

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1880
Sept. 9.

NEMAI CHARAN DHABAL AND OTHERS (DEFENDANTS) v. KOKIL BAG
(PLAINTIFF).*

Specific Performance—Registration Act (III of 1877), ss. 49 and 50—Oral Agreement, Evidence of—Effect of Oral Agreement as against subsequent Registered Conveyance.

A, by an oral agreement, agreed to grant two mokurari leases of certain properties upon certain terms to B, and thereupon executed two mokurari leases in favour of B, which were not however registered. Afterwards A granted two mokurari leases of the same mouzas, upon terms more favourable to himself, to C and D, who, at the time of such grant, had notice of A's previous agreement with B. Held, in a suit for specific performance brought by B against A, and to which C and D were added as defendants, that, notwithstanding the provisions of ss. 49 and 50 of Act III of 1877, B could obtain a decree for specific relief, and a declaration that the leases to C and D were void as against him.

THE plaintiff in this case, which was instituted on the 10th December 1877, sought to enforce specific performance of an oral agreement made between him and the defendant, Raja Nemai Dhabal, under which the latter, in consideration of the payment to him by the plaintiff of a bonus and fees amounting in all to Rs. 270, agreed to grant to him two mokurari pottas of two mouzas in Zilla Manbhum. This agreement, the plaintiff alleged, had been made with him orally on the 13th Assin 1284, corresponding with the 28th September 1877, by the defendant, at his cutcherry; and on that occasion, he, the plaintiff, had paid to the defendant Rs. 32, in advance, as a part-payment of the consideration. The plaintiff further alleged, that, on the 16th of Assin 1284, corresponding with the 1st October 1877, two mokurari papers were drawn up on stamped paper, and executed by the defendant; and that he, the plaintiff, paid on that day a

* Appeals from Appellate Decrees, Nos. 1594 and 1595 of 1879, against the decree of R. Towers, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated the 28th April 1879, affirming the decree of Baboo Syamchand Dhur, Munsif of Manbazar, dated the 26th June 1878.

further sum of Rs. 138 on account, it being agreed that the balance of Rs. 100 should be paid at the time when the pottas and kabuliats were registered. These mokurari papers were not put in as evidence.

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The raja-defendant denied the oral agreement and the part-payments alleged by the plaintiff. He said, that two persons, named Madhub Mondul and Narain Mondul, had, previous to Assin 1284, been in possession of the two mouzas in question under a temporary lease, and that he, being anxious to let the mouzas upon receipt of an adequate bonus, had invited offers from all directions; that, among other offers which he had received, he had received an offer from the plaintiff to accept a mokurari lease at Rs. 140 per annum, and pay a bonus of Rs. 280 as consideration-money; that, while this offer was under consideration, and before it had been finally accepted, and before a single rupee had been paid on account of bonus, the Monduls had offered to accept a mokurari lease at Rs. 155 per annum, to pay a bonus of Rs. 700, and further to lend him Rs. 500 at a low rate of interest; that no better offer having being made by the plaintiff, he had accepted that of the Monduls, and having received the consideration-money of Rs. 700 from them, made a mokurari settlement with them, and granted them a registered potta, under which they were in actual possession.

The raja-defendant further contended, that the Monduls being in possession of the mouzas, and interested either legally or equitably in the subject-matter and result of the suit, ought to have been joined as defendants.

The Munsif found, first, that the Monduls were not necessary parties, and that the plaintiff had satisfactorily proved his case, and gave him a decree directing that, on payment by him of the balance of the premium or consideration, leases and counterparts should be exchanged.

On appeal from this decision, the lower Appellate Court found it was necessary that Madhub Mondul and Narain Mondul should be made defendants in the suit. This was done, and the suit was remanded to the Munsif to try the following issues:—

1.—Whether the lease given to them was given in good faith, and for value?

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2.—Whether they had notice of the original contract with the plaintiff?

The Munsif on these issues found that Madhub Mondul and Narain Mondul had given value for their lease, and that they had notice of the previous contract. The lower Appellate Court affirmed this finding and dismissed the appeal.

Against this decree all the defendants appealed to the High Court.

Baboo Rash Behary Ghose for the appellants.

Baboo Sreenath Doss and *Baboo Bamachurn Mookerjee* for the respondent.

Baboo Rash Behary Ghose.—This is not a case for specific performance. Taking the case of the plaintiff to be true, that, on the 13th Assin, the raja-defendant promised to execute two mokurari leases in favour of the plaintiff, the plaintiff himself asserts, whether truly or falsely, that the raja-defendant did execute the two mokurari leases; if so, and there was a difficulty about registration, the plaintiff should not have proceeded by separate suit, but should have taken proceedings under parts vii and xii of the Registration Act (III of 1877). If his statement is true, the terms of the oral agreement were reduced into writing on the 16th Assin; if so, the Courts below were wrong in law, when they admitted secondary evidence of the terms of an agreement which had admittedly been reduced into writing; and if that evidence was wrongly admitted there is absolutely no evidence to support the findings of the Courts below. The case is really one in which the plaintiff is endeavouring to evade the operation of the registration law, and by falling back upon a pretended anterior oral agreement to use and give effect to two documents, which, if they exist, cannot be received in evidence, and which, if they could be received in evidence, could not legally, being unregistered, take effect as against registered documents relating to the same property. It was also contended that even if the Courts below had the power in this case to grant specific performance of the alleged oral agreement, the

special circumstances of the case did not warrant such an exercise of their discretion.

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Baboo Sreenauth Doss.—This is a case for specific performance. The meaning and intention of the oral agreement of the 13th Assin must be taken to have been, not that the raja-defendant would sign any particular papers, but that he would put the plaintiff in the position of a mokuraridar, and till that has been done, the agreement has not been fully performed. 2. There is no proof that the terms of the oral agreement were reduced into writing. The secondary evidence admitted, was evidence, not of the contents of the two leases, but of the terms of the oral agreement. 3. If the Mondul-defendants have been ill-treated, they, in their turn, can sue the raja-defendant. 4. If the Court below had the power in its discretion to make a decree for specific relief, this Court will not rightly control it in the exercise of such discretion.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J. (who, after stating the facts, continued).—The Rajah and Madhub and Narain Mondul have appealed against the result of the case. It is contended on their behalf that specific performance cannot be decreed, and that the agreement with the plaintiff having been reduced into writing cannot be proved by oral evidence. It is further contended, that the oral agreement cannot prevail against the later registered lease.

Now the plaintiff sues on an oral contract to execute a moku-rari lease, which has never been reduced into writing. It is true that the raja, at first intending to carry out that contract, had the lease drawn up in writing ; but the transaction was not completed by delivery and registration. Therefore, under the circumstances, the objection that parol evidence is not admissible, does not arise ; in fact, it was not seriously pressed on behalf of the appellants.

Taking it then as established, that the raja-defendant entered into an oral agreement to execute a lease in the plaintiff's favour, the next question is, whether specific performance can be enforced. If the case were governed by the Specific Relief Act, we

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should have no hesitation in saying that s. 27 would apply to this case. Madhub and Narain Mondul are clearly, on the finding of the lower Court, transferees under a subsequent title with notice of the original contract to the plaintiff. But although that Act (I of 1877) is not in force in the district of Manbhoom, we may fall back upon the general rules of equity, which are, undoubtedly, in the plaintiff's favour.

It has indeed been argued that, under s. 48 of the Registration Act, the oral agreement with the plaintiff not being accompanied or followed by delivery of possession, cannot be enforced against the registered lease held by Madhub and Narain Mondul. No doubt, the words of that section (48) are positive, and they have been interpreted by Pontifex, J., as meaning "that the only oral alienations of which the law can take notice in competition with registered instruments, are those which are properly established by evidence of possession;" and again "unless the oral alienee was in possession, the Courts would now be excluded from considering any equity which he might have against a subsequent alienee by registered deed"—*Fuzluddeen Khan v. Fakir Mahomed Khan* (1). But that case turned upon the construction of s. 50 of the Registration Act, and the issue was between two deeds conveying the same property, one registered and the other not; and Garth, C. J., in his judgment, expressly states, that no question of equity arose; and also that the equitable doctrine of notice might have been applied if it could be shown that the subsequent purchaser had notice of the prior unregistered conveyance.

In this case we have a finding that the alienee under the registered lease had notice of the oral agreement to execute a lease in favour of the plaintiff, and having looked at the evidence, we see that they were present when he paid a portion of the consideration-money.

It appears to us, that if we adopt the principle that no equity is to be considered where an oral agreement to alienate is not followed by possession, the 27th section of the Specific Relief Act, as illustrated (b), would be rendered a dead letter wherever it applies, when competition arises between an oral agreement to

(1) I. L. R., 5 Calc., at pp. 346, 347.

alienate unaccompanied by possession, and an alienation by registered deed with notice of the previous agreement; but we are not compelled to adopt this conclusion. The subject has been fully considered in the case of *Waman Ramchandra v. Dhondiba Krishnaji* (1), and the judgment of Westropp, C. J., at pp. 146 to 154, discusses the effect of actual notice and the application of the English rules of equity to mofussil cases, and that too in a case to which the Specific Relief Act did not apply, as it does not in these cases before us. It is unnecessary to recapitulate the reasons upon which the judgment of Westropp, C. J., are founded. It is sufficient to say that we follow them, and consider that they apply to these cases.

The foregoing remarks apply equally to Appeal No. 1595. We therefore dismiss these appeals with costs; but we think that the decree of the Munsif must be amended, for in its present form it will not have the effect that the cases require. We think that it should declare the leases by the raja-defendant to Madhub Mondul and Narain Mondul void as against the plaintiff; and that, on the plaintiff paying Rs. 100 to the raja-defendant, the latter shall execute mokurari pottahs to the plaintiff, receiving from him kabuliats in the terms of the agreement between them.

Appeals dismissed.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

IN THE MATTER OF THE PETITION OF BHOOPENDRA NARAIN ROY.

BHOOPENDRA NARAIN ROY *v.* GREESH NARAIN ROY

AND ANOTHER.*

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Nov. 23.

Application under Act XXXV of 1858—Interference of Court—Ill-treatment of Lunatic—Accounts of Joint Property—Mitakshara.

The husband of a lunatic's daughter applied to the Court to declare his father-in-law, who was a member of a joint Mitakshara family, to be a lunatic, and appoint a manager of his property and guardian of his person under Act XXXV of 1858. The lunatic had an interest both in joint ances-

* Appeal from order, No. 197 of 1880, against the order of A. J. R. Bainbridge, Esq., Judge of Moorshedabad, dated the 7th April 1880.

(1) I. L. R., 4 Bomb., 126.

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