partly corroborated by that of Mr. Siddons, can be accepted.

Mr. *Acworth* followed on the same side.

Mr. *Woodroffe* and Mr. *Sale* for the respondent were not called upon.

The following authorities were referred to in the course of the arguments:—*Try on Specific Performance*, 2nd ed., ss. 277, 488; *Hudson v. Buck* (1); *Hussey v. Horne Payne* (2); *Sreegopal Mullick v. Ram Churn Nusker* (3); Evidence Act (I of 1872), ss. 91, 92; Specific Relief Act (I of 1877), ss. 26 (d), 31.

The following judgments were delivered by the Court (PETHERAM, C.J., and PRINSEP and PIGOT, JJ.):—

PETHERAM, C.J. (PRINSEP, J., concurring).—This is a suit brought by the plaintiff against the defendant for the specific performance of a contract to purchase a house. The contract was in writing, and two points have been argued before us: first, that the defendant is entitled to give evidence to show that the written document does not accurately express what the contract between the parties was; secondly, that on the true construction of the written contract as it stands, the defendant was not liable to take the house unless his solicitors approved the title: that they had not done so, and consequently this action is not maintainable. The first point was taken before Mr. Justice Wilson, and he says:—"I may say at once that the oral evidence in my opinion conclusively shows that the letters contained the whole of the contract between the parties, and that the defendant himself, his attorney and everybody else concerned in the case acted on that view of the matter."

(1) L. R., 7 Ch. D., 683.

(2) L. R., 8 Ch. D., 670; L. R., 4 App. Ca., 311.

(3) I. L. R., 8 Calc., 866.

As to that, it is sufficient for me to say that I entirely agree with Mr. Justice Wilson in that view of the facts. The second question then resolves itself into one of the construction of the document, and on that question of construction there have been a variety of cases cited before us, which show that in a contract for the purchase of property where words such as "subject to the approval of our solicitor" are contained—that puts the solicitors in the position of persons who are to say whether the title is a good one or not. It is sufficient to say that this contract does not contain such words, and I do not think it is necessary for me to say anything more than that I agree with the view that Mr. Justice Wilson has taken of the contract. The result in my opinion is that the appeal must be dismissed with costs, and the case must go back to the Registrar for the ordinary enquiry as to title in accordance with the order of Mr. Justice Wilson.

PRIGOR, J.—I am of the same opinion. I think that the meaning of the contract, as unaffected by any of the considerations arising from the evidence which has been given, is that which has been attributed to it by the learned Judge in the original Court. If, on the other hand, the evidence in the case may be looked to upon the grounds argued by Mr. Evans, and having reference to the provisions of section 92 of the Evidence Act and of the Specific Relief Act as referred to by him, then the safest guide we in that case could take would be, as it seems to me, the evidence of Mr. Siddons, who has stated the circumstances of the introduction into the contract of the interpolated words. It seems to me that, assuming the propriety of using that gentleman's evidence for this purpose, and giving to that evidence its fair and reasonable construction, and to the rest of the words of the document their fair meaning, the effect of the agreement certainly could not be carried further than is expressed in the words of Lord Justice Cairns in *Hussey v. Horne Payne* in L. R. 4, Appeal Cases, page 322, where he says:—"I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser." In no way in which the case is to be looked at can it, I think, be properly held that it was the intention

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1890 of the parties, or of either of them, that the bargain was to
 COHEN depend upon the unfettered discretion of Mr. Gregory.
 v. I agree with the Chief Justice that this appeal must be dis-
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Appeal dismissed.

Attorneys for the appellant: Messrs. *Gregory & Jones.*

Attorneys for the respondent: Messrs. *Dignam, Robinson & Sparkes.*

A. A. C.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Ghose.

1890
 June 27.

RAMDHAN BHADRA AND ANOTHER (DEPENDANTS) v. RAM KUMAR DEY AND ANOTHER (PLAINTIFFS).*

Limitation—Bengal Tenancy Act (VIII of 1885), s. 184, Sch. III, Art. 3—Suit for possession by an occupancy ryot.

Having regard to the provisions of section 184 of the Bengal Tenancy Act, 1885, the period of limitation for a suit for the recovery of land by an occupancy ryot is two years, as prescribed by Article 3, Sch. III of the Act.

Saraswati Dasi v. Horitarun Chuckerbutti (1) followed.

In this appeal the question was raised whether the period of limitation for a suit for the recovery of possession of land by a person claiming as an occupancy ryot was two years, as provided by Article 3, Schedule III of the Bengal Tenancy Act, 1885, or 12 years under the Limitation Act, 1877. For the purposes of this report the facts of the case and the arguments are sufficiently stated in the judgment of Ghose, J.

Baboo *Grish Chunder Chowdhury* for the appellants.

Baboo *Dwarka Nath Chuckerbati* for the respondents.

The following judgments were delivered by the Court (NORRIS and GHOSE, JJ.):—

GHOSE, J.—This is a suit to recover possession of certain lands under a *jote* right. The plaintiff's allegation is that he acquired a

* Appeal from appellate decree No. 1122 of 1889, against the decree of Baboo Atool Chunder Ghose, Subordinate Judge of Mymensingh, dated the 30th of March 1889, affirming the decree of Baboo Anand Mohun Biswas, Munsiff of Hosseinpore, dated the 24th of February 1888.