

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 323 of 1873.

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September 13.

KACHU BAYA'JI.....*Plaintiff and Appellant.*

KACHOBA' VITHOBA' and

MAGAN DULLABH*Defendants and Respondents.**Assignment of a chose in action—Consideration—Hindu Law—ale—Possession.*

The question whether an assignment of an equity of redemption admitted by the assignor, was made for a valuable consideration or not, is no material in determining the rights of the assignee against a party who holds adversely to the assignor.

According to Hindu law, a change of possession is necessary to complete a sale of corporeal property, in order to prevent successive purchasers from being cheated by successive sales of the same property, and to obviate disputes as to what was really sold. A purchaser from a Hindu vendor, who buys corporeal property without possession, does not thus obtain a title, which in a suit for specific performance against the vendor, he can enforce against a person actually in possession under a title adverse to the vendor by joining that person as a defendant.

THIS was a special appeal from the decision of E. T. Candy, Extra Assistant Judge of Tháná, at Násik, confirming the decree of Narso Hari Apte, Subordinate Judge, Second Class, of Yevla.

The facts of the case, in so far as they are material, are as follows :—

The second special respondent, Magan Dullabh, who was the second defendant in the Court of first instance, in his written statement said that he was the mortgagee of a piece of property from a son of the first defendant, Kachobá ; and was in possession. The plaintiff alleged, on the other hand, that he was the purchaser of the identical property from Kachobá and sought to recover possession. The purchase was subsequent to the mortgage, and was also impeached as a merely colourable and fraudulent transaction.

The Courts below held the plaintiff's deed of sale fraudulent, as being one without a valid consideration, and rejected his claim.

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The special appeal was heard by WEST and PINNEY, JJ..

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Rávsáheb V. N. Mandlik, for the second respondent, was called upon to support the judgment appealed against. He argued;—That the first respondent could not gratuitously sell his right in the property to the plaintiff. The transaction is on the face of it fraudulent and set up to defeat the mortgagee's just claim. Moreover, what the first respondent professes to sell is not the equity of redemption in this property but the property itself, for the deed of sale includes many other properties which were never mortgaged. The Hindu law requires possession to be delivered up to the purchaser to make his purchase valid; and possession was admittedly with my client.

The first respondent did not appear in person or by pleader.

Girdharlál Dayáldás for the special appellant:—The question of consideration ought not to have been inquired into in this case. It is immaterial; and the first respondent has admitted the sale.

There is no evidence whatever in the case to support the finding of fraud. The Hindu law does require possession to complete the sale; but the plaintiff's deed may be looked upon as an agreement to sell, and this suit one to compel specific performance thereof.

WEST, J.:—The Assistant Judge has rejected the claim of the plaintiff in this case on the ground that the consideration for the alleged sale by the vendor to the plaintiff was not proved. We do not think that that was a material circumstance with reference to the rights of the plaintiff against a party holding adversely to the vendor. An assignment of his right might be made by the vendor, and his admission of such assignment made proof of it and of its consideration unnecessary.

When we look into the documents in the case, however, we find that the vendor professes to sell to the plaintiff not

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any chose in action or incorporeal right. He professes to sell to him various parcels of property in his own possession. One of those parcels is the house which the plaintiff now seeks to recover. It is perfectly clear from the proceedings that, at the date of this transaction, the house was not in the possession of the vendor, but in the possession of the defendant Magan. The vendor, therefore, sold what he could not sell according to the Hindu law, as laid down in *Hárjivan Anandráam v. Náran Haribháí* (a). The texts there cited make a transfer of possession equally necessary to the completion of a sale as of a gift, and the delivery of possession of things having a material existence is regarded by the Hindu law as essential to their legal transfer. Such appears to be the principle of the decision in *Girdhar Parjárám v. Dáji* (b). Until the transfer is thus completed, the vendee has an equitable right, because the conscience of the vendor is affected, which he can enforce against the latter, so as to compel him to make his engagement good; but he has not, until that process has been gone through, a real right in the property itself, capable of exercise against a possessor standing on a right adverse to the vendor's. It has been argued that the plaintiff can sue for specific performance against his vendor, and that Magan, being in possession, is properly joined as a defendant. But in *De Hoghton v Money* (c), Lord Justice Turner says:—"I take it to be well settled, both upon principle and authority, that a mere stranger, claiming under an adverse title, cannot be made a party to a suit for specific performance. There is no equity against him independently of the agreement, and the agreement to which he was not a party, cannot create such an equity." These words may be applied to the case of Magan sued by the plaintiff in this case. He is not to be called on to defend his right against the plaintiff without gaining a protection for it against a suit, substantially identical, which may afterwards be brought by his present co-defendant.

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(a) 4 Bom. H. C. Rep. A. C. J. 31. (b) 7 Idem. 4.

(c) L. R. 2 Ch. 170.

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We may observe that the English law looks with disfavor on sales of real property by persons not in possession as partaking of maintenance and champerty (4 Steph. Com. 318). Coke on Littleton (p. 369a) says:—"If *A* be disseised in this case, *A* hath a good lawful right, yet if *A* being out of possession granteth to or contracteth for the land with another, he hath now made his good right of entry pretenced within the Statute (32 Hen. VIII c. 9), and both the grantor and grantee within the danger thereof. *A fortiori* of a right of action;" but the Hindu law requires a change of possession to accompany sale in order to prevent successive purchasers from being cheated by successive sales of the same property, and to obviate disputes as to what was really sold. The badge of effectual sale, delivery of possession, is wanting, and cannot be supplied where the vendor has no possession to deliver. Such was the case here. The plaintiff, therefore, took nothing by his purchase in this case as against the real defendant Magan. The first defendant, Kachobá Vithobá, was introduced as vendor, merely in order to furnish the plaintiff with a defendant having an apparent privity with him. His interests are really identical with those of the plaintiff. We, therefore, confirm the decree of the Assistant Judge with costs.

It will be understood that this judgment is not intended in any way to limit the power of a mortgagor though out of possession to deal in good faith with his equity of redemption as such.