Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

ALOKESHI DASSI (DEFENDANT No. 1) *v.* HARA CHAND DASS (PLAINTIFF.) * 1897 *April* 7.

Specific performance—Unsuccessful Denial of Contract by defendant—Dismissal of the suit for non-payment of the balance of the consideration money within the stipulated period—Right of plaintiff to return of deposit of the part of the consideration money paid, where specific performance is refused—Equity and good conscience—Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), section 37.

In a suit for specific performance of a contract, the defendant denied the contract *in toto*. The lower Appellate Court, while finding that there was a contract between the parties, refused to grant specific performance on the ground that the plaintiff failed to pay the balance of the consideration money on the stipulated day, but made a decree for the refund of the deposit. On appeal by the defendant to the High Court,

Held, that inasmuch as the defendant unsuccessfully denied the contract *in toto*, and as there was no repudiation of the contract by the plaintiff, he (the plaintiff) was entitled to a refund of the deposit made by him.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgments of the High Court.

Babu *Boidyo Nath Datt* for the appellant.

Babu *Lal Behary Mitter* for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

MACLEAN, C.J.—This is a suit by the purchaser for specific performance of a contract to purchase certain property for Rs. 525. The defendant No. 1 denied the contract *in toto*, and aid that the plaintiff's case was wholly false. That was his efence.

The matter was tried out by the Munsif, who dismissed the laintiff's suit. The Subordinate Judge found that there was a ontract between the parties, and disbelieved the defendant's

* Appeal from Appellate Decree No. 1121 of Babu Beni Madhub Mitter, Subordinate Judge of March 1895, modifying the decree of Babu Sara 29th of December 1893.

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case, but refused to grant specific performance on the ground that the plaintiff was in default in not paying the purchase money upon the stipulated day. The agreement was an oral agreement, and there is no finding of fact in the judgment of the Subordinate Judge that the plaintiff ever agreed to pay the purchase money within one month from the date of the contract. The Judge finds as a fact that the defendant agreed to execute a conveyance within a month, and he infers from that, and I daresay the inference is well-founded, that there was an agreement on the part of the plaintiff to pay the balance of the purchase money within that period, but there is no distinct finding of fact by the Subordinate Judge on that point. Be that as it may, however, the Subordinate Judge refused to make a decree for specific performance. There is no appeal on that point, so I need say nothing as to that part of the case. The plaintiff, however, had paid by way of deposit, or, as the appellant's Vakil puts it, by way of earnest money, a sum of about Rs. 100. It is found as a fact by the Court below, and the fact is not challenged, nor could it be challenged, that that money was paid by the plaintiff to the defendant. The defendant insists on keeping that Rs. 100. The plaintiff contends that if not entitled to specific performance she, at any rate, is entitled to a return of her deposit. The Subordinate Judge accepted that view and has made a decree for the return of the deposit. The defendant appeals against that decision. The defendant, who, as I have pointed out, set up that there was no contract at all, now insists upon retaining the deposit. I think she is not so entitled. It is admitted that there is nothing either in the Specific Relief Act or in the Contract Act which touches the question. We have, therefore, to consider what is just and equitable, and may fairly consider the law in England upon the subject.

There are, I need scarcely say, various decisions in the English Courts upon the point, but I do not propose to go into them in detail. The learned Vakil for the appellant cited the case of *Howe v. Smith* (1). He cited that case as a decision in his favour, but the facts of that case are so different from the facts of this case that it has very little application. The case, however, is

(1) L. R., 27 Ch. Div., 89.

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valuable as illustrating what the late Lord Justice Cotton regarded as the principle upon which questions of this class are to be decided—a view which was not dissented from by the other Lord Justices who were members of the Court. At p. 95 of the report Lord Justice Cotton says : "I do not say that in all cases where this Court would refuse specific performance the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it, so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser, which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract."

In the present case there are no facts found by the learned Subordinate Judge to show that the plaintiff by her delay had lost her right to specific performance, or any conduct on her part such as to amount to a repudiation of the contract. On the contrary, the facts rather point in the opposite direction. In a case such as the present, where the defendant unsuccessfully denied the contract *in toto*, and where there has been no repudiation of the contract by the plaintiff, but on the other hand an attempt to enforce it, I do not think it would be equitable that the defendant should be allowed to retain the deposit.

On these grounds it seems to me that the judgment of the Court below is correct, and the appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. It being admitted on both sides that there is nothing either in the Contract Act or in the Specific Relief Act applicable to this case, it must, by sub-section 2 of section 37 of Act XII of 1887, be governed by the rules of justice, equity and good conscience. Now, is there anything in justice, equity and good conscience to entitle the defendant No. 1 in this case to retain the money that was paid by the plaintiff as part of the consideration money for the sale of immoveable property that was contracted for? The

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answer to this question must be in the negative. For upon the facts found it is impossible to say that the defendant No. 1 has made out any case to entitle her to retain this money as against the plaintiff. Her defence was not that by reason of any default of the plaintiff she had been damnified and that she was therefore entitled to retain the money. Her defence was an utter denial of the contract, a denial which has been found to be false.

That being so, and the only grounds upon which the plaintiff's prayer for specific performance has been refused being, firstly, that the plaintiff did not tender the balance of the purchase money within the time mentioned in his plaint, and, secondly, that the defendant No. 2 has purchased the property for value in good faith without notice of the contract in favour of the plaintiff, I do not think that there is anything to justify the defendant No. 1 in retaining the deposit.

As to the case cited, *Howe* v. *Smith* (1), as pointed out by the learned Chief Justice, that case is no authority for the broad proposition contended for by the learned Vakil for the appellant. That case itself shows that it is not in every case where there is default in performance of a contract that the vendor is entitled to retain the deposit. He is entitled to do so only under special circumstances, none of which exist in this case.

S. C. G. *Appeal dismissed.*

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

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PEARY MOHUN MUKERJEE (PETITIONER) *v.* AMBICA CHURN BANDOPADHYA, CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF UTTERPARAH (OPPOSITE PARTY).*

Res Judicata—Civil Procedure Code (Act XIV of 1882), sect 11—Dismissal of suit for want of notice, and also upon directly and substantially in issue finally heard and decided—Bengal Municipal Act (Bengal Act III of 1884), section 363.

In a suit brought by one *A* against *C* for damages for not removing certain offensive matter from his land, the questions raised were, whether there was notice, and whether the defendant was bound to remove the filth from the plaintiff's property. The Court having found that there was no notice,

* Civil Rule No. 768 of 1897.