

ORIGINAL CIVIL.

Before Mr. Justice Scott.

1886.
November
12, 15.

PITAMBER SUNDARJI, (PLAINTIFF), v. CÁSSIBÁI, EXECUTRIX OF
MÁNCOREBÁI, WIDOW, (DEFENDANT).*

Vendor and purchaser—Contract for sale of immoveable property—Breach of such contract—Damages—Costs of suit—Title to be made by vendor.

On the 8th October, 1884, the defendant, who was executrix of one Máncorebái, contracted to sell to the plaintiff a house in Bombay for Rs. 5,351; the contract to be completed within two months. The plaintiff paid Rs. 500 as earnest-money at the date of the contract, and the remainder of the purchase-money was to be paid on the execution of the conveyance. In October, November, and December the plaintiff's solicitors applied to the defendant for the title-deeds, in order that the conveyance might be prepared; and on the 6th December the defendant through her solicitors replied that she was ready and willing to execute the conveyance, but could not find the title-deeds. The plaintiff's solicitors then requested to be furnished with an abstract of title or a statement of the defendant's title to the house, and then they would consider what could be done. No reply to this letter being received, they wrote again on the 10th December, 1884, stating that the time for completing the contract had expired; and giving formal notice that, if the defendant did not send the abstract or statement of title within two days, proceedings would be taken to compel specific performance, and to recover damages. In reply to this letter, the defendant's solicitors wrote on the 11th December, 1884, stating that the defendant had searched for the title-deeds, but had been unable to find them, but that as soon as they were found they would be handed over. In the meantime, they were instructed to state that the property was mortgaged to Máncorebái, (of whose will the defendant was executrix), and one Kessowji Jádowji; that Kessowji Jádowji had agreed to convey the property in question to the defendant, and that the deed of conveyance was being prepared. They further stated that, if the plaintiff wished to accept a conveyance without the old title-deeds, the defendant was willing to indemnify him against all claims to the property; but, if he was not prepared to do so, the defendant was willing to pay back the earnest-money to him, and to rescind the contract. On the 13th December, 1884, the plaintiff's solicitors wrote that they could not advise the plaintiff to take the mere conveyance offered, but if the defendant would deposit the purchase-money in a bank in the joint names of the plaintiff and defendant until the title-deeds were found, the plaintiff would complete the purchase at once. They further stated that the plaintiff declined to rescind the contract, and would hold the defendant responsible for loss and costs incurred by the delay.

Further correspondence ensued, and the suit was filed on the 20th February, 1885, praying for specific performance and Rs. 500 damages, or that the defendant should pay to the plaintiff the sum of Rs. 2,500 damages and refund the Rs. 500

*Suit No. 74 of 1885.

earnest-money. It subsequently transpired that the title-deeds were with Kessowji Jádowji, the co-mortgagee, and they were set forth in the defendant's affidavit of documents filed in July, 1885. The defendant, after the suit was filed, sold the property to one Jaikissondás Gangádás; and Kessowji Jádowji, the co-mortgagee, joined in the conveyance to him.

Held, that the case was governed by *Flureau v. Thornhill*(1) and *Bain v. Fothergill*(2), and that the plaintiff could not recover damages for the loss of his bargain. The defendant had offered to do all that lay in her power to carry out her contract, and the case of *Engell v. Fitch*(3) did not apply.

Held, also, that as the defendant had not paid the earnest-money into Court, or formally tendered it, she must pay the costs of the suit.

A purchaser of immoveable property is entitled to receive, and the vendor is bound to give, a title free from reasonable doubt.

SUIT by a purchaser for specific performance of a contract to sell a house, or for damages for breach of contract.

By an agreement dated the 8th October, 1884, the defendant, who was the executrix of one Máncorebái, contracted to sell a house in Bombay to the plaintiff for the sum of Rs. 5,551, the contract to be completed within two months. The plaintiff paid Rs. 500 as earnest-money at the date of the contract, and the remainder of the purchase-money was to be paid upon the execution of the formal conveyance.

On the 23rd October, 1884, the plaintiff's solicitors, (Messrs. Chalk and Walker), wrote to the defendant, requesting her to send them the title-deeds, in order that the conveyance might be prepared. No reply being received, they wrote again on the 22nd November, 1884, and again on the 5th December, 1884, calling upon her to complete the sale, and warning her that, if the purchase was not completed by the 8th December, as provided by the contract, the plaintiff would file a suit for specific performance.

On the 6th December, 1884, the defendant's solicitors, (Messrs. Jefferson, Bháishankar, and Dinshá), wrote, in reply, stating that the defendant was ready and willing to execute the conveyance, but regretted that she could not find the title-deeds.

On the same day (6th December, 1884,) Messrs. Chalk and Walker wrote to Messrs. Jefferson, Bháishankar, and Dinshá, referring to

(1) 2 W. Bl., 1078.

(2) 7 Eng. & Ir. Ap., 268.

(3) L. R., 4 Q. B., 659.

1886.

PITÁMBER
SUNDARJI
v.
CÁSSIBÁI.

their last letter, and requesting them to send an abstract of title, or a statement of the defendant's title to the house, and then they would consider what could be done. No reply was received to this letter, and on the 10th December, Messrs. Chalk and Walker wrote again, calling attention to the fact that the time for completing the contract had expired on the 8th, and giving formal notice that, if the defendant did not send the abstract or statement of title within two days, proceedings would be taken to compel specific performance, and for damages,

In reply to this letter, Messrs. Jefferson, Bháishankar, and Dinshá, the defendant's solicitors, wrote on the 11th December 1884, stating that the defendant had searched for the title-deeds, but had been unable to find them; but that, as soon as they were found, they would be handed over. In the meantime they were "instructed to state that *the property was originally mortgaged by one Meghji Calliánji to one Rámji Jethá, who again mortgaged the property to Máncorebái, the widow of Gangádás Vizbhukandás, and Kessowji Jádowji. The last-named gentleman has agreed to convey the property to our client, Báí Cássibái, and the deed of conveyance is being prepared in the office of Messrs. Payne, Gilbert, and Sayáni. All these facts were brought to the notice of your client before our client entered into the agreement for the sale of the house, and he was informed, at the time, that the title-deeds could not be found, but that they would be handed over to him when our client had found them. If your client wishes to accept a conveyance at present without the old title-deeds, our client is willing to indemnify him against all claims to the property; but if he is not prepared to do so, our client is willing to pay back the earnest-money to your client, and rescind the contract.*"

In reply to that letter, Messrs. Chalk and Walker wrote, as follows, on the 13th December, 1884:—

"Dear Sirs,

"We are in receipt of your letter of the 11th instant.

"We are informed by our client that the facts mentioned in your letter were never brought to his notice. In your said letter you did not give any particulars of date, month, or the year in

which the house was mortgaged. Your client must have known the state of the title before she entered into the contract, and the least she can now do is to give us a full statement of the title for our consideration. Why cannot copies of the deeds be obtained from the Registrar ?

“ We cannot advise our client to take the mere conveyance as offered by you ; but if your client consents to deposit the purchase-money in a bank, in the joint names of your and our clients, until the title-deeds are found, our client will complete the purchase at once.”

“ He declines to rescind the contract, and holds your client responsible for his loss and costs by the delay in completion.”

On the 6th January, 1885, Messrs. Chalk and Walker wrote the following letter :—

“ Dear Sirs,

“ We beg to draw your immediate attention to our letter to you of the 13th ultimo. The matter cannot be allowed to remain in its present unsatisfactory state any longer : unless, therefore, your client furnishes some proper evidence of title in the course of this week, a suit will be filed against her, at her cost, without further delay.”

To this above letter, Messrs. Jefferson, Bhaishankar, and Dinshá replied as follows on the 8th January, 1885 :—

“ Dear Sirs,

“ We are in receipt of your letter of the 6th instant. Our client is quite willing and anxious to convey the property to yours, and she has no desire whatever to throw any obstacles in the way of completing the sale. She can derive no benefit from doing so, and it is only an unfortunate accident that the old title-deeds are not at hand, of which your client was perfectly aware when he entered into the contract for sale. She is doing her best to discover the deeds, but she has not yet succeeded, and she cannot be called upon to do what it is impossible for her to do, namely, to produce the title-deeds, which are not in her possession. She is, however, willing to convey the house to your client, with an indemnity against any loss by reason of the non-

1886.

PITÁMBER
SUNDARJI
v.
CÁSSIBÁI.

1886.

PITÁMBER
SUNDARJI
v.
CÁSSIBÁI.

production of the old deeds; we may remind you that our client has been in possession of the house for the last nineteen years. The title-deeds are still being searched for, and if they are found, our client will be happy to send them to you; but this must take some time, and your client cannot be prejudiced by a short delay in completing the purchase. If, however, he is not disposed to wait, our client gives him the option of rescinding the contract, and it will be, therefore, unnecessary to incur further costs in the matter. Should he, however, after this intimation, take any action, as threatened, he will do so at his own risk.

“The deed of mortgage from Rámji Jetha to Máncorebái and Kessowji Jádowji can be inspected in the office of Messrs. Payne, Gilbert, and Sayáni, if your client wishes to do so.”

On the 13th January, 1885, Messrs. Chalk and Walker wrote as follows:—

“Dear Sirs,

“We are in receipt of your letter of the 8th instant.

“We are instructed by our client to state that he is surprised at the statements made that our client was perfectly aware that the old title-deeds were not at hand when he entered into the contract. It is quite a mistake, and if your client knew at the time that the old title-deeds were lost or mislaid, she ought not to have entered into the contract of sale.

“Our client declines to complete the purchase merely upon an indemnity from your client, but is ready and willing to complete the purchase if the money is deposited in our and your clients' names until the old title-deeds are found and handed over to our client, the interest being paid to your client in the meantime. It is the first time you mention that your client has been in possession for the last nineteen years; but in proof of that you do not offer to show or send us an extract of any paper or document or a declaration to vouch the statement.

“Your client has already had abundant time to furnish some abstract of title and proof of ownership, and it is obvious that this can be done. Our instructions are not to allow the matter to remain in the unsatisfactory state it is now any longer.

“Our client is not bound to go to the office of Messrs. Payne, Gilbert, and Sayani to inspect the mortgage, but it is the duty of your client either to send the original mortgage, or an abstract thereof, to the purchaser’s solicitors. If, however, your client agrees to pay all costs which may be incurred by our client, we will go and inspect the mortgage-deed, and see what title your client really has; but we consider this the vendor’s duty, not the purchaser’s.”

“If the matter be not placed on some more satisfactory footing in the course of two days from the receipt hereof, our client will take such proceedings in the matter, as he may be advised, at your client’s costs.”

The suit was filed on the 20th February, 1885, and the plaintiff prayed that the defendant should be ordered to specifically perform the contract of the 8th October, 1884, and to pay the plaintiff the sum of Rs. 500 as damages, or (2) that the defendant should be ordered to pay to the plaintiff the sum of Rs. 2,500 as damages, and the sum of Rs. 500 paid by the plaintiff as earnest-money.

In her written statement filed on the 25th April, 1885, the defendant repeated the allegations made by her solicitors in the above correspondence, *viz.*, that at the time of making the contract she informed the plaintiff that the title-deeds of the property in question had been lost or mislaid, and were not in her possession; that she had promised to search for them, but had stipulated that, if they were not found, the plaintiff should nevertheless accept the defendant’s title, to which stipulation the plaintiff consented; that she had searched for the deeds, but without success. She further stated that she was still willing to do what she had offered to do before the suit, *viz.*, either to convey the property to the plaintiff, giving him an indemnity in respect of the missing deeds, or, in the alternative, to cancel the contract and repay the deposit money.

It subsequently transpired that the title-deeds had been with Kessowji Jádowji, who was, as stated in Messrs. Jefferson, Bháishankar, and Dinshá’s letter of the 11th December, 1884,

1886.

PITÁMBER
SUNDARJI
v.
CÁSSIBÁI.

1886.

PITÁMBER
SUNDARJI
v.
CÁSSIBÁI.

above set forth, the co-mortgagee of the property with Máncoré-bái, of whose will the defendant was executrix, and they were duly mentioned in the defendant's affidavit of documents filed in July, 1885.

The defendant, after this suit was filed, sold the property in question to one Jaikissondás Gangádás; and the co-mortgagee, Kessowji Jádowji, joined in the conveyance to him. The suit was afterwards referred to arbitration; but the arbitrators subsequently withdrew at the instance of the defendant, and the case now came on for hearing.

Farran (Acting Advocate General) and *Kirkpatrick* for the plaintiff:—The contract made no stipulation as to title. The defendant, as vendor, was bound to give a good title to the plaintiff. From the title-deeds, which are now forthcoming, it appears that the defendant was in a position to give a good title to the plaintiff. The defendant must have known where the title-deeds were; if she did not, it is clear that if she had made any inquiry whatever for them, she would have at once discovered them; she has since done so, and has conveyed the property to a third party. It is untrue that the plaintiff was told, at the time of the contract, that the deeds were missing. We wish to get specific performance; but if that is impossible, in consequence of the sale of the property to a third party, we claim damages from the defendant, and also a return of the Rs. 500 deposit, and the costs of this suit.

Inverarity (with *Macpherson*) for the defendant:—The defendant is executrix of Máncoré-bái, who was one of two mortgagees. She, therefore, could only convey her undivided interest in the property. That interest she has now conveyed to Jaikissondás Gangádás; and Kessowji Jádowji, the co-mortgagee, joined in the conveyance, so that Jaikissondás has now the whole interest in him. That conveyance, however, so far as regards the defendant's interest, is void, being made *pendente lite*. The defendant is, and always has been, willing to convey her interest to the plaintiff, whatever it is. She is not bound to give a good title—*Devi Ghela v. Jivraj Mukundás*⁽¹⁾.

(1) 2 Bom. H. C. Rep., 406.

As to the plaintiff's claim for damages, it is clear he is not entitled to any damage for the loss of his bargain—*Bain v. Fothergill*⁽¹⁾. Damages can only be obtained in an action of deceit.

Farran in reply:—When the defendant made the contract with the plaintiff it is clear that she intended to make over the property to him. This she could only do by getting Kessowji Jádowji, the co-mortgagee, to join in the conveyance. This she was bound to do after making the contract with the plaintiff. But she has since then got Kessowji Jádowji to join her in conveying the property, not to the plaintiff, but to Jaikissondás. By so doing she has put it out of her power to fulfil her contract with the plaintiff. The plaintiff cannot now get the property he contracted to buy; for the undivided half interest, which was in Kessowji as co-mortgagee, has passed to Jaikissondás. The plaintiff, therefore, is entitled to damages. Why should not the defendant, who thus deliberately disables herself from keeping this contract, be liable as a party would be in any other case? The rule laid down in *Devisi Ghela v. Jivraj Mukundás*⁽²⁾ has been superseded by section 18 of the Specific Relief Act I of 1877. The defendant has herself by her own act made it impossible for her to fulfil her contract, and must pay damages. The law laid down in *Engell v. Fitch*⁽³⁾ is applicable to the case. In her solicitors' letter of the 11th December, 1884, the defendant admits that she was able to convey the premises to the plaintiff, and we say that Kessowji Jádowji was willing to join her in such conveyance, as is shown by the fact that he subsequently did join her in conveying to Jaikissondás. Defendant could have given a title to the plaintiff, and has refused to complete her contract, and the plaintiff is entitled to compensation—*Bain v. Fothergill*⁽⁴⁾. He is also entitled to expenses, and to a return of the deposit, with interest.

November 30. SCOTT, J.:—In this case there were two questions of law raised. In the first place, Mr. Inverarity argued that the English rule, which gives to the purchaser of immove-

(1) 7 Eng. & Ir. Ap., 158.

(3) L. R., 4 Q. B., 659.

(2) 2 Bom. H. C. Rep., 406.

(4) 7 Eng. & Ir. Ap., 158.

1886.

PITÁMBER
SUNDARJI
v.
CÁSSIBÁI.

ables a right to have a good title made out, does not apply to India—*Devsí Ghelá v. Jivráj Mukundás*⁽¹⁾. This case cited by him seems to show that the title to be given depends on the intention of the parties. In the present case, the words, “a clear deed of sale” and the demand for the title-deeds and the promise to give them, show that the parties contemplated some title. Moreover, the Specific Relief Act I of 1877, sec. 25, would seem, by implication, to lay down the rule, that the purchaser is entitled to receive, just as the vendor must give “a title free from reasonable doubt.” The defendant in this case, therefore, was, in my opinion, bound both by agreement and by law to give “a title free from reasonable doubt.”

But the further and more difficult question is the measure of damages in the case of failure on her part to carry out her contract. The decision on that point really turns on the question whether this case comes within the rule laid down, a hundred years ago, in *Flureau v. Thornhill*⁽²⁾, and confirmed by the House of Lords in 1874 in *Bain v. Fothergill*⁽³⁾. Lord Hatherley, in the last case, lays it down, as a settled rule, that in the sale of immoveables “no damages can be recovered for a loss of the benefit of a bargain in case a good title cannot be made out by a vendor to his purchaser. In the present case, the defendant, the vendor, did not, at the time of the bargain, state what her title was. But she described herself as executrix, she promised to give “a clear deed of sale” in two months, and meanwhile she was to show her title-deeds. She did not show the deeds, but on the 11th December, 1884, (just over the two months’ period) she described her title through her solicitors in the following words:—“The property was originally mortgaged by one Meghji Callánji to one Rámji Jethá, who again mortgaged the property to one Máncorebái, the widow of Gan-gádás Vizbhukhandás, and Kessowji Jadowji. The last-named gentleman has agreed to convey the property to our client, and the deed of conveyance is being prepared If your client is willing to accept a conveyance at present without the old title-deeds, our client is willing to indemnify him against all

(1) 2 Bom., H. C. Rep., 406.

(2) 2 W. Bl., 1078.

(3) 7 Eng. & Ir. Ap., 268.

claims to the property; but if he is not prepared to do so, our client is willing to pay back the earnest-money, and rescind the contract." To this offer, on the 13th, the plaintiff replied asking for further particulars of the date of mortgage, and making the following offer:—"If your client consents to deposit the purchase-money in a bank, in the joint names of your and our client, until the title-deeds are found, our client will complete the purchase at once." No reply was made to the counter-offer until the 8th January, 1885, when she declines to do what the plaintiff wants; but again offers to convey the house with an indemnity against loss by reason of the non-production of the title-deeds; and renews the alternative offer of rescission of the contract. The plaintiff on the 13th replies, insisting on his counter-offer. At this point correspondence ceased, and a suit was filed in the following month.

Now, upon the facts as they appear in the correspondence—and they are not altered by the evidence—it is quite clear that the defendant was not in possession of, and had not the control of, the title-deeds. She could not, therefore, do more than make the offer that she did make—to wit, to convey the property on a mortgagee's title with an indemnity. As regards this offer, I should doubt whether, as executrix under a Hindu will, she had the power to convey without the consent of the Court. At any rate, she could not safely accept the counter-offer of the plaintiff, for she could not be sure of finding her deeds, and she might have been kept out of the purchase-money for an indefinite time. The one deed which she had under her control she offered for inspection. As the plaintiff did not accept her offer *simpliciter*, she did not take the conveyance from Kessowji Jádowji, which he was then willing to give, and it must be remembered that she had no power to force him to convey at any time.^u The conveyance he subsequently joined in, was one of a different character. It must also be remarked that the plaintiff, on inspection of the deeds and on discovery of the exact position of the defendant as executrix, might, after all, have rescinded the bargain.

1886.

PITÁMBER
SUNDARJI
v.
CÁSSIBÁI.

1886.

PITÁMBÉR
SUNDARJI
v.
CÁSSIBÁI.

It was argued that the case came within the principle of *Engell v. Fitch* ⁽¹⁾, which the House of Lords state to be that "a vendor is bound to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance:" (see observations of Lord Hatherley on this case in *Bain v. Fothergill* ⁽²⁾). Now it seems to me the defendant, on her side, did offer to do all that then lay in her power, and the plaintiff, on his side, insisted on something further that did not lie in her power. She offered all she was able to offer. The title-deeds did not really turn up till some time after. They were with her co-mortgagee, and she could not force him to deliver them. The case, then, does not come within *Engell v. Fitch* ⁽¹⁾, but within the leading case, and there can be no damages for the loss of the bargain. But as the defendant has not paid the earnest-money into Court, or formally tendered it, she must pay the costs of the suit. There must be a decree for the earnest-money—for Mr. Chalk's costs of the arbitration: Rs. 50—and the plaintiff is to have all the costs of the suit.

Attorneys for the plaintiff:—Messrs. *Chalk and Walker*.

Attorneys for the defendant:—Messrs. *Jefferson, Bháishankar, and Dinshá*.

⁽¹⁾ L. R., 4 Q. B., 659.

⁽²⁾ 7 H. L., p. 209.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

ATMA'RA'M, (PLAINTIFF), v. GOVIND, (DEFENDANT)*

Limitation Act XV of 1877, Sec. 19—Acknowledgment within "the new period"—Construction.

In a suit brought on the 20th July, 1886, by the plaintiff to recover the price of goods sold on the 12th March, 1881, to the defendant, the plaintiff filed two *khátás* under the defendant's signature, acknowledging the debt, and bearing dates the 6th March, 1882, and the 29th October, 1884. The Subordinate Judge, being of opinion that the suit was barred, referred the case to the High Court.

*Civil Reference, No. 22 of 1886.

1886.

October 5.