

I discharge the rule, therefore, and dissolve the injunction. Costs will be costs in the cause.

Solicitors for the plaintiffs—Messrs. *Crawford and Beevey*.

Solicitors for the defendants—Messrs. *Hore, Conroy, and Brown*.

1881
AUG. 6.

ORIGINAL
CIVIL.

5 B. 539.

5 B. 554=6 Ind. Jur. 92.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

DHONDIBA KRISHNAJI PATEL AND ANOTHER (*Original Plaintiffs*),
*Appellants v. RAMCHANDRA BHAGVAT AND OTHERS (Original Defendants), Respondents.** [2nd March, 1881.]

Limitation—Act XV of 1877, sch. II, art. 49—Time when “detaiiner’s possession becomes unlawful”—Sale of immoveable property in the Mofussil—Decree for specific performance operates as a conveyance—Contract for sale of moveable and immoveable property combined—Indian Contract Act, s. 85—Joinder of causes of action—Objection, not taken in the Court of first instance, too late—Act X of 1877, s. 44.

In the Mofussil of this Presidency the transfer of the ownership of immoveable property to a vendee who has obtained a decree ordering the specific performance of the contract of sale to himself, does not wait for the execution of a conveyance—even if the vendor is required, as he seldom is, to execute such a conveyance—but is effected by the passing of the decree itself, coupled with the payment of the purchase-money.

A entered into an agreement with B for the purchase of moveable and immoveable property, and paid a deposit. Under such an agreement, by s. 85 of the Indian Contract Act, the ownership of the moveable property would not pass before the transfer of the immoveable property. B, instead of conveying to A the property agreed to be conveyed to him, conveyed it to C, and put him, C, in possession. A brought a suit against C and B, and obtained a decree setting aside the conveyance to C, and ordering B specifically to perform his contract and execute a conveyance of the property to himself, A. This decree was confirmed on appeal. B refusing to execute the conveyance to A, the conveyance was executed by the Court under the provisions of s. 202 of Act VIII of 1859. C still [555]detaining possession of the moveable and immoveable property in question. A brought this suit against him to recover possession of the same. The suit was brought within three years of the final decree of the Court of Appeal in the former suit, ordering a conveyance of the property to be executed to A, but not within three years of the date of the agreement to purchase, and it was contended that, as to the moveable property the suit was time-barred.

Held that the suit for the possession of the moveable property was not time-barred, as the right to possession of both the moveable and immoveable property accrued to A, at the earliest, on the date of the final decree for specific performance of the agreement of sale, and it was from that time that the “detaiiner’s possession” first became unlawful under art. 49, sch. II of Act XV of 1877.

An objection that the plaintiff has joined together causes of action which, by s. 44 of Civil Procedure Code, may not be joined together without leave first obtained, is taken too late if it is taken for the first time in the Court of Appeal after the case has been already heard on its merits.

[F., 16 A. 130; R., 12 A. 234 (285).]

THIS was an appeal from the decision of Rao Bahadur C. S. Chitnis, First Class Subordinate Judge of Poona, in Original Suit No. 52 of 1880.

The plaintiffs, Dhondiba and his partner, brought this suit to obtain possession of certain moveable and immoveable property situated in the village of Agar, near Junnar, in the district of Poona. The following are

* First Appeal No. 67 of 1880.

1881
MARCH 2.
—
APPEL-
LATE
CIVIL.
—
5 B. 554=
6 Ind. Jur.
92.

the facts of the case :—On the 26th May, 1874, Dhondiba, plaintiff No. 1, offered to purchase the property in dispute for Rs. 14,000 from Mrs. Dickenson (afterwards Mrs. Bayley, defendant No. 4) on certain conditions, and agreed to deposit immediately the sum of Rs. 1,000 as earnest-money, and to pay the balance of the purchase-money, within one month from that date, on execution of a conveyance of the property by her to him. On the following day his offer was accepted by her through her solicitors, Messrs. Hearn, Cleveland and Peile, to whom, on the same day, he (Dhondiba) paid the earnest-money, as agreed. Instead, however, of conveying the property to Dhondiba, Mrs. Dickenson (defendant No. 4) conveyed it to Waman Ramchandra, Virchand, and Vitho (defendants 1, 2 and 3) by a deed dated the 20th June, 1874, and gave them possession. Dhondiba thereupon brought a suit (No. 799 of 1874) (1) in the Subordinate Court of Poona against the same four defendants for specific performance of the contract by defendant No. 4, and to set aside the conveyance of the property by her to defendants 1, 2, and 3. On the 6th [556] November, 1875, the Subordinate Judge made a decree in favour of Dhondiba, holding that the sale by defendant No. 4 to defendants 1, 2 and 3 was fraudulent, and that the plaintiff was entitled to the property as first purchaser. The decree directed defendant No. 4 to fulfil her agreement with the plaintiff (Dhondiba) by executing to him a formal deed of sale of the property. On appeal (No. 55 of 1875) that decree was confirmed by the High Court on the 10th October, 1879. On the 17th January, 1880, Dhondiba and his partner, Hariha, instituted the present suit in the Subordinate Court of Poona against defendants 1, 2 and 3 for possession of the property. Defendant No. 4 was subsequently made a party to it on her own application. The plaintiffs offered to pay the balance of the purchase-money into Court with the presentation of the plaint on the 17th January, 1880, and, again, on the 18th June of the same year; but in fact, though through no fault of the plaintiffs, the money was not paid into Court. The plaintiff Dhondiba also presented on the 17th January, 1880, an application (*darkhast*) to the Court, praying that defendant No. 4 should be made to furnish him with a formal deed of sale of the property as directed by the decree in suit No. 799 of 1874 (Appeal No. 55 of 1875).

Defendants 1, 2 and 3 pleaded, *inter alia*, that the plaintiffs were not competent to bring this suit against them until they (the plaintiffs) had obtained a deed of sale of the property from defendant No. 4, and that the plaintiffs' claim to the moveable property in dispute was time-barred.

On the 10th July, 1880, the Subordinate Judge made a decree in favour of the plaintiffs for the immoveable property, and rejected their claim to the moveable property, holding that the latter was barred, under Act XV of 1877, sch. II, art. 49. The following is his statement of his reasons:—

“The plaintiffs sue to recover possession of property, both moveable and immoveable. Article 49 of sch. II of the Limitation Act (XV of 1877) provides a period of three years for suits for specific moveable property, to be counted from the time when the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful; and art. 144 provides a period of [557] twelve years for suits for possession of immoveable property, to be counted from the time when the possession of the defendant becomes adverse to the plaintiff. The plaintiffs have stated in their plaint that the

(1) See 4 B. 126.

1881
MARCH 2.
—
APPEL-
LATE
CIVIL.
—
5 B. 554=
6 Ind. Jar.
92.

cause of action in this suit accrued to them on the 10th October, 1879, being the date on which the decree of this Court in the last suit was confirmed, in appeal, by the High Court. But, according to the provisions of the Limitation Act quoted above, the cause of action with respect to both the moveable and immoveable property must be held to have accrued to the plaintiffs from the time when the defendants' possession became adverse to the plaintiffs. The decrees of this Court and of the High Court did not create any new right in favour of the plaintiffs, or give them any fresh cause of action. They simply made a binding declaration with respect to the right which had already become vested in the plaintiffs, but which was contested by the defendant. The plaintiffs, therefore, cannot date their cause of action from the passing of either of those decrees. On the 20th June, 1874, the first three defendants were placed in possession of the property by Mrs. Dickenson. The possession of the defendants has ever since been adverse to the plaintiffs, and the period of limitation must, therefore, be held to have commenced to run against the plaintiffs since the 20th June, 1874. When the plaintiffs brought their last suit to obtain a declaration of their title, as first purchasers, against defendants 1, 2 and 3, and to compel Mrs. Dickenson to pass to them a formal deed of sale, they could have simultaneously sued the defendants for possession of the property, but they did not do so. The period of limitation against the plaintiffs in this case must be reckoned from the 20th June, 1874, the date on which the defendants 1, 2 and 3 got possession of the property from Mrs. Dickenson."

On the 16th July, 1880, the plaintiffs paid into Court the balance of the purchase-money, and on the 23rd August of the same year they obtained a conveyance of the property executed by the Subordinate Judge on behalf of Mrs. Dickenson (defendant No. 4), under the Civil Procedure Code (Act VIII of 1859, s. 202, and Act X of 1877).

The plaintiffs appealed to the High Court on the 29th September, 1880.

[558] *Farran* (with him *Mānekshah Jehangirshah*), for the appellants, contended that the present cause of action dated from the decree of the Appeal Court made on the 10th October, 1879, and that, therefore, the suit was not time-barred.

Inverarity (with him *M. C. Apte*) appeared for respondents 1, 2 and 3, and took the preliminary objection that the plaintiffs had joined together in one suit causes of action which by s. 44 of the Civil Procedure Code may not be joined, except by leave of the Court first obtained.

Russell (instructed by *Chalk and Turner*) appeared for respondent No. 4 (Mrs. Dickenson).

JUDGMENT.

The judgment of the Court was delivered by

WESTROPP, C.J.—The Subordinate Judge has held the suit of the plaintiffs, so far as it regards moveable property, to be barred by Act XV of 1877, sch. II, art. 49, which prescribes the time "when the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful" as the point from which the period of limitation begins to run. The question, therefore, is—when did the possession of the detainers, the four defendants, become unlawful? To answer this question we must look at the contract between the plaintiff Dhondiba and Mrs. Dickenson, the fourth defendant, now Mrs. Bayley or Baillie. As stated in the judgment in the specific performance suit

1881
MARCH 2.
—
APPEL-
LATE
CIVIL.
—
5 B. 554—
6 Ind. Jur.
92.

between the same parties in respect of the same contract (1), the contract was perfected by the payment of the earnest-money (Rs. 1,000), on the 27th of May, 1874, to Messrs. Hearn, Cleveland, and Peile, as the solicitors and authorized agents of Mrs. Dickenson for the sale of the property. The letter of the plaintiff, Dhondiba, of the 26th May, 1874, contained (in its last paragraph) this passage: "I also agree to pay the balance of the purchase-money within a month from this date on execution of the conveyance by the administratrix." That implies that the conveyance was to be executed by Mrs. Dickenson within a month from the 26th May, 1874, and that thereupon the plaintiff Dhondiba would pay to her the balance of the purchase-money, which would be [559] Rs. 13,000—the whole purchase-money being Rs. 14,000. The terms offered by the plaintiff Dhondiba in that letter were, subject to the immediate payment of the earnest-money (Rs. 1,000), accepted by Messrs. Hearn, Cleveland, and Peile, by their letter of the 27th May, 1874. Hence it is clear that the plaintiff would not be entitled to the possession of the immovable property, the subject of the contract, until the execution of the conveyance (or something equivalent thereto) and the payment or tender of the balance of the purchase-money. Until then the plaintiff had, by the contract, acquired only that equitable lien on the property, usually called an equitable estate, *viz.*, a right to call for a conveyance and possession of the property on payment or tender of the balance of the purchase-money (2). He has throughout been ready and willing to pay that balance, and it is owing to the fraud and misconduct of Mrs. Dickenson and her co-defendants that it was not received, and that the conveyance was not duly executed to him within the time named in the letter of the 26th May, 1874.

That fraud and misconduct compelled him to institute his suit for specific performance, and for a declaration of his right of priority over the present defendants 1, 2 and 3 (which suit was brought without delay and within the period named in Act IX of 1871, sch. II, art. 113—the Limitation Act then in force), and, in that suit, the final decree of this Court on appeal was made in his favour on the 10th October, 1879. The balance of the purchase-money was paid into the Court of the Subordinate Judge on the 16th of July, 1880, and the conveyance was, under the Civil Procedure Code (Act VIII of 1859, s. 202; Act X of 1877, s. 262), in the absence of Mrs. Dickenson, executed on the 23rd August, 1880, by the Subordinate Judge on her behalf. "Where," as here, "an agreement is made for the sale of the immovable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immovable property." This is so enacted by s. 85 of the Indian Contract Act, IX of 1872. In the Mofussil of this Presidency, where there has been a contract for sale of immovable property and a suit by the vendee for specific performance of [560] it, the decree for the specific performance of the contract, (coupled with the payment of the purchase-money), pass and have been treated, so long as we can recollect, as sufficiently passing, *i.e.*, transferring, the ownership to the vendee, and entitle him to the possession of the property. It has been hitherto extremely unusual for the vendor to be required to go through the form of executing a conveyance to the vendee, or for the Judge, as in the present case, to execute the conveyance for an absent or recalcitrant

(1) 4 B. 126 (187).

(2) See *Lala Chumilal Nagindas v. Savaichand Namidas*, 5 W.R. 111 (P.C.).

vendor—proper as the Act VIII of 1859, s. 202, and Act X of 1877, s. 262, show that course to be. Were we, however, to hold the actual conveyance under such circumstances to be indispensable, we should shake thousands of titles heretofore considered unimpeachable. Without any conveyance the vendee is deemed to be, under the decree and the payment or tender of the purchase-money, full owner, and, as such, entitled to possession, and to maintain an action in the nature of ejectment against all persons bound by the decree and obstructing his right to possession. In the present case that right accrued to the plaintiffs, as regards both the moveable and immovable property, at the earliest on the making of the final decree in the specific performance suit and the payment or tender of the balance of the purchase-money under it. The period of limitation to the present suit commenced to run then, and not at the date of the original contract, and this suit is, accordingly, quite within the time allowed by art. 49, sch. II of Act XV of 1877,—the plaint having been presented on the 17th January 1880. So far from this suit being open to the impeachment of being too late, as held by the Subordinate Judge and contended for by the defence, the real question is whether it was not premature, the balance of the purchase-money not having been paid when this suit was instituted, or, in fact, until the 16th of July, 1880, *i.e.*, six days after the Subordinate Judge made his decree in this suit—such decree being dated the 10th of July, 1880. We find, however, on examination of the record, that the plaintiffs, simultaneously with the presentation of their plaint, offered to pay into Court the sum of Rs. 13,000, the balance of the purchase-money, and that they again offered to pay it into Court on the 18th of June, 1880. This is established by a [561] *darkhast* presented to the Subordinate Judge by the first, second, and third defendants on the 19th of June, 1880. In that *darkhast* it is stated that “while the discussion was going on yesterday in Court, the plaintiffs offered to pay the balance of the purchase-money, Rs. 13,000. To whom should this money be paid—whether to us or to the fourth defendant (Mrs. Dickenson *alias* Bayley)? With reference to this discussion, we omitted to mention one circumstance. If the Court comes to the conclusion that the fourth defendant should get the purchase-money, she, it should be remembered, has received from us Rs. 5,000. She admits this—“the balance of Rs. 10,000” (alleged by the first three defendants to have been paid by them to Mrs. Dickenson, on their contract with her for purchase—held in the specific performance suit to be fraudulent as against the plaintiff in that suit) “she does not admit to have received. The Court should be pleased to make an order to pay her the remaining sum after deducting Rs. 5,000.” The order made on that *darkhast* by the Subordinate Judge on the same 19th of June, 1880, was that this *darkhast* (or petition) should be taken into consideration by him when making his decree in the suit. That the balance of the purchase money was not received into Court together with the plaint, was the fault of the Court, and not of the plaintiffs. The act or omission of the Court cannot be permitted to prejudice the suitor. Again, the non-reception of that balance, when again tendered on the 18th of June, 1880, was due partly to the convenience of the Court and partly to a question raised by the defendants. For this the plaintiffs are not responsible. We must hold that they were entitled to bring this suit when they did, and that it was neither premature nor too late. The objection made in this Court to-day by the learned counsel on behalf of the defendants other than Mrs. Dickenson

1881
MARCH 2.
—
APPEL-
LATE
CIVIL.
—
5 B: 554—
6 Ind. Jur:
92.

1881
MARCH 2.
—
APPEL-
LATE
CIVIL.
—
5 B. 554 =
6 Ind. Jur.
92.

(i.e., the first three defendants), that leave was not obtained to bring this one suit for the immoveable and moveable property together, was not made in the Court below—those defendants being then and there apparently content to have the suit decided on its merits. Such an objection being of a dilatory character, and quite besides the merits, ought, we think, to have been taken in the Court of first instance, and not after the parties have incurred the cost and expended the time [562] necessary for a hearing on the merits. If not taken in the Court of first instance, and the defendants have gone to a full hearing on the merits, we think that it must be regarded as waived. It is, therefore, unnecessary for us now to decide whether, in a case like this, viz., a single contract for sale of moveable and immoveable property together, s. 44 of Act X of 1877 renders leave to bring such a suit as this a preliminary step requisite for its institution.

We vary the decree of the Subordinate Judge by holding that, neither as regards the moveable nor the immoveable property, is this suit barred by the law of limitation; and by directing that the plaintiffs (Hariba being admittedly in the same interest as Dhondiba) be put into possession of the moveable property as well as the immoveable property respectively mentioned in the plaint. And if it appear to the Subordinate Judge on inquiry that the said moveable property has, since the date of the contract for sale by Mrs. Dickenson to the plaintiff Dhondiba, become deteriorated or to any extent been lost, so that it cannot now be delivered to the plaintiffs in the same condition and to the same extent as it existed at that date, let the Subordinate Judge ascertain and fix the amount in money, which would be a fair compensation to the plaintiffs for such deterioration and loss. And it is hereby directed that all of the defendants shall forthwith pay to the plaintiffs the amount so fixed by the Subordinate Judge. Mrs. Dickenson (otherwise Bayley) must bear her own costs of this suit and appeal. The other defendants must pay to the plaintiffs their costs of this suit and of the appeal.

5 B. 563 = 6 Ind. Jur. 38.

[563] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., and Mr. Justice Melvill.

VARJIVAN RANGJI AND OTHERS (*Plaintiffs*), *Appellants v. GHELJI GOKALDAS AND OTHERS (Defendants), Respondents.**

GHELJI GOKALDAS AND OTHERS (*Defendants*), *Appellants v.*

VARJIVAN RANGJI AND OTHERS (*Plaintiffs*), *Respondents.**

[27th January, 1881.]

Hindu law—Widow—Daughter—Alienation—Consent of heirs—Legal necessity.

An alienation, by a Hindu widow, of immoveable property inherited from her husband is invalid in the absence of legal necessity, but the invalidity can be removed by the consent of all the heirs of the widow's husband who are likely to be interested in disputing the transaction: *Raj Lukhee Dabee v. Gokool Chunder Chowdhry* (1) followed.

Sale made conjointly by a Hindu widow and her daughter, who subsequently predeceased her mother, of immoveable property inherited by the widow from her husband, in the absence of legal necessity ordered to be set aside; and the grandsons

* Cross Appeals Nos. 175 and 180 of 1880.

(1) 13 M.I.A. 209.