APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice McDonell.

LOKENATH GHOSE (ONE OF THE DEFENDANTS) *v.* JUGOBUNDHOO ROY (PLAINTIFF).*

1875 *Dec.* 14 & 21, 1876 *April* 25.

Lessor and Lessee—Lease granted while Lessor is out of Possession—Rights of Lessee—Suit for Possession.

A transfer of property, of which the transferor is not at the time of the transfer in possession, is not *ipso facto* void.

Where a patnidar, while out of possession of the patni estate, granted a durpatni thereof, *held* that the dur-patnidar's suit against third persons, who were in possession of the estate, to recover possession would lie, it appearing that the plaintiff had paid an adequate consideration for the durpatni, and that the durpatni potta was not evidence of a contract to be performed in future on the happening of a certain contingency, or that if it were so that the plaintiff had done all he was bound to do to entitle him to specific performance of the agreement by the patnidar.

THE plaintiff sued for a declaration of his durpatni and char-patni rights in certain estates and for possession. He alleged that he had obtained in 1278 (1871) a durpatni of an 8-anna share in the properties mentioned in the plaint from Grish Narain Roy and Mohendro Narain Roy, the heirs of Bykunt Nath Roy, the patnidar of the said share; that he afterwards granted a sepatni of one of the estates to one Krishto Bullubh Roy and again took from the latter a char-patni; and that, on attempting to take possession of the estates, he was opposed by the defendants.

The defendants contended, amongst other things, that the ikrar of 1278 from Grish Narain Roy and Mohendro Narain Roy in the plaintiff's favor showed that the plaintiff's title had not become complete and that neither Bykunt Nath Roy nor his heirs Grish Narain and Mohendro Narain were ever the owners of the patni or in possession thereof, and that the plaintiff had never obtained possession of the estates granted in dur-patni.

* Regular Appeal, No. 211 of 1874, against a decree of the Subordinate Judge of Zilla Moorshedabad, dated the 30th of June 1874.

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The original ikrar of 1278 was not forthcoming, but a copy was put in evidence which, so far as material, was as follows:—

"1*st*. I shall pay rent for the durpatni mehal from the date on which I shall get possession thereof, and within one month from the date of my obtaining possession, I shall pay the balance of the consideration money for which I have given a bond. If I fail herein, I shall pay with interest at the rate of one per cent. per month. If from any cause the crops of the entire mehal or of any portion of it are injured in the future, I shall get back from you with interest at the rate of one per cent. per month consideration money in proportion to the injury which my interest will suffer, and you will also grant an abatement of rent in that proportion.

"2*nd*. From this time I shall pay out of the amount due to the zemindar whatever you have to pay into the Collectorate under assignment regarding the zemindar's sudder rent as per towji of the mehals mentioned in the patni-potta and the profit which after deducting the same, you have to pay to the zemindar. If I do not get possession of the durpatni mehals at present, you will pay me the rent which will be paid to the Collectorate and the zemindar during the said period of dispossession, with interest at one per cent. per month from the amount which you will receive from other parties on account of wasilat for the period that I may be out of possession in my durpatni time. If that be deficient you will pay me yourselves. After deducting from the said dur-patni rent the Collectorate rent of Rs. 5,223-5-5 and the zemindar's profit of Rs. 2,731-10-7 mentioned above, which I shall pay from the date on which I shall get possession of the entire mehal, I shall go on paying you the remaining profit of Rs. 1,100. If I fail to pay the Collectorate and zemindar's rent, and the mehal is consequently sold by auction, I shall be responsible for the loss or damages which will result therefrom.

"3*rd*. If for obtaining possession of this property I or you have to institute any suit in the Court or in the Collectorate, I shall pay the amount of costs and you will pay me that amount. If the suit is decreed you will receive the costs which will be stated in the decree and the wasilat for the period of

dispossession, and if it is dismissed you will pay the costs which will be incurred by the opposite party and there will be no concern with me."

The plaintiff paid the consideration for the dur-patni partly in costs and partly by a bond, the due date of which had not arrived when this suit was brought.

It was admitted on the part of the plaintiff that Grish Narain Roy and Mohendro Narain Roy were not in possession when they granted the durpatni.

The first issue tried by the Subordinate Judge, and the only issue material for the purpose of this report, was whether under the terms of the ikrar executed by Grish Narain and Mohendro Narain in favour of the plaintiff the plaintiff's suit for possession would lie. This issue he decided in the plaintiff's favour, holding that the rulings cited by the defendant, *viz.*, *Raja Sahib Prahlad Sen* v. *Budhu Sing* (1) and *Ranee Bhobosoondree Dasseah* v. *Issur Chunder Dutt* (2) did not apply, the facts of the present case being quite dissimilar, and that he considered the cases of *Pran Kristo Dey* v. *Bissumbhur Sein* (3) and *Tara Soonderry Debya* v. *Shama Soonderry Debya* (4) to be authority for the position that a transfer by one who has a right of possession, but who is not in possession, is not void on that account, and that in the present case there was no suggestion even that the plaintiff had not done all he was bound to do, and, as he had been distinctly empowered by his lessor to sue alone, that the transfer to him was complete, and that the present suit would lie. Having also decided the other issues in the plaintiff's favor he gave him a decree for possession of the half share of the several mehals. From this decision the principal defendant appealed.

Baboos *Gopal Lal Mitter* and *Lucky Churn Bose* for the appellant.

Baboos *Mohiny Mohun Roy*, *Gooroodoss Banerjee*, and *Kishory Mohun Roy* for the respondent.

(1) 2 B. L. R., P. C., 111 at p. 117; S. C., 12 Moore's I. A., 275 at p. 307.
(2) 11 B. L. R., 36.
(3) 11 W. R., 81.
(4) 4 W. R., 58.

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The arguments raised and the cases cited appear in the judgment of the Court which was delivered by

JACKSON, J. (who, after stating the facts and the holding of the Subordinate Judge on the first issue tried as above, and briefly stating the findings on the other issues, continued):—In appeal the first point argued was that the Subordinate Judge ought to have dismissed the plaintiff's case on the strength of the Privy Council Rulings cited by the (defendant) appellant. Great stress was laid upon the fact that Grish Narain and Mohendro Narain were admittedly not in possession at the time they granted the lease, which formed the basis of the plaintiff's claim, and it was pointed out that the ikrar, dated 17th Assar 1278, clearly showed that the full payment of the consideration was contingent on the result of this litigation, and that thus the suit was eminently a speculative one. The rulings cited by the (defendant) appellant before the Subordinate Judge as well as *Tara Soondaree Chowdhrain* v. *The Collector of Mymensingh* (1), *Ram Khelawun Singh* v. *Mussamut Oudh Kooer* (2), *Boodhun Singh* v. *Mussamut Luteefun* (3), and *Bishonath Dey Roy* v. *Chunder Mohun Dutt Biswas* (4), were referred to in support of the appellant's contention. Now the ruling in *Tara Soonduree Chowdhrain* v. *The Collector of Mymensingh* (1) only shows that where the vendor was a defendant in the suit, and the agreement was only to sell as much as was recovered, the suit could not be maintained as contrary to public policy. In the ruling in *Ram Khelawun Singh* v. *Mussamut Oudh Kooer* (2), the principle laid down was that wherever a party executed a deed of sale of property not in his possession, this should be held to be only a contract to sell. In *Bhoodhun Singh* v. *Mussamut Luteefun* (3), it was ruled that an assignee of property is not entitled to recover against his assignor, on the footing of a champertous contract, and that an assignee of property, whose assignor was not in possession when the assignment was made,

(1) 13 B. L. R., 495.
(2) 21 W. R., 101.
(3) 22 W. R., 535.
(4) 23 W. R., 165.

can only recover even from the hands of third persons, upon showing that he should have a right to enforce specific performance of his contract against his assignor, if the property were to come back to the hands of the assignor. The ruling in *Bishonath Dey Roy* v. *Chunder Mohun Dutt Biswas* (1), lays down the proposition that alleged purchasers whose vendors were not in possession, and who pay nothing for what is said to have been sold to them, are not competent to maintain a suit for possession of the property in dispute. The ruling in *Rajah Sahib Prahlad Sen* v. *Budhu Sing* (2) has been fully discussed by the Subordinate Judge.

None of these rulings in our opinion apply to the present case. The present case was not brought for the specific performance of a contract, and there is nothing to show that the plaintiff has not performed his part of the contract. The contract may be a speculative one, but there is nothing to show that the plaintiff purchased at a sum below the value of the thing sold. The stipulation in the ikrar, regarding the refusal of part of the consideration money in case of loss of the thing sold tends to show that the price paid was adequate. There is nothing in the present case to show that the durpatni potta was evidence of a contract to be performed in future on the happening of a certain contingency, or that if it were so that the plaintiff has not done all he was bound to do, if a suit for the specific performance of the contract were brought. The ikrar in the present case shows that the transfer was in substance complete. The warranty clause at the end of the first paragraph shows not only that the consideration money was paid, but that under certain contingencies it would be refunded.

In none of the cases relied on by the appellant has it been held that a transfer of property of which the transferor is not at the time of such transfer in possession would be *ipso facto* void.

The rulings in *Bihan Singh* v. *Mussamat Parbutty Kooer* (3) *Chedambara Chetty* v. *Renja Krishna Muthu Vira Puchanja*

(1) 23 W. R., 165.

(2) 2 B. L. R., P. C., 111; S. C., 12 Moore's I. A., 275.

(3) 22 W. R., 99.

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Naiker (1), and *Gungahurry Nundee* v. *Raghubram Nundee* (2) point to a contrary conclusion. In the first of these cases it was ruled that where a conveyance of property was made by a person who had been in possession and enjoyment for years before, and he was wrongfully ousted, the conveyance gave a right to sue for immediate possession. In the second the Lords of the Judicial Committee of the Privy Council pointed out that the statute of champerty has no effect in the mofussil of India; they held that the true principle was that stated by Sir Barnes Peacock, *viz.*, that the Courts in India administering justice in accordance to the broad principles of equity and good conscience, will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up merely for the purpose of spoil or of litigation, and carried on for corrupt or other improper motives.

In the third the ruling was still stronger; there it was distinctly held that delivery was not necessary to complete the title of the vendee; further that this was the general rule in India, and that under the Hindu law a well defined usage acquires the force of law. Considering, therefore, that the latter rulings support the view taken by the Subordinate Judge, we hold that in the present case the plaintiff had a right to bring the suit.

(His Lordship after deciding the remaining issues in the plaintiff's favour dismissed the appeal with costs).

Appeal dismissed.

(1) 13 B. L. R., 509. (2) 14 B. L. R., 307.