APPELLATE CIVIL.

Before Mr. Justice Holmwood and Mr. Justice Chatterjee.

RANJIT SINGH

v.

KALIDASI DEBI.*

1909
Nov. 25.

Chowkidari chakran lands—Bengal Act VI of 1870, s. 50—Resumption and transfer by Government—Rights of patnidars and dar-patnidars—Suit for recovery of khas possession—Frame of suit—Specific performance of contract—Landlord and tenant.

Where chowkidari chakran lands had been resumed by the Government and settled under s. 50 of Bengal Act VI of 1870, with a zemindar who had created a patni under which there was a darpatni and who made a raiyati settlement, and the dar-patnidars brought a suit against the zemindar for khas possession of the lands and for the execution of a deed of transfer, on the allegation that the zemindar had transferred his rights in the said lands to the patnidars and the patnidars had similarly transferred all their rights, subject of course to the payment of the respective head rents :—

Held, that the joining of the two prayers for execution of a deed of transfer and for recovery of possession was in no way repugnant to any rule of law.

Nathu Pandu v. *Budhu Bhika* (1) and *Narayana Kavirayan* v. *Kandasmi Goundan* (2) referred to.

SECOND APPEAL by the defendant No. 1, Rajah Ranjit Singh Bahadur.

A suit was instituted by the plaintiff, Kalidasi Debi, who was a dar-patnidar, for execution of a deed of transfer and for the recovery of khas possession of the resumed chowkidari chakran lands from the defendant, Rajah Ranjit Singh Bahadur, on the allegation that by virtue of the patni lease the right to these lands passed to the patnidars, Raja Miah and Jabeda Bibi defendants Nos. 2 and 3 respectively, and that the patnidar defendants had conveyed the same to her. Defendant No. 1 resisted the claim on the ground that the chakran lands, which were resumed by the Government under Bengal Act VI of

*Appeals from Appellate Decrees, Nos. 1092 of 1907 and 1093, 1094, 1199 and 1200 of 1907, against the decrees of K. N. Roy, District Judge of Birbhum, dated May 20, 1907, confirming the decree of Umesh Chandra Sen, Subordinate Judge of Birbhum, dated July 19, 1906.

(1) (1893) I. L. R. 18 Bom. 537. (2) (1898) I. L. R. 22 Mad. 24.

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1870, were subsequently settled with him under section 50 of the said Act, on different dates in 1898, 1899 and 1900 at a total jama of Rs. 215, and that he made a settlement of the same lands with defendants Nos. 4 to 18, who were now in possession, and that the plaintiff had no cause of action, and that the suit was barred by limitation.

The Subordinate Judge decreed the suit for the recovery of possession with mesne profits, but left to a future suit the determination of the terms on which the plaintiff was to hold the lands.

The decree of the Subordinate Judge was upheld on appeal by the District Judge. Against this decision the defendant No. 1 appealed to the High Court.

Dr. Rashbehary Ghosh (with him *Babu Basanta Kumar Bose*, *Babu Satish Chandra Ghose*, *Babu Priya Sankar Mazumdar*, *Babu Hemendra Nath Sen* and *Babu Sridhar Das Gupta*), for the appellants. The suit has been wrongly framed and the jural relation created by the patni and dar-patni leases in respect of the disputed lands, is no more than a mere agreement to grant, contingent upon a subsequent transfer, and a suit for specific performance of the contract ought to have been first brought before the suit for recovery of possession: *Ranjit Singh* v. *Radha Charan Chandra* (1) and *Kashim Sheik* v. *Prasanna Kumar Mukerjee* (2). The former case has been dissented from in *Banwari Mukunda Deb* v. *Bidhu Sundar Thakur* (3) and the latter distinguished by the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (4), and there should, therefore, be a reference to a Full Bench.

Babu Dwarka Nath Chakravarti (with him *Babu Jogendra Nath Mukerjee* (in No. 1092), *Babu Ram Chandra Mozumdar* and *Babu Tarak Chandra Chakravarti* (in Nos. 1074, 1199, 1200), for the respondent. The plaint contains a prayer for specific relief by way of execution of a proper deed of settlement and a further prayer for consequential relief by way of possession, hence even if the case of *Ranjit Singh* v. *Radha Charan*

(1) (1907) I. L. R. 34 Calc. 564.
(2) (1906) I. L. R. 33 Calc. 596.
(3) (1908) I. L. R. 35 Calc. 346.
(4) (1906) I. L. R. 34 Calc. 109.

Chandra (1) is relied upon, the suit is not defective and no reference to a Full Bench is necessary.

Cur. adv. vult.

HOLMWOOD AND CHATTERJEE JJ. The defendant No. 1 is the zemindar of a certain mouza called Kaytha now in the district of Birbhum. Defendants Nos. 2 and 3 are the patnidars and plaintiff is the dar-patnidar of the said mouza. Subsequently to the creation of these tenures the Government resumed the chowkidari chakran lands of the mouza under Bengal Act VI of 1870, and made a transfer of the same to defendant No. 1 under section 50 of the said Act on several dates in 1898, 1899 and 1900 at a total jama of 215 rupees, and defendant No. 1 made raiyati settlements of the said lands with defendants Nos. 4 to 18 who are in possession. The plaintiff brings this suit on the allegation that the defendant No. 1 having transferred all his rights in respect of the mouza to the patnidars, and the patnidars having similarly transferred all their rights to the dar-patnidar, subject of course to the payment of the respective head rents, she as dar-patnidar was entitled to khas possession of the said lands at the jama payable to the Collector. She prays that she may recover khas possession and that proper deeds of transfer may be executed in her favour by defendant No. 1. The Subordinate Judge gave a a decree for recovery of possession with mesne profits from date of decree, but left to a future suit the determination of the terms on which the plaintiff was to hold the lands. On appeal, the District Judge of Birbhum has upheld the decree of the Subordinate Judge, and in second appeal it is contended on behalf of defendant No. 1—(i) that the suit has been wrongly framed; it ought to have been one for the specific performance of a contract pure and simple without any prayer for possession, and that it should be dismissed on this ground alone; and (ii) that the suit is barred by limitation.

In support of the first plea the learned vakil for the appellant contends that defendant No. 1 had no title in the disputed

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lands before the transfer by the Collector, and he could not therefore have made any valid transfer of the same at the time of the patni, nor on the same ground could the patnidar transfer any title to the dar-patnidar; that the jural relation created by the patni and the dar-patni leases in respect of the disputed land was no more than that of a mere agreement to grant, contingent upon a subsequent transfer, and this agreement must be specifically enforced before the plaintiff could have a title which would entitle her to treat defendant No. 1 or his lessees as trespassers and to sue for recovery of possession. He relies upon two cases as supporting his contention: *Ranjit Singh* v. *Radha Charan Chandra* (1) and *Kashim Sheik* v. *Prasanna Kumar Mukerjee* (2). It is conceded that the former case has been dissented from in a later case, that of *Banwari Mukunda Deb* v. *Bidhu Sundar Thakur* (3), and the latter case distinguished by one Judge and dissented from by another in the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (4), and it is contended that a reference ought to be made to a Full Bench in consequence of this conflict. The second ground depends upon the decision of the first. The learned vakil for the respondent contends that the suit is rightly conceived, in that it does contain a prayer for specific relief by way of execution of a proper deed of settlement and contains a further prayer for consequential relief by way of possession, so that even if the right view of the law were that enunciated in the case of *Ranjit Singh* v. *Radha Charan Chandra* (1), there is no defect in the form of the suit and no reference to a Full Bench is necessary: he also contends that if that view is not right still his suit is well conceived, in that he prays for recovery of possession as his main relief and the other reliefs as ancillary thereto.

We have carefully considered the plaint and we have no doubt it is rightly conceived in either view of the law: we do not think that the joining of the two prayers for execution of a deed of transfer and for recovery of possession is in any way repugnant to any rule of law. In the case of *Nathu valad*

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Pandu v. *Budhu valad Bhika* (1), Sir Charles Sargent C.J. held that a claim to possession on the contract might be barred by section 43 of the Civil Procedure Code, as not included in a previous suit for specific performance, but a suit for possession based on the deed of sale executed as a result of the suit for specific performance was a different cause of action and was not so barred. The Madras High Court in the case of *Narayana Kavirayan* v. *Kandasami Goundan* (2), held that a separate suit for possession would be barred as the right to possession arose at the same time as the right to the conveyance. Although Sir Charles Sargent in the Bombay case held that the conveyance gave a fresh cause of action for a suit for possession, he also held that there was a claim to possession on the contract which was barred by section 43 of the Civil Procedure Code, so that there is no conflict between the said two cases as to there being a cause of action for possession on the contract, which ought to be impleaded in the suit for specific performance. In this view of the cases, it is not necessary in this case to consider whether there is a fresh cause of action on the conveyance and a fresh suit for recovery of possession would be maintainable. It is sufficient to say that in this case the prayers are rightly joined and both the above cases support this view.

The suit therefore is not liable to be dismissed on the ground that there is no cause of action for recovery of possession.

It is contended, however, that had the parties gone to trial on the issue of specific performance the defendant No. 1 would have been in a position to prove by evidence that he had given notice of refusal long before. The question of limitation in a suit for specific performance was not considered in the Court of first instance, but it is clear from the judgment of the lower Appellate Court that the plaintiff did put in documentary evidence to show that the demand and refusal were within time, and there appears to have been no reason why the defendant No. 1 should not have put in rebutting evidence showing a previous refusal if there was one. The necessity for bringing

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a suit for specific performance as a condition precedent to any relief was never pressed until the case was being argued before us and we do not think that any such question arose in the lower Courts or that the lower Appellate Court committed any error of law in deciding as it did on the materials before it. The question of limitation and the question of privity of contract were decided on the facts by the lower Appellate Court, and the appellant now wishes to have a remand to make a new case on the facts as regards limitation to a suit for specific performance, because it is possible that if a Full Bench decided that such a suit was imperative such a defence might have been open to him in the Court of first instance. This we cannot allow. Another contention upon which it is sought to obtain a reference to a Full Bench in this case is that if a suit for specific performance is imperative, and if this is regarded as such a suit the conditions on which the transfer is to be made must be decided in the suit itself. It does not appear to us that this question was raised in any form in the lower Appellate Court, but it is admitted by the learned pleader for the respondent that the conditions on which the transfer should be made are laid down in *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (1) as a matter of law, and we are of opinion that the learned Judge in the Court below should in any case, whatever view of the law be taken, decide the conditions in this suit on the principles laid down in that decision. We think that all that is necessary is to remand the case to him now for that purpose upholding the judgments and decrees in other respects and dismissing the appeals.

It is admitted that the same result will follow the analogous appeals Nos. 1093, 1094, 1199, 1200.

We allow no costs in these appeals but the appellants must pay the costs in the lower Courts.

Appeals dismissed.

S. A. A. A.

(1) (1900) 4 C. W. N. 814.