

1881
JAN. II.
—
ORIGINAL
CIVIL.
—
5 B. 154 =
3 Ind. Jur.
589.

nomination be embodied in the order. And the Advocate-General assenting the Court directed that the costs of the several parties be paid out of the trust-fund, and those of the Advocate-General as between attorney and client.

Attorneys for the petitioner.—Messrs. *Hearn, Cleveland and Little.*

Attorneys for surviving trustee.—Messrs. *Smith and Frere.*

Attorneys for Narotamdas Kahandas.—Messrs. *Ardesir and Hormusji.*

5 B. 177.

[177] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice.

LJOCKUMSEY OOKERDA (*Plaintiff*) v. FAZULLA CASSUMBHOY
AND OTHERS (*Defendants*).^{*} [20th December, 1880.]

Specific performance—Misjoinder—Civil Procedure Code (Act X of 1877), ss. 28 and 45—Specific Relief Act I of 1877, s. 42, Illustration (a).

A stranger to a contract, of which specific performance is sought, cannot be a party to the suit.

Where, therefore the plaintiff sued as against one defendant for specific performance of a contract to sell land and as against another for a declaration that he was not entitled to any charge upon the said lands, held, that the latter defendant was improperly made a party to the suit.

[R., 19 M. 211 (216) = 4 M.L.J. 288; 11 Bom. L.R. 545 (563) and 366 = 6 M.L.T. 200 = 3 Ind. Cas. 124; *Expl. & D.*, 10 C. 1061 (1068); *D.*, 18 M. 415 = 5 M.L.J. 164.]

SUIT for specific performance.

The plaint stated that on 12th February 1876 the plaintiff contracted to purchase certain lands from the first defendant, Fazulla Cassumbhoy; that at the date of the contract he had paid Rs. 2,000 earnest-money, and that the remainder of the purchase-money, viz, Rs. 10,500, were to be paid when the said defendant should execute the conveyance and effect the registration thereof; that the said defendant was willing to carry out the contract and to execute the conveyance, but that he was unable to do so, inasmuch as the second and third defendants, viz, the New Dhurumsey Spinning and Weaving Company and Cassumbhoy Dhurumsey, held possession of the title-deeds and refused to deliver them up, alleging that they had an equitable lien upon the said lands.

The plaintiff prayed for a declaration that neither the second nor the third defendant was entitled to any charge upon the premises, and that they might be ordered to deliver up the title deeds, and that the first defendant should be ordered to specifically perform the contract of the 12th February 1876, and to convey the premises to the plaintiff.

The second defendant put in a disclaimer.

Inevitably (with *Lang*), for the third defendant, objected that the plaintiff could not obtain the relief he sought against the [178] third defendant in a suit for specific performance against the first defendant. He relied on *Tasker v. Small* (1) and *De Hoghton v. Money* (2) and ss. 44 and 45 of the Civil Procedure Code, Act X of 1877.

Farran (*Jardine* with him), for the plaintiff.—I admit that, unless this case can be distinguished from the cases of *Tasker v. Small* (1) and *De Hoghton v. Money* (2), the suit as against the third defendant cannot proceed. The objection now taken is, that the plaintiff cannot sue the

* Suit No. 208 of 1879.

(1) 3 My. & Cr. 63.

(2) L. R. 2 Ch. Ap. 164.

third defendant, because he has not yet got the legal title to the lands. That objection is based on the decisions in the two cases cited. But in these cases the plaintiff was seeking to get possession, while in this case the plaintiff has had possession since February 1879 and has paid part of the purchase-money. Section 42 of the Specific Relief Act I of 1877, illustration (3), seems to show that in this country possession by the plaintiff entitles him to sue, thus going further than the English cases, which require the conveyance of the legal estate. See also the section itself. The parties here are not subject to English law; the vendor (*i.e.*, the first defendant) being a Mahomedan and the vendee (the plaintiff) a Hindu. By Mahomedan and Hindu law possession is the important point. No conveyance is required.

The Court can, under s. 44 of the Civil Procedure Code, Act X of 1877, give permission to the plaintiff to join the two causes of action in one suit. The question here relates to the same land, and could not properly be heard and decided at the same hearing.

JUDGMENT.

SARGENT, J.—I do not think that this suit can proceed against the third defendant. It has long been an established rule of the Court of Chancery, as stated by Lord Justice Turner in *De Hoghton v. Money*, that a mere stranger cannot be a party to a suit for specific performance, and the same rule has always been followed in this Court, as appears from the observations of the Chief Justice in *Naoroji v. Rogers* (1). In the present suit the plaintiff [179] seeks specific performance of a contract against the first defendant, and also asks for a declaration that the third defendant is not entitled to a certain equitable charge claimed by him against the estate which is the subject-matter of that contract.

But Mr. Farran has contended that the plaintiff being in possession he was entitled under the Specific Relief Act I of 1877, s. 42, illustration (a), by virtue of his possession, to a declaratory decree as against the third defendant independently of his established right to a specific performance of the contract with the first defendant.

I do not express any opinion as to the effect of that section of the Specific Relief Act, as I think that the plaintiff is precluded by s. 45 of the Civil Procedure Code, Act X of 1877, from joining two distinct causes of action against the first and third defendants in the same suit. It was said, indeed, that these two sections must be read with s. 28, which provides that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative in respect of the same matter." But it cannot, I think, be said that in this case the relief claimed against the first defendant and the declaration sought against the third defendant, are in respect of the same matter. The right to the relief prayed for against the first defendant is in respect of the non-fulfilment of the contract. The right to the declaration sought against the latter must be deemed to be in respect of a threatened disturbance of his possession.

I am, therefore, of opinion that the third defendant is not a proper party to this suit. I will, however, allow the plaintiff to withdraw the suit against him, with liberty to bring a fresh suit under s. 373 of the Civil Procedure Code, but the plaintiff must pay the third defendant's costs.

Attorneys for the plaintiff.—Messrs. Crawford and Boevoy.

Attorney for the third defendant.—Mr. H. W. Payne.