

[353] ORIGINAL CIVIL.

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APRIL 15.

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

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HIS HIGHNESS SHRIMANT MAHARAJ YASHVANTRAV HOLKAR,
OF INDORE, BY HIS CONSTITUTED ATTORNEY, MR. GUMROODIN
TYABJI (*Original Plaintiff*), Respondent v. DADABHAI CURSETJI
ASHBURNER (*Original Defendant*), Appellant.*

[28th February, and 15th April, 1890.]

*Jurisdiction—Power of High Court to order sale of land situate outside jurisdiction—
Suit for land—Mortgage of land outside jurisdiction—Suit for specific performance
relating to land outside jurisdiction—Letters Patent, 1865, cl. 12.*

In a suit for specific performance of an agreement made in Bombay, but relating to land situate outside the original jurisdiction of the High Court, and to realise a mortgage-debt by sale of the said land.

Held, that the Court had jurisdiction to try the suit, and to order a sale of the mortgaged land.

[R., 22 B. 701; 29 B. 249=6 Bom.L.R. 958; 37 B. 494=14 Bom.L.R. 846=17 Ind. Cas. 198; 19 C. 358; 27 M. 157; 33 M. 181=20 M.L.J. 103=6 M.L.T. 263=3 Ind.Cas. 930; 35 M. 63=8 Ind. Cas. 520=21 M.L.J. 44=9 M.L.T. 142; 7 Bom. L.R. 319 (323); D., 23 B. 22; 28 M. 227.]

SUIT for specific performance of an agreement made in Bombay between plaintiff and defendant, dated 8th January, 1883.

In November, 1884, at a sale held by the Commissioner for taking Accounts under an order of Court, the defendant became the purchaser of certain villages and lands, known as the Bhandup Estate, situate in the island of Salsette.

The price of the said estate was Rs. 2,03,000, and the defendant paid Rs. 30,000 in part payment of the purchase-money and as a deposit. Being in want of funds to complete the purchase, he requested the plaintiff to lend him Rs. 1,60,000, which the plaintiff agreed to do on the terms set forth in the said agreement of the 8th January, 1885. The agreement was executed in Bombay.

The agreement provided (*inter alia*) that the defendants should get the sale confirmed to him, and a proper conveyance of the same executed; that the defendant should mortgage the said property to the plaintiff as a security for the said loan; that the defendant should provide quarters for an agent of plaintiff on the said estate, in order that the plaintiff might be kept acquainted with the condition of the property, and should pay the net income to the said agent on behalf of the plaintiff; that, in case the net income should not be sufficient to satisfy the interest, the [354] defendant should make good the deficiency, and, in default, the plaintiff might enter into exclusive possession and have power to sell, &c., &c.

The plaintiff alleged that, in pursuance of the agreement, he had paid to the defendant the said sum of Rs. 1,60,000, and had become entitled to the benefit of all the terms of the agreement, which the defendant has wholly failed to perform. He prayed:—

1. "That it may be declared that the said agreement of the 8th January, 1885, is valid and subsisting agreement, and that the plaintiff is entitled to specific performance of the same.

* Suit No. 459 of 1888; Appeal No. 649.

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2. "That the defendant may be decreed to specifically perform the said agreement by obtaining a proper conveyance of the said estate and delivering the same to plaintiff, and by executing a proper mortgage of the said estate in favour of the said plaintiff, and by permitting him to enter into possession of the said estate and receipt of the rents and profits thereof, as provided in the said agreement.

3. "That defendant may be ordered to pay the said sum of Rupees 1,60,000, and all interest accrued due thereon, by a short date in that behalf to be named by this Honourable Court, and that, in default of such payment, the said Bhandup Estate may be sold by and under the direction of this Honourable Court and the net proceeds thereof may be applied on or towards the payment of the moneys due to the plaintiff and the costs of the suit.

4. "That, for the purposes aforesaid, all such accounts may be taken, directions given, and enquiries made as to this Honourable Court shall seem just and expedient.

5. "That, in the meantime and until the determination of this suit, the defendant may be restrained by and under the order and injunction of this Honourable Court from receiving, collecting and getting in the rents and profits of the said estate, and from managing the same, and that some fit and proper person may be appointed receiver to take charge of the said estate, and to manage the same, and to receive, collect and get the rents and profits thereof."

The defendant pleaded (*inter alia*) that the High Court of Bombay had no jurisdiction to try this suit. The written statement set forth that the defendant was a resident of Salsette, and not of Bombay; that he possessed no property in Bombay; nor did he trade, or follow any calling in Bombay.

The Court of first instance (Bayley, J.) held that the Court had jurisdiction, and passed a decree for the plaintiff. The decree was in the following form:—

"This Court doth pass judgment for the plaintiff, and doth order and declare that the agreement of the 8th January, 1885 in the plaint and hereinbefore mentioned is a valid and subsisting agreement, and that the plaintiff is entitled to [355] specific performance of the same; and this Court doth order and decree that the said defendant do specifically perform the said agreement by obtaining a proper conveyance of the said estate and delivering the same to the plaintiff, and by executing a proper mortgage of the said estate and delivering the same to the plaintiff, and by executing a proper mortgage of the said estate in favour of the plaintiff and by permitting the plaintiff to enter into possession of the said estate and receipt of the rents and profits thereof, as provided in the said agreement; and this Court doth further order that, upon the defendant paying into Court on behalf of the plaintiff on or before the 26th day of December, 1889, the sum of Rs. 1,60,000 for debt and simple interest thereon at the rate of 8 $\frac{1}{2}$ per cent. per annum from the 8th day of January, 1886, till payment and the costs of this suit when taxed and noted in the margin hereof, including the costs of and incidental to the motion and order for injunction and receiver together with interest on such costs at 6 per cent per annum from the date hereof until payment; the plaintiff to reconvey to the said defendant the property hereinbefore mentioned, free and clear of and from all incumbrances done by him, the said plaintiff, or by any person or persons claiming by, from or under him, and to deliver up all deeds, documents.

and writings of or relating to the said premises in his possession, custody or control to the said defendant or to whom he shall appoint. But, in default of the said defendant paying into Court such principal interest and costs by the time aforesaid, then the plaintiff will be entitled to a final decree for sale of the said property by the Commissioner of this Honourable Court for taking Accounts, &c., and this Court doth, lastly, order that the order for injunction and receiver, dated the 1st May, 1889, be continued until further order."

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The defendant appealed. The only point argued in appeal was whether the Court had jurisdiction.

Lang (with *Macpherson*), for the appellant (defendant).—This Court has no jurisdiction to try this case. The defendant does not reside or carry on business in Bombay, and the land, which is the subject-matter of the agreement, is situate wholly outside the jurisdiction. From the prayer of the plaint and the decree which actually orders possession of the land to be given to the plaintiff, it is clear that this is a suit for land, and as the land is wholly outside the jurisdiction, the Court cannot try this suit. The case of *Yenkoba B. Kasar v. Rambhaji* (1) will be relied on. We submit that the decision in that case is wrong. It is contrary to *In the matter of the Petition of S. J. Leslie* (2); see, also, *Bibee Jaun v. Meerza Mahomed* (3) and *Sreenath Roy v. Cally Doss Ghose* (4); *The Delhi and London Bank v. Wordie* (5); *Earl of Kildare [356] v. Eustace* (6); *Bull v. Bodie* (7). We submit that the term "suit for land" includes a suit to obtain rights over land.

Latham (Advocate-General), *Jardine* with him, for respondent (plaintiff).—For eighteen years this Court, following *Yenkoba Balshet Kasar v. Rambhaji* (1), has exercised jurisdiction over cases like the present. In Bombay there has been no decision to the contrary. In Calcutta the decisions have not been consistent: see the cases cited in *The East Indian Railway Co. v. The Bengal Coal Co.* (8). The phrase "suit for land" in cl. 12 of the Letters Patent is ambiguous, and may be given a broad or narrow interpretation. I submit that it was intended to introduce into India the rule prevailing in the Courts in England. The Letters Patent were drafted in England, and it is reasonable to conclude that the intention was to prescribe for India the rule of *Penn v. Lord Baltimore* (9). We may construe the words "suits for land" used in the Letters Patent by the English cases which had been decided before the Letters Patent were issued. The jurisdiction of the Courts in England at that time was clear. They could do all that could be done *in personam*. They decreed the sale of land outside the jurisdiction: see *Cotte on Mortgage* (5th ed.), Vol. II, p. 1073. So, also, they appointed receivers for property outside the jurisdiction: 2 *Spence's Equity Jurisprudence*, 678; *Beckford v. Kemble* (10) *Notes to Penn v. Lord Baltimore* (9). No doubt it may be said, with reference to these cases, that the English Courts are uncontrolled by any charter. That is so: but they have no territorial jurisdiction in foreign countries, and they can only have jurisdiction at all in these cases by acting *in personam*—*Paget v. Ede* (11). *Willink v. Bentinck* (12). *Daniel's*

(1) 9 B.H.C.R. 12. (2) 9 B.L.R. 171. (3) 1 Ind. Jur. 40.
(4) 5 C. 82. (5) 1 C. 249 (263). (6) 2 Vernon, 419, (422).
(7) 1 Dickens, p. 1. (8) 1 C. 95. (9) 2 Wh. & Tud. L. C. (6th ed.), 1047.
(10) 1 Sim. & St. 7. (11) L.R. 18 Eq. 118. (12) 1 Coop. Temp. Lord. Cott., p. 288.

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Chancery Practice, p. 452. The only real dispute here is as to the part of the decree which orders a sale of the land. As to the greater part of the decree, there is no difficulty. The contract was made within the jurisdiction. Why should not this Court order a man to execute a mortgage? See *Sreenath Roy v. Cally Doss Ghose* (1).

JUDGMENT.

[357] 15th April, 1890. SARGENT, C. J.—This is a suit for specific performance of an agreement dated 8th January, 1885, and to realize a mortgage-debt by sale of the land on which it is secured. The agreement was entered into for the purpose of enabling the defendant to complete the purchase at a sale, by the Commissioner, of the Bhandup Estate, in the island of Salsette, at the price of Rs. 2,03,000, of which Rs. 30,000 had been paid as a deposit at the time of the sale, and provides for the advance of Rs. 1,60,000 by the plaintiff to the defendant, to be paid into the Commissioner's office, upon which the defendant is to get the sale confirmed to him, and obtain a conveyance of the property and possession thereof.

By the 4th clause it is provided that upon completion of the purchase the repayment of the said loan with interest shall be secured by a formal mortgage in the English language, with the usual power of sale, declarations and conditions.

The 5th clause provides that the loan shall not be repayable within two years, with option to borrowers to extend the period for three years more if the interest has been regularly paid.

The 8th and 9th clauses provide that the borrower should pay over the net income of the estate to plaintiff's agent, and that, in case the income shall be insufficient to satisfy the interest, the borrower is to make good the deficiency, and, in default, the plaintiff should have power to enter into exclusive possession and in receipt of the income, and also to sell the property and realize the principal and interest due to him.

The 10th clause provides for the deposit with plaintiff of the agreement of purchase, together with such title-deeds and documents as the defendant might have in his possession; and, lastly,

The 11th clause provides that, until the mortgage shall be executed, the agreement should enure as a good and equitable mortgage of the property.

By his plaint the plaintiff prays that the defendant be decreed to specifically perform the agreement by obtaining a proper conveyance and delivering the same to the plaintiff and by executing a proper mortgage and permitting the plaintiff to enter into possession of the property and profits thereof. Secondly, [358] that the defendant be decreed to pay him Rs. 1,60,000 and all interest due, and, in default, that the estate may be sold under the direction of this Court; and, lastly, that in the meantime the defendant may be restrained from receiving and collecting the rents and profits of the estate and managing it, and that a receiver be appointed.

At the trial an issue was raised whether the Court had jurisdiction to try the suit—having regard to s. 12 of the Letters Patent—the land being outside the territorial jurisdiction of the Court. The Judge of the Division Court (Bayley, J.) held that it had jurisdiction, and passed a decree

declaring plaintiff entitled to specific performance of the agreement, and ordering defendant to specifically perform it in the terms of the second and third paragraphs of the prayer of the plaint; and the decree further ordered that, on defendant paying into Court the principal and interest due, the plaintiff should reconvey to the defendant the property, but that, in default, the plaintiff would be entitled to a final decree for sale by the Commissioner for taking Accounts.

The expression "suits for land" was considered as far back as 1872 with reference to the application of s. 5 of Act VIII of 1859 by a Division Bench of this Court (Gibbs and Melvill, JJ., in *Yenkoba Baset Kasar v. Rambhaji* (1), where the suit was on a bond, and asked for sale of the mortgaged land. The Court said: "We think this is not a suit for land within the meaning of s. 5 of Act VIII of 1859. Comparing that section with ss. 223 and 224 of the Code, we think that a "suit for land" is a suit which asks for delivery of the land to the plaintiff." In *The Delhi and London Bank v. Wordie* (2) the High Court of Calcutta (Garth, C.J., and Pontifex J.) would appear to have been inclined to construe suits for land in the Letters Patent as meaning suits "substantially 'for land'—that is, for the purpose of acquiring title to, or control over, land." However, they decided the case on the ground that the serious question raised by it was whether the trustees of the trust deed for creditors, which it was sought to enforce on the defendant Lightfoot, had the legal title to the lands. In *Sreenath Roy v. Cally* [359] *Doss Ghose* (3), in a suit for specific performance of an agreement to execute a mortgage of certain land beyond the jurisdiction of the High Court, and, in the alternative, for the return of the Rs. 4,000 advanced, Mr. Justice Pontifex held that so far as the suit was a suit for specific performance the Court had no jurisdiction to make a decree.

The construction which the Court of Calcutta would thus appear to have placed on the section, more especially in the last case, would exclude from the jurisdiction of the High Courts the large class of cases in which English Courts of Equity exercise jurisdiction, although the lands are in the colonies or even in foreign states. Those cases are set out in detail by Kay, J., in *Graham v. Massey*; *In re Hawthorne* (4); and the principle on which they proceed is stated by the Earl of Selbourne, L. C., in *Eving v. Orr Eving* (5). "The Courts of Equity in England", he says, "are and always have been Courts of conscience operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilli* within their jurisdiction."

The present suit, whether it be regarded as a suit for specific performance or to enforce an equitable mortgage by deposit of title-deeds, is clearly one which a Court of Equity in England would entertain—*Paquet v. Ede* (6), and in which, as appears from 2 Spence's Equity Jurisprudence, p. 678 and Cote on Mortgages, Vol. II, p. 992 (5th ed.), they would, if the land were in the colonies where it is the practice in mortgage suits to enforce the security by sale, make an order for sale, instead of one for foreclosure.

(1) 9 B. H. C. R. 13.
(3) 5 C. 82.
(5) L.R. 9 A.C. 34 (40).

(2) 1 C. 249 (263).
(4) L.R. 23 Ch. D. 748.
(6) L.R. 18 Eq. 118.

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The High Courts in India have all the powers of a Court of Equity in England for enforcing their decrees *in personam*—*Martin v. Lawrence* (1); *Hassanbhoj v. Cowasji Jehangir Jassawalla* (2); and we think that, had it been intended to exclude suits *in personam* as well as suits *in rem* from the jurisdiction of the [360] High Courts, the framers of the Letters Patent, who were presumably English lawyers, would have employed different language.

The present decree, it is true, is for sale of the land by the officer of the High Court. The practice, however, of making an order for sale in that form has been so long established that it ought not, we think, to be interfered with.

We must, therefore, confirm the decree with costs.

Attorneys for the appellant (defendant): Messrs. *Ardesar, Hormasji and Dinsha*.

Attorneys for the respondent (plaintiff): Messrs. *Tyabji and Dudabhai*.

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

VULLUBHDAS DAMODHAR (*Original Defendant*), Appellant v.
 THUCKER GORDHANDAS DAMODHAR AND OTHERS (*Original
 Defendants and Plaintiffs*), Respondents.* [27th February, 1890.]

Will—Construction.

One Damodhar Madhowji died, leaving two sons, Gordhandas and Vullubhdas. His will contained the following clauses:—

“5. As to the immoveable property which I have, the particulars thereof are as follows:—There is one *vadi* (oart) situated on the Girgaum Back Road. In it there are small and large bungalows, chawls, stables, sepoy's and *mali*'s sheds, making in all thirteen buildings. Thereof one bungalow, bearing No. 23, shall be given to my two sons Gordhandas and Vullubhdas and Kesarbai, the widow of my brother Karsandas Madhowji, a denizen of paradise (*i.e.*) to these three persons, to reside therein, and the remaining bungalows, chawls, stables and the large bungalow in which I live shall be let for rent. And out of the rent that may be realized therefrom, the expenses of repairs, Government taxes and the servants' wages being paid, the surplus shall be paid to my son Gordhandas. Out of such surplus this my son Gordhandas shall pay the expenses of my house, of the maintenance of the said two sons, and of my said sister-in-law, *i.e.*, all such expenses as I carry on, and also Rs. 15 *per* month for the worship of (the deity) Thakorji, of my house. *In this manner moneys are to be paid as long as there may be sons' heirs in my family.* And when there may be no son (*i.e.*) male as heir in my family, the whole property shall be all used on religious and charitable account, as stated in the below written clause.”

[361] “8. My two sons and my sister-in-law, making three persons, shall reside in the bungalow No. 23. And if one of them, *i.e.*, my two sons, Vullubhdas shall disagree with the others, he shall go out of the said *vadi* at the Girgaum Back Road and reside elsewhere; and as to his (Vullubhdas's) expenses out of the money which my son Gordhandas may receive from the trustees for defraying the household expenses, he (Gordhandas) shall continue to pay at the rate of Rs. 30 *per* one month to Vullubhdas for his (Vullubhdas's) own expenses during his and his son's lifetime. And if this my son Vullubhdas should not act

* Suit No. 316 of 1888; Appeal No. 666.