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VENU v. COORYA NARAYAN.

The defendant did not appear in person or by counsel.

SARGENT, J.—We answer the question in this case, viz., was the discharge of the plaintiff by the Magistrate such a termination of the prosecution as entitled her to maintain an action for malicious prosecution, in the affirmative.

APPELLATE CIVIL.

FULL BENCH.

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Melvill, Mr. Justice West, and Mr. Justice Pinhey.

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February 2.

BAISURAJ, WIDOW OF SANMUKRAM (ORIGINAL DEFENDANT), APPELLANT, v. DALPATRAM DAYASHANKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Vendor and purchaser—Hindu law—Necessity of possession—Vendor without possession—Ejectment—Sale of right of entry—Right of Purchaser—Construction —Intention of parties.

A Hindu, whose estate is in the possession of a trespasser or a mortgagee, may sell his right of entry as such, or his equity of redemption as such, and the purchaser may thereupon sue to eject the trespasser or to redeem the mortgage; but a bill of sale by a Hindu vendor, purporting to convey *the estate itself*, executed by a person who is not in possession, cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment.

Raja Saheb Prahlad Sen v. *Baboo Budhusing* (1) *and Ronu Bhobosundree Daseah* v. *Issurchunder Dutt*(2) followed.

Bikan Singh and others v. *Mussamut Parbutty Kover and others* (3), *Gungahurry Nundee* v. *Raghubram Nundee* (4), *and Lokenath Ghose* v. *Jugobundhoo Roy* (5) referred to.

Cases will often arise in which, though a bill of sale may in terms purport to convey the property itself, yet it is clear upon the face of the instrument that the intention of the parties was to convey the right of entry or the equity of redemption, and nothing more. In such cases the Court should not lay stress on the mere terms of the instrument, but give effect to the intention of the parties, and recognize the purchaser's right of action.

THIS was a special appeal from the decision of A. D. Pollen, Acting Assistant Judge of Surat, reversing the decree of the Second Class Subordinate Judge of Broach.

* Special Appeal, No. 292 of 1874.

(1) 12 Moo. I. Ap. 275, 307; S. C. 2 Beng. L. R. P. C. 111.
(2) 11 Beng. L. R. 36.
(3) 22 Calc. W. R. 99.
(4) 14 Beng. L. R. 307.
(5) I. L. R., 1 Calc. 297.

The facts of the case are fully stated in the order of reference.

The case first came before Westropp, C. J., and Kemball, J., who, on the 18th August, 1877, referred it to a Full Bench with the following statement :—

WESTROPP, C. J.—The plaintiff Dalpatram brought this suit against the first defendant Bai Suraj, a widow, to obtain possession of 32 bighas and a fraction of *vazifa* land in the village of Vejulpore, then in the possession of the second defendant Mahomed Dussoo, who claimed to hold the land as sub-tenant of the first defendant Bai Suraj. There were two other defendants, who did not appear at the original hearing, and who are not parties to this special appeal. They were averred in the plaint to be sub-tenants of Bai Suraj.

The plaintiff's title rested upon a deed of conveyance executed to him on the 21st June, 1865, by Harishankar, the husband of a woman named Rukshmani, whom he had survived. That deed (exhibit No. 3), rendered into English *viva voce* by the Court Interpreter, is as follows :—

"I have taken from you Rs. 2,995 in ready cash of the Company's currency. In consideration of the same, I have sold to you property situated at Broach, &c., &c., known as the property of Asyaram, obtained by me by inheritance. I have sold the same to last so long as the sun and moon endure, and I have given up my claim to the whole of this property (property here specified in detail). The whole of the above-mentioned property was distributed in the time of Parbhuram Asyaram, and there were deeds of partition accordingly. The Haveli lands, buildings thereon, and other lands are entered in the Government records mentioned above. The same, as well as open land, all these from this day I have given possession of to you. You may occupy, use, mortgage, let, or sell the same. I have now nothing to do with those properties. I have executed this deed of my own will and pleasure."

It is found as a fact by the Assistant Judge that the plaintiff's vendor, Harishankar, was not in possession at the time of the execution of the above deed.

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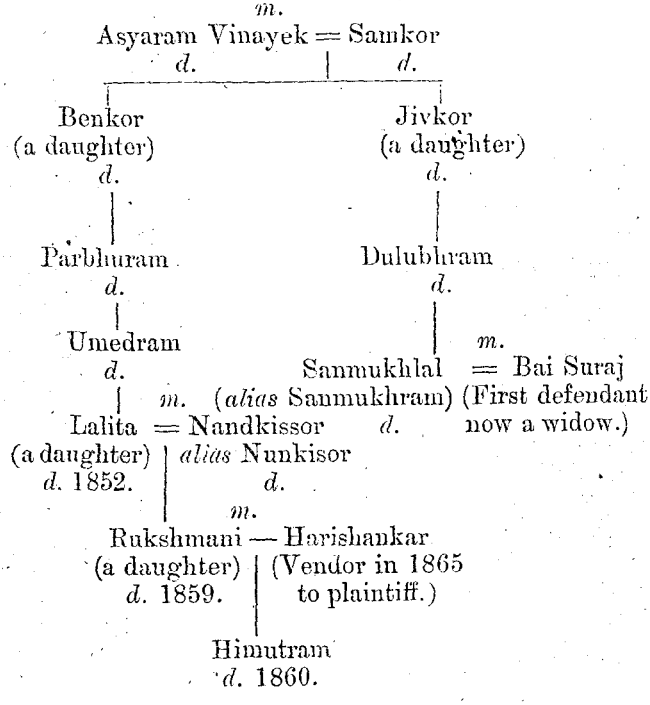
Asyaram Vinayek, in whom the property was originally vested in possession, had four wives; but as only one of them, namely, Samkor, appears to have left any issue by him, she alone is mentioned in the following pedigree, which may be usefully introduced here:—

Pedigree.



The *vazifa* land in dispute originally belonged, as already stated, to Asyaram Vinayek, and eventually descended upon his great-great-granddaughter Lalita through her father Umedram. From Lalita it descended upon her daughter Rukshmani, and upon her death in 1859 it descended upon her son Himutram, and, upon his death in 1860, it would appear to have descended upon his father Harishankar, husband of Rukshmani. At least this course of descent from Lalita to Rukshmani, from Rukshmani to Himutram, and from Himutram to Harishankar, was determined by the High Court with respect to another portion of the property of Asyaram Vinayek consisting of a house and land in Broach (see the judgment of Forbes, J.—Arnould, Acting C. J.,

and Warden, J., concurring—in *Navulram Atmaram* v. *Nandkishore*(1). The *vazifa* land in dispute in the present suit was, as a matter of fact found by the Assistant Judge, enjoyed by Lalita and her daughter in succession, the *kabulayats* given by the under-tenants being executed in favour of Lalita and Rukshmani successively, and the rent being paid to them. We gather from the judgment of the Assistant Judge, Mr. Pollen, in the Regular Appeal in this case, that he also held* Himutram to have been in possession from the death of his mother Rukshmani in 1859 until his own death in 1860—at which time it would appear that the first defendant, Bai Suraj, the widow of Sunmukhlal (*alias* Sunmukhram), who was a great-great-grandson of Asyaram Vinayek, induced the sub-tenants to attorn to her by executing *kabulayats* in her favour, and paying rent to her. Hence it is that Harishankar was not in possession when, in 1865, he conveyed the *vazifa* land to the plaintiff by the deed above set forth.

The Subordinate Judge, relying on *Girdhar* v. *Daji*(2), has held that Harishankar, not being in possession at the time of the execution of the deed, the plaintiff, as his vendee, cannot recover the land in this action.

The Assistant Judge, referring to the first passage in the judgment of Couch, C. J., in *Girdhar* v. *Daji*,—viz., "although, according to Hindu law, transfer of possession is not essentially necessary to give validity to a sale of immoveable property, yet it is essential that the vendor should have possession at the date of the sale,"—proceeds to comment on it thus: "This doctrine, if applied literally to the present case, would decide the suit against the plaintiff, because his vendor Harishankar became by operation of law the owner of the property, and the power of alienation is

(1) 1 Bom. H. C. Rep. 209. (2) 7 Bom. H. C. Rep., A. C. J.

* NOTE.—There may be a shade of doubt whether the Assistant Judge positively found this to be so. But, even assuming that the sub-tenants did not pay rent to Himutram, the presumption of law would, until they repudiated tenancy under him, be that after the death of Rukshmani they continued to be the tenants of her son Himutram, who was her only child and undoubted heir; and the Assistant Judge must be regarded as finding that Bai Suraj did not obtain possession until after Himutram's death in 1860, when the sub-tenant or sub-tenants in occupation attorned to her.

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a necessary incident of ownership. It seems evident to me, then, that the suit in question was not determined with reference to this doctrine. I am certain that the decision in question has been misunderstood, at least by many of the pleaders and Subordinate Judges. After quoting with approval a Privy Council case (12 Calc. W. R. P. C. 6), which only shows that a purchaser may claim a performance of the contract whenever his vendor becomes in a position to perform it, as, for instance, on the happening of a certain contingency, Chief Justice Couch proceeded to say 'the vendor could not sell property of which he had been dispossessed at the date of the sale. *The sale under such circumstances could only, at the utmost, give a right to sue for the land of which the vendor had been dispossessed.*'* In most cases this is all the purchaser wants: this is all he wants in the present instance. If the purchaser cannot get all he wants from Bai Suraj, he may then sue his vendor for damages. It is not pretended that all the property cannot be reached by suing Bai Suraj, for it is in the possession of tenants paying rent to her. If she, before the sale to the plaintiff, had destroyed any of the property, or made its delivery impossible, then, perhaps, the doctrine might have applied; but here we have the case of Harishankar succeeding to certain property, and selling his right to it to a third party. The third party seeks to enforce his right by ousting a trespasser; and as he can reach all the property by doing so, he is, I think, entitled to the relief he seeks. The difficulty of possession may be got over from another point of view. Though Harishankar himself never had possession, those through whom he claims by inheritance had possession, namely, Lalita and Rukshmani. His claim as heir being established, their possession may be regarded as his, and this being so, he has a right to sell the property." The learned Assistant Judge then reversed the decree of the Subordinate Judge, and made a decree for the plaintiff with all costs against Bai Suraj.

There being some conflict of authorities as to the effect of absence of possession on the part of a vendor, we submit to a Full Bench the question, whether, under the circumstances above related, and especially the fact that Harishankar was not in

* The italics are those of the Assistant Judge.

possession in 1865 when he executed the conveyance to the plaintiff, the latter can maintain this suit against Bai Suraj and her sub-tenants?

The question argued before the Full Bench was whether the sale, under which the plaintiff claimed, was invalid, because his vendor was not in possession of the property sold at the time of the sale.

Nagindas Tulsidas, for the appellant, relied upon *Raja Sahib Prahlad Sen* v. *Baboo Budhusing* (1); *Ranee Bhobosoondree Dasseah* v. *Issurchunder Dutt* (2); *Mathewsetlal* v. *Girdharlal Fatechand* (3); *and Kachu Bayaji* v. *Kachoba Vithoba and another* (4).

Gokaldas Kahandas, for the respondent, contended that a sale was not void merely because the vendor was not in possession of the property sold. If he had a right to it, the sale was valid. The learned pleader cited *Bikan Singh* v. *Mussamut Parbutty Kooer* (5); *Gungahurry Nundee* v. *Raghubràm Nundee* (6); and *Lokenath Ghoose* v. *Jugobundhoo Roy* (7).

The following is the judgment of the Full Bench delivered by—

MELVILL, J.—In *Raja Sahib Prahlad Sen* v. *Baboo Budhusing* (8) and in *Ranee Bhobosoondree Dasseah* v. *Issurchunder Dutt* (9) the Judicial Committee have clearly stated their view of the law to be that the execution of a bill of sale by a Hindu vendor does not pass an estate, unless there be a transfer of possession actual or constructive, and that, consequently, the sale of an estate by a person who is not in possession cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment. This decision has been followed in two reported cases by this Court—*Mathews* v. *Girdharlal Fatechand* (10), *Kachu Bayaji* v. *Kachoba Vithoba* (11), and the question, therefore, appears to us to be, so far as this Court is concerned, concluded by authority.

(1) 12 Moo. I. Ap., 275, 307; S. C. 2 Beng. L. R. P. C. 111.
(2) 11 Beng. L. R., 36.
(3) 7 Bom. H. C. Rep., 4.
(4) 10 Bom. H. C. Rep., 491.
(5) 22 Calc. W. R. 99.
(6) 14 Beng. L. R., 307.
(7) I. L. R. 1. Calc., 257.
(8) 2 Beng. L. R. I. C., 111; S. C., 12 Moore's Ind. Apps., 275, 307.
(9) 11 Beng. L. R., 36.
(10) 7 Bom. H. C. Rep., 4.
(11) 10 Bom. H. C. Rep., 491.

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There are, indeed, some Calcutta cases in which the Privy Council rulings seem to have been evaded or disregarded—*Bikan Singh and others* v. *Mussamut Parbutty Kooer*(1), *Gungahurry Nundee* v. *Raghubram Nundee*(2), and *Lokenath Ghose* v. *Jugobundhoo Roy*(3); but those rulings are couched in terms so clear and authoritative, that we think we must hold ourselves bound by them, until the law be differently stated by the Judicial Committee.

It may, indeed, be taken as established that a Hindu, whose estate is in the possession of a trespasser or a mortgagee, may sell his right of entry, as such, or his equity of redemption, as such, and that the purchaser may thereupon sue to eject the trespasser, or to redeem the mortgage. It must be confessed that it savors somewhat of technicality to insist that the result shall be wholly different, merely because the bill of sale purports to convey the estate itself, and not the right of entry, or the equity of redemption. It is not, however, a disadvantage that persons in this country should be compelled to do what they seem very unwilling to do, namely, to state the truth, and express their real intentions, in the instruments which they execute. It would tend to honest dealing if, in such documents as that relied on by the plaintiff in this case, the vendor were to admit that he was out of possession, and was merely selling his right of action, instead of falsely pretending that he sold an estate of which he was in possession, and that he put the purchaser in possession at the time of the sale. We do not, therefore, see that we need be astute to find arguments for explaining away the Privy Council decisions; and we are quite prepared to follow them to the full extent to which, we think, they were intended to go.

Cases will, no doubt, often arise in which, though a bill of sale may, in terms, purport to convey the property itself, yet it is clear upon the face of the instrument that the intention of the parties was to convey the right of entry, or the equity of redemption, and nothing more. *Vasudev Hari* v. *Tatia Narayan*(4), which was referred to the Full Bench at the same time with the present case, is an instance in point. In such cases we should not, we

(1) 22 W. R., 99.
(2) 14 Beng. L. R., 307.
(3) Ind. L. R., 1 Calc., 297.
(4) *Infra*, p. 387.

think, lay stress on the mere terms of the instrument, which follow a certain established usage, but should give effect to the intention of the parties, and recognize the purchaser's right of action. But there is nothing to take the present case out of the operation of the rule laid down by the Judicial Committee; and we, therefore, reply to the Division Bench that the plaintiff cannot maintain his suit against Bái Suraj and her sub-tenants.

On the return of the case by the Full Bench, it came for final disposal before Melvill and Kemball, JJ., who, on the 14th February, 1882, reversed the decree of the Assistant Judge, and restored that of the Subordinate Judge, with all costs on the plaintiff throughout.—(*Note;* See next case.)

Decree reversed.

APPELLATE CIVIL.

FULL BENCH.

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Melvill, Mr. Justice West, and Mr. Justice Pinhey.

VASUDEV HARI PATVARDHAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* TATIA NARAYAN, SON AND HEIR OF NARAYAN HAIBUTRAV, DECEASED, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

February 2.

Vendor and purchaser—Hindu law—Possession—Sale of land by a Hindu—Vendor without possession—Sale of right of entry—Conveyance of right of action—Right of purchaser.

Where a Hindu vendor sold his share in certain land, but expressly stated in the deed of sale that he was out of possession; that the land was in the hands of a third party, to whom it had been mortgaged without the vendor's authority, and that he (vendor) empowered the purchaser to bring a suit against the person in possession in order to recover the vendor's share in the land, with mesne profits.

Held that what the deed contemplated was nothing more than the transfer of the right of entry, although, according to the invariable mode of expression in such documents, the vendor professed, in terms, to convey the property itself.

Held further that the purchaser acquired the same right of action which his vendor possessed, notwithstanding that the vendor was not in possession at the date of the sale.

Bai Suraj v. *Dalpatram* (1) referred to.

THIS was a special appeal from the decision of W. M. Coghlan, Judge of the District Court of Thána, affirming the decree of Náro Mahádeo, Second Class Subordinate Judge of Mahád.

* Special Appeal, No. 80 of 1877.

(1) See *supra*, p. 380.