

Before Mr. Justice Mitter and Mr. Justice Grant.

MODUN, MOHUN DUT AND ANOTHER (PLAINTIFFS) *v.* FUTTARUNNISSA
AND OTHERS (DEFENDANTS).*

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June 8.

Transfer of Property Act (IV of 1882), ss. 52, 135 — Sale of immoveable property by person out of possession — Actionable claim.

A transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession.

A and *B* being owners of an 8-annas share of certain immoveable property sold it under a kobala to *C* and *D*. At the time of the sale *X* and *Y* were in adverse possession of the share. *Held*, that the transaction was a sale under s. 52 of the Transfer of Property Act, to which the provisions of Chapter 8 of the Act, specially those of s. 135, were inapplicable.

Seemle, s. 135 refers to claim for money of some kind or the like, although the money claim may be a charge on immoveable property.

THIS was a suit to recover possession of an 8-annas share of 5 kedars and 2 puns of land. The property was originally in the joint possession of four brothers, Jugul, Obhoy, Nil and Puddo. Jugul and Obhoy sold the whole property to Futtarunnissa, and the latter then executed a kobala with respect to the land in dispute in favour of Jogomohun and Ramchunder, the principal defendants, who took possession in Bysack 1287 (April 1880). Nil and Puddo, while thus out of possession, sold their 8-annas share of the land to the plaintiffs under a kobala, dated the 9th Kartick 1291 (24th October 1884.) The defendants contended that the plaintiffs, their vendors being out of possession at the time of the sale, had purchased an actionable claim as defined by s. 130, Act IV of 1882, and were entitled to no more than the amount of consideration-money actually paid by them and the incidental expenses of the sale. The Munsiff, while of opinion that the subject of sale was an actionable claim, decreed the suit in view of cl. (d) of s. 135. The Subordinate Judge, differing from the Munsiff in his interpretation of cl. (d.), held that the defendants would be exonerated by the

* Appeal from Appellate Decree No. 425 of 1886, against the decree of Baboo Ram Cumar Pal Chowdry, Rai Bahadur, Subordinate Judge of Sylhet, dated the 12th of December 1885, reversing the decree of Baboo Kali Dhun Chatterji, Munsiff of Habigunge, dated the 25th of June 1885.

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payment of the consideration-money and the incidental expenses of sale with interest, and altered the decree accordingly.

On second appeal, it was contended on behalf of the plaintiffs that the transaction between them and their vendors was one of sale under s. 52 of the Transfer of Property Act, to which the provisions of s. 135 were inapplicable.

Baboo *Akhil Chunder Sen* for the appellants.

Baboo *Taruck Nath Palit* for the respondents.

The judgment of the High Court (MITTER and GRANT, JJ.) was as follows :—

This was a suit to recover possession of an 8-annas share of a certain property. We may take it upon the finding of the lower Courts that the defendants Nos. 6 and 7 had been the owners of this 8-annas share. It is not disputed that the plaintiffs purchased this property under a kobala from the defendants Nos. 6 and 7, and by the terms of that kobala the ownership was transferred to the plaintiffs. It is also not disputed that at the time of the execution of the kobala the defendants Nos. 6 and 7 were not in possession, but that the property in dispute was in the possession of the principal defendants. Upon these facts the question that was raised in the lower Courts, and that has been raised before us, is whether it was a sale of an actionable claim within the meaning of Chapter 8 of the Transfer of Property Act ; and further if it is a sale of an actionable claim, whether s. 135 of that Chapter applies to the present case.

It seems to us that the sale in this case does not come within Chapter 8 of the Transfer of Property Act. Section 130 of the Act says: "A claim which the Civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary." It is therefore evident that it refers to nothing more than to a sale of a claim, but if the transfer be that of the ownership of property it is something more than the transfer of a claim. It is unnecessary for us to define exactly the classes of cases coming within the purview of s. 130 ; all that we decide is that a transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not

be in possession. The Transfer of Property Act is divided into several chapters. Chapter 1 deals with preliminary matters. Chapter 2 deals with general rules relating to the transfer of property. Then from Chapter 3 to Chapter 8 the Act deals with rules of law relating to different kinds of transfer of property. Chapter 3 treats of sales of immoveable property, Chapter 4 deals with mortgages of immoveable property and charges, Chapter 5 with leases of immoveable property, Chapter 6 deals with the subject of exchange, Chapter 7 deals with the subject of gifts, and then comes Chapter 8, which deals with transfers of actionable claims. It is clear from the division of these chapters that it is made with reference to the different classes of transfer, and therefore if a particular transfer comes under one chapter it is necessarily excluded from the other chapters. That being so, it is important to consider whether, under the circumstances stated above, the transaction between the plaintiffs and the defendants Nos. 7 and 8 comes within the definition of a sale of immoveable property; if it does, it appears to us that it would not come under the purview of any of the following chapters, including Chapter 8. The conditions laid down in s. 54, which defines sales of immoveable property are, in our opinion, fulfilled in the transaction in question. It seems to us that under s. 54, a sale by registered kobala is valid, although the owner may not be in possession at the time of the sale. Section 54, para. 2 says: "Such transfer, in the case of tangible immoveable property of the value of Rs. 100 and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument." Para. 3 says: "In the case of tangible immoveable property of a value less than Rs. 100, such transfer may be made either by a registered instrument, or by delivery of the property." Comparing these two paras. it seems to us that where a sale is of tangible immoveable property, whether of the value of Rs. 100 and upwards or not, the transfer is complete when the instrument by which the transfer is made is registered; and delivery of possession in that case is not a condition precedent to the validity of the transfer. That being so, the transaction in this case comes within s. 54, and it follows, therefore, that it does not come within Chapter 8. But even if it be conceded that it is a sale of an

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actionable claim, we think that s. 135 is not applicable. That section says that, "where an actionable claim is sold, he, against whom it is made, is wholly discharged by paying to the buyer the incidental expenses," &c. The word *discharged* would be inapplicable to a suit of this description, because it is for possession of land. We are inclined to think that s. 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property. On the whole, we are of opinion that Chapter 8, and specially s. 135, are not applicable to the facts of this case. That being so, the right of the plaintiffs being found in the judgment of the lower Courts, the decree of the lower Appellate Court will be set aside, and the plaintiffs' suit for possession will be decreed with costs in all the Courts.

K. C. M.

Appeal allowed.

Before Mr. Justice Norris and Mr. Justice O'Kinealy.

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 August 3.

BROJENDRO KUMAR ROY CHOWDHRY (PLAINTIFF) v. RASH BEHARI ROY CHOWDHRY AND OTHERS (DEFENDANTS).*

Right of suit—Cause of Action—Contribution, suit for—Joint wrong-doers—Breach of Covenant—Damages for breach of Contract—Breach of Contract.

In a suit for damages against A and others for breach of a covenant not to open a ferry at a particular place, a decree was obtained against all the defendants. The amount of this decree was levied by execution from A alone, who thereupon brought a suit for contribution against his co-defendants in the former suit. Both the lower Courts dismissed the suit on the ground that the plaintiff and the defendants had been joint wrong-doers, and that no suit for contribution would lie as between them. On second appeal to the High Court—

Held, that the rule of law relied on by the Courts below had no application to the circumstances of the present case, and that the plaintiff was entitled to maintain his action.

In this case it appeared that a decree had been obtained by one Bhogowan Chunder Chowdhry against the plaintiff and the defendants jointly for the sum of Rs. 352-14-0 as damages for breach of contract. The whole amount was, in execution of the

* Appeal from Appellate Decree No. 1555 of 1885, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 20th of April 1885, affirming the decree of Baboo Mohendro Nath Das, Munsiff of Manikgunj, dated the 18th of February 1884,