

15 B. 657.

[657] ORIGINAL CIVIL.

Before Mr. Justice Farran.

HAJI MAHOMED MITHA (*Plaintiff*) v. MUSAJI ESAJI (*Defendant*).*
[31st July, 1891.]

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Vendor and vendee—Specific performance—Suit by vendor for specific performance—Title—In absence of special contract good title to be shown by vendor—Specific Relief Act (I of 1877), s. 25—Title derived through will of former owner—Necessity of probate—Succession Act (X of 1865), s. 187—Notice to complete contract—Reasonable notice—Rescission—Clause in contract requiring vendor to hand over deeds relating to property, construction of.

By an agreement in writing dated the 20th June, 1888, the defendant purchased a certain house in Bombay from the plaintiff for Rs. 6,000. By this agreement the plaintiff agreed that at the time of the execution of the deed of sale he would hand over to the defendant "the title-deeds, vouchers and bills, whatever there may be relating to the said property." The agreement further provided: "The time in respect of this bargain is fixed at two months; within this time we are duly to have everything cleared." In September, 1890, the plaintiff filed this suit for specific performance of the agreement. The defendant pleaded, 1st, that the plaintiff had failed to show a good title to the property, 2nd, that the plaintiff had not handed over to him all the deeds and documents relating to the property, 3rd, that he (the defendant) had lawfully rescinded the contract on the 30th August 1890.

It appeared that in 1880 the then owner of the property, one Nanabhoy Trikamdas, had mortgaged it to one Vizbhukandas Jadusha, and that on the 26th October, 1882, both mortgagor and mortgagee had joined in conveying it to one Cassumbhoy Ahmedbhoy. This deed, however, had not been registered, and was consequently inadmissible in evidence, and was rejected at the hearing. Cassumbhoy Ahmedbhoy had, however, after his purchase taken possession of the property and had held it until 1885. On the 6th May, 1885, he sold it to Hansraj Kallianji. Prior to this sale, viz., in 1883, Nanabhoy Trikamdas had died, and left a will appointing Vizbhukandas Jadusha his executor, but no probate of this will had ever been obtained. In the sale-deed, however, to Hansraj Kallianji of the 6th May, 1885, Vizbhukandas Jadusha had joined as a conveying party both in his own right and as executor of Nanabhoy Trikamdas. On the 29th September, 1887, Hansraj Kallianji sold the property to the plaintiff, who, as already mentioned, sold it to the defendant on the 20th June, 1888.

Held, that the plaintiff was bound to give the defendant a good title, or, in other words, a title free from reasonable doubt (s. 25 of the Specific Relief Act I of 1877). In the absence of a contract providing that the plaintiff should show only such title as he could give, or of some other special contract as to title, the general law laid down in s. 25 of the Specific Relief Act I of 1877 must prevail.

[658] *Held*, further, dismissing the suit, that the title shown by the plaintiff was not a good title. The conveyance of the 26th October 1882 by the mortgagor and mortgagee to Cassumbhoy Ahmedbhoy not being registered was not admissible, and could not be referred to, so that it was necessary to regard Nanabhoy Trikamdas as still the mortgagor and Vizbhukandas Jadusha as still the mortgagee of the property while Cassumbhoy Ahmedbhoy had, in some capacity or other, the actual possession. That being the state of things, Nanabhoy died in 1883, and it was alleged that he had left a will appointing Vizbhukandas his executor, but no probate of that will had been obtained. The equity of redemption remaining in Nanabhoy as mortgagor passed on his death to his executor Vizbhukandas. On the 6th May 1885 Cassumbhoy Ahmedbhoy sold the property to Hansraj Kallianji (the plaintiff's predecessor) and Vizbhukandas joined in the deed of conveyance as executor of Nanabhoy. But it was necessary for the plaintiff to show not merely that he joined as executor, but that he had a right, as executor, to convey to Hansraj Kallianji the equity of redemption which had come to him from Nanabhoy. By s. 187 of the Succession Act (X of 1865) the

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only mode of doing this was by the probate of Nanabhoy's will, and this had not been obtained. If an heir of Nanabhoy Trikamdas sued for redemption, the defendant would have no defence, unless he could prove that he had acquired the equity of redemption. For this purpose by s. 187 of the Succession Act (X of 1865) probate would be necessary, and he would consequently be obliged to prove the will and pay duty upon all the property included in it. That would be a liability which the Court could not impose upon a defendant resisting specific performance of a contract like the one made by the plaintiff.

Where a vendee ascertained that the title of property sold to him was derived through the will of a former owner which had not been proved,—

Quere whether a notice given by him (the vendee) to the vendor to produce the will and give satisfactory proof of its being the last will of the said owner within four days was a reasonable notice so as to entitle the vendee afterwards to rescind the contract.

A contract of sale provided as follows for the handing of the title-deeds of the property to the purchasers:— "And at the time of the execution of the deed of sale you" (*i.e.*, the vendor) "are duly to give us, the purchasers the title-deeds, vouchers and bills, whatever there may be relating to the said property."

Held, that this clause meant that whatever documents of title were necessary under the terms of the contract, or under the general law, should be handed over by the vendor to the vendee at the execution of the deed of sale.

[R., 21 B. 827 (865); D., 19 B. 828.]

SUIT by vendor against vendee for specific performance.

By an agreement in writing, dated the 20th June 1888, the defendant agreed to purchase from the plaintiff a house, No. 22, Falkland Road, in Bombay for Rs. 6,000. On the execution of the agreement the defendant paid the plaintiff Rs. 251 as earnest money, and it was agreed that Rs. 5,649 should be paid at the [659] time of executing the conveyance and Rs. 100 when the property was transferred to the defendant's name.

The agreement was as follows:—

"To Haji Mahomed Mitha written by Vora Mamuji Hassanbhoy and Company (the defendant was the owner of this firm). To wit: The cause of this being written is as follows. As to your own house (situated) at Falkland Road outside the Fort of Bombay" (here followed the description of the property) "(that house being) your own property thus bounded on four sides, inclusive of the land we have this day entered into this bargain paper to purchase from you. The price thereof (is fixed) at Rs. 6,000. In part (payment) thereof we have this day paid to you Rs. 251 in cash as earnest-money; and Rs. 5,649 we are duly to pay at the time of the execution of the deed of sale at the Registrar's office; as to the balance of Rs. 100, which will remain (due) from us, the same we are duly to pay after the said property is transferred to our names in the assessment books and in the books of the Collector. And if any person or persons whatever should raise any claim (or) dispute against the said property by (way of) inheritance, share, gift, mortgage, *patta* (lease), or in any other manner whatever, you, the vendor, are duly to clear it all for us, the purchasers, with your money and at your cost. And if the *Sarkar's* bills in respect of the said property should have become due, the same you, the vendor, are duly to pay up to the day of execution of the deed of sale; and at the time of the execution of the deed of sale (you) are duly to give us, the purchasers, the title-deeds, vouchers and bills, whatever there may be relating to the said property, as also the said property in the same state in which it is at present. This bargain has been entered into through the brokers Smirji Lackmanji and Sayad Mastan. Their brokerage is duly to be paid by us, the purchasers, at one rupee per cent., and by you, the vendor, at one rupee per cent. *The time in respect of this bargain is fixed at two months.*

Within this time (we) are duly to have everything cleared. We have given this bargain paper in writing of our free will and pleasure. It is duly to be agreed to by us and our heirs and representatives.—The 20th of June in the English year 1888."

The plaintiff prayed for specific performance of the above agreement. He filed his suit on the 23rd September, 1890.

In his written statement the defendant alleged that he was always ready and willing to perform his part of the agreement, but that the plaintiff had failed and refused to perform his part thereof. He contended that on a true construction of the agreement the plaintiff was bound to make out a good title to the property; that he had failed to do this; and that the defendant had accordingly put an end to the contract. He further contended that the plaintiff was bound to produce and deliver to him all the deeds and documents whatever relating to the property, and that he (the plaintiff) had not done so. The defendant also [660] contended that he had lawfully rescinded the contract on the 30th August 1890.

From the evidence it appeared that in 1880 the property belonged to one Nanabhoy Trikamdas, who on the 7th April 1880 mortgaged it to one Vizbhukandas Jadusha. On the 26th October 1882 the said mortgagor and mortgagee sold to Cassumbhoy Ahmedbhoy, and a deed of that date was duly executed by both of them. This deed, however, was not registered, and was rejected at the hearing as inadmissible in evidence. It was alleged that Cassumbhoy Ahmedbhoy paid the purchase money and entered into possession, which he held till 1885.

In 1883 Nanabhoy Trikamdas died, leaving a will, dated the 2nd February 1883, whereby he appointed the said Vizbhukandas Jadusha his executor. No probate of this will was ever obtained. It was alleged that by this will Nanabhoy left all his property to Vizbhukandas.

On the 6th May 1885 Cassumbhoy sold the property in question to Hansraj Kallianji. In the conveyance Vizbhukandas Jadusha joined as a conveying party, both *in his own right and as executor of Nanabhoy Trikamdas*.

On the 29th September 1887 Hansraj Kallianji sold to the plaintiff, and, as above stated, the plaintiff contracted to sell to the defendant on the 20th June 1888.

The agreement of sale having been made, the plaintiff handed over to the defendant all the documents in his possession relating to the property. On the 22nd September 1888 the defendant's attorney wrote to the plaintiff, stating that there were two documents not forthcoming, *viz.*, a mortgage, dated 16th December 1869, and probate of the will of Nanabhoy Trikamdas, and that these two documents "must be produced, or their absence sufficiently accounted for."

To this letter the plaintiff's attorneys replied on the 4th October 1888, stating that by the contract the plaintiff was bound only to deliver such documents as were in his possession, and that he had done so; that the mortgage-deed referred to was with the mortgagee; and that the probate was with the executor. [661] (It was not until some time later that it was ascertained that no probate had ever been obtained.)

The correspondence continued during the month of October, 1898, but each party maintained his position; the defendant demanding production of the above documents, and the plaintiff contending that he had

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handed over all the documents in his possession, which was all that he was bound to do by the agreement, and that by the terms of the agreement he was under no obligation to make out a good title to the property.

The correspondence was resumed fourteen months later, *viz.*, in January, 1890, and several letters passed between the parties. On the 11th January, 1890, the plaintiff consented to procure for the defendant a certified copy of the mortgage of 1869, and referred him to the Ecclesiastical Registrar's office if he wanted to satisfy himself that probate of Nanabhoy's will had been granted. Nothing more was done until the 18th August, 1890, when the plaintiff's attorneys wrote to the defendant, stating that they had ascertained that probate of the will of Nanabhoy Trikamdas had never been applied for or granted, and that, therefore, the plaintiff could not produce it, or a copy of it. On the 22nd August, 1890, the defendant's attorney wrote the following letter to the plaintiff's attorney:—

"Bombay, 22nd August 1890.

"DEAR SIRS,—With reference to your letter to me herein of the 18th instant, I have to state that although probate of the will of Nanabhoy Trikamdas may not have been applied for and granted to Vizbhukandas Jadusha, yet your client has hitherto failed to produce the said will and satisfy me that that is the last will of the said deceased, and unless this is done, my client certainly refuses to complete the contract, and I have, therefore, to give your client this final notice through you that, unless he produces the said will and gives me satisfactory proof regarding thereto within four days from the service hereof upon you, my client will without further notice consider the contract at an end, and take such steps in the matter as he may be advised to adopt against your client, holding him responsible for the consequences.

"Yours truly,

(Signed) SHAMRAO PANDURANG."

On the 30th August, 1890, the defendant's attorney wrote the following letter to the plaintiff's attorney, rescinding the contract:—

"Bombay, 30th August 1890.

[662] "DEAR SIRS,—As your client, the vendor above named, has hitherto failed to produce the will of Nanabhoy Trikamdas referred to in my letter to you of the 22nd instant, and to give me satisfactory proof as to the same being the last will of the said deceased, I beg to give your said client this notice through you that my client doth hereby rescind the contract of sale of the 20th June 1888 made between your client and mine, and to call upon your client through you to pay to my client, or to me as his attorney, the sum of Rs. 632-15-0, being the earnest-money, with interest thereon, and the expenses my client has been put to in reference to the said contract, particulars whereof are herewith sent, and I have to warn your client through you that, unless the said monies are paid by him within two days from the receipt hereof by you, my client will, without further notice, file a suit against your client for recovery of the same, holding him liable for the consequences."

"Yours truly,

(Signed) SHAMRAO PANDURANG."

The plaintiff, as above stated, filed this suit for specific performance on the 23rd September, 1890.

The defendant pleaded that the plaintiff had not shown and could not show a good title to the property. The deed of the 26th October 1882, whereby Nanabhoy Trikamdass (as mortgagor) and Vizbhukandas Jadusha (as mortgagee) conveyed to Cassumbhoy Ahmedbhoy was not registered, and, therefore, could not be given in evidence. It was admitted, however, that Cassumbhoy had taken possession and had held possession until the 6th May 1885, and the plaintiff contended that, as land might be conveyed in India without any written instrument, he should be allowed to call Cassumbhoy as a witness to give oral evidence of the sale to him and of the character of his possession.

The defendant further contended that there being no admissible evidence of the sale to Cassumbhoy it was necessary, to regard Nanabhoy Trikamdass as still the mortgagor possessed of the equity of redemption and Vizbhukandas Jadusha as still the mortgagee of the property; that although Nanabhoy had left a will, dated the 2nd February 1883, whereby he had appointed Vizbhukandas his executor, yet no probate of that will had ever been obtained; that there was, therefore, no admissible evidence (see Act X of 1865, s. 187) to show that Nanabhoy's interest as mortgagor (*viz.*, the equity of redemption) had passed to Vizbhukandas as executor, and that, therefore, it could not be shown [663] that Vizbhukandas had any right to convey the equity of redemption to Hansraj Kallianji, (the plaintiff's vendor), by the conveyance of the 6th May, 1885. The defendant contended that the plaintiff's title was on these points defective, and that he was not bound to carry out his contract.

Lang (Acting Advocate General) and *Kirkpatrick*, for plaintiff.—The defence is that the plaintiff has not made a good title. We contend, first, that he has not contracted to give a good title and is not bound to do so. The only covenant for title in the contract is the agreement to clear off all claims that may be made. The effect of the contract is that the defendant agrees to take such title as the plaintiff can give. It is something like the contract in *Devsji Ghela v. Jivaraj Mukundas*(1). As to the production of the documents required, we say we are only bound to produce such documents as are in our possession, and we are to do this at the time of execution of the conveyance, which time has never yet arrived. As to the production of deeds, see *Dart's Vendors and Purchasers*, pp. 159, 160.

Next we say the title we show is a good one. Title can be shown at the hearing—*Krishnaji Ravji Godbole v. Ganesh Bapuji Patvardhan* (2); Specific Relief Act I of 1877, s. 25. The defect in title alleged is the absence of probate of Nanabhoy's will. This can only be necessary if Nanabhoy's equity of redemption did not pass to Cassumbhoy Ahmedbhoy by the sale in 1882. It is contended that it did not pass, because the conveyance of 26th October, 1882, is not registered. But the deed was not necessary. Nanabhoy could pass his interest to Cassumbhoy without any writing at all. The Transfer of Property Act IV of 1882 is not in force here, nor the Statute of Frauds, and an oral conveyance is good. The deed not being registered it is as if there was no deed at all. If a deed is not necessary in Bombay, the absence of a deed is no defect in title. If the law does not require a deed, the Court will not require one.

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(1) 2 B. H. C. R. 406.

(2) 6 B. 139 (142).

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Cassumbhoy undoubtedly got possession, and his possession can be proved.

[FARRAN, J.—Yes, but if he got possession under a contract, and that contract was a written deed, s. 91 of the Evidence [664] Act I of 1872 requires you to give that evidence, and excludes oral evidence; so the deed must be available to show that the interest passed to Cassumbhoy.]

Then is probate necessary. An executor takes under the will, not under the probate. The property vests in him: Succession Act X of 1865, s. 179; Act V of 1881, s. 4. The property being vested in him there is no law which prevents him from conveying it as executor, and Vizbhukandas did this by the deed of 6th May 1885. Probate is not necessary to make that a valid conveyance by him. No doubt where an executor seeks to enforce and establish his right as such in a Court of law, probate is necessary under s. 187 of the Succession Act X of 1865. But that section does not apply, except to executors. It cannot apply to parties who cannot themselves take out probate. We can now give evidence of the execution of the will by Nanabhoy: Fry on Specific Performance, 393; Dart's Vendors and Purchasers, p. 1130; *Colton v. Wilson* (1). The defendant could not rescind the contract. The notice of the 22nd August 1890 was not reasonable—*Haji Fakir Mahomed v. Shaik Abdulla* (2).

Inverarity and Jardine, for defendant.—In no case can the plaintiff get a decree for specific performance. For two years we have given him an opportunity to comply with our requisition. If we were justified in making these requisitions he cannot get a decree, even though he can now show a good title. That is the rule, and the reason is that the plaintiff in that case has not been always ready and willing to perform his part.

But we say the plaintiff was bound to make a good title—*Pitamber Sundarji v. Cassibai* (3). The defendant was entitled to call for the will and probate, whatever his motive may be—*Denny v. Hancock* (4); *Stevens v. Guppy* (5). The title was good *dehors* the will, and yet the buyer was held entitled to see the will to satisfy himself that it did not affect the property. *A fortiori* in a case like this, where the title is derived through the will; *Bellamy v. Debenham* (6). That is our first point, *viz.*, [665] that we were justified in demanding to see the probate, and that having refused to comply, the plaintiff is not now in any case entitled to a decree.

Next we say the plaintiff cannot show a good title. It is said that Nanabhoy and Vizbhukandas, (the mortgagor and mortgagee), sold to Cassumbhoy on 26th October, 1882. But the conveyance was not registered, and so the sale cannot be proved. It is said that Cassumbhoy's possession could be proved. But his possession, if proved, would be a cloud on the title, for there would be no evidence as to the character of his possession.

Nanabhoy died in 1883, and so far as appears from the evidence he was then mortgagor with the equity of redemption in him. It passed to his executor Vizbhukandas, and then in 1885 Vizbhukandas, as executor, joined Cassumbhoy in conveying to Hansraj Kallianji. But to prove his rights as executor to convey, probate must be produced: s. 187 of the

(1) 3 Peere, Wm.
(4) L.R. 6 Ch. 1.

(2) 12 B. 658.
(5) 2 Sim. & St. 439.

(3) 11 B. 270 (280).
(6) L. R. 45 Ch. D. 481.

Succession Act X of 1865; Williams on Executors (8th Ed.), p. 308; *Pinney v. Pinney* (1). This agreement does not amount to a contract to take any title that the plaintiff can give. That is shown by *Devsī Ghela v. Jivaraj Mukundas* (2). Counsel referred to *Pitamber Sundarji v. Cassibai* (3).

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JUDGMENT.

FARRAN, J.—I will give my judgment now, as I do not think it possible, that any further consideration would alter my opinion upon the points that arise for decision. Upon several questions that have been dealt with in argument it is not necessary for me to express any opinion. Upon some of them I feel doubtful. For example, it has been contended that the defendant by his letter of the 30th August, 1890, rescinded the contract which he had made with the plaintiff, and that his rescission was valid. That question depends upon whether the notice of the 22nd August, 1890, calling upon the plaintiff to produce the will of Nanabhoy Trikamdas and give satisfactory proof of its being the last will of Nanabhoy within four days was a reasonable notice. That was the first time the plaintiff had been called upon to prove the will, for up to that time [666] the correspondence had apparently proceeded upon the supposition that probate of the will had been obtained. I think it is doubtful whether under the circumstances that letter could be regarded as such a notice as justified the defendant in rescinding the contract by his subsequent letter of the 30th August. That point, however, it is not necessary to decide.

Nor do I decide another point that has been raised on behalf of the defendant, *viz.*, that the contract was at an end, because the plaintiff was unable to produce and hand over the original mortgage of the 16th December, 1869, and also the will of Nanabhoy Trikamdas, as required by the defendant's letter of the 22nd September, 1888, and many subsequent letters. The contract was in these words: "And at the time of the execution of the deed of sale you are duly to give us, the purchasers; the title-deeds, vouchers and bills, whatever they may be, relating to the said property." I think that clause means that whatever documents of title were necessary under the terms of the contract or under the general law should be handed over by the plaintiff to the defendant at the execution of the deed of sale. Now, under the general law the mortgage of 1869 is not a document which he is bound to hand over, nor is he bound to hand over the will of Nanabhoy Trikamdas, and the contract certainly does not in terms, require him to do so. I should, therefore, feel a difficulty in deciding the case upon this point.

The main question, however, which has been discussed, and upon which the case rests, is, whether under this contract or by the general law the plaintiff is bound to give a good title to the property which he has sold to the defendant. I use these words "a good title," as being equivalent to the words "a title free from reasonable doubt" which are the words used in cl. (b) of s. 25 of the Specific Relief Act. The plaintiff is here asking the Court to compel the defendant to complete his purchase and take over the property. The defendant contends that he cannot be required to carry out the contract, because the plaintiff cannot give him a good title. The case of *Devsī Ghela v. Jivaraj Mukundas* (2) has been cited. The contract there was in, [667] some respects similar to the

(1) 8 B. & C. 335.

(2) 2 B.H.C.R. 406.

(3) 11 B. 272.

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contract in this case, but the opinion of the Appeal Court seems to have been that, although under that contract the plaintiff was not bound to give a better title than appeared in the deeds mentioned as in his possession, yet as a defence the purchaser might show that the title was bad. That case was different from this, in the fact that there two deeds were specified in the contract as the deeds to be delivered to the purchaser, and it was argued on behalf of the plaintiff-vendor that he should only be required to give such title as could be shown from these two deeds. In the present case, no deeds or documents are specifically mentioned in the contract, but it is merely provided that "the title-deeds, vouchers and bills whatever there may be relating to the property" shall be handed over. Coupling these words with the clause at the end of the bargain paper, which provides that within two months the vendor (plaintiff) is "duly to have everything cleared," I should be inclined to think that the contract or covenant for title made by the vendor with the purchaser was really a contract that there was no claim to the property.

It is further to be remembered that at the time when *Devisi Ghela v. Jivaraj Mukundas* (1) was decided, there was no law which imposed upon a Hindu vendor any obligation to give a good title to a purchaser. The Specific Relief Act I of 1877, s. 25, however, now requires that such a vendor, in the absence of any contract to the contrary, shall be able to give a title free from reasonable doubt if he asks the assistance of the Court to enforce the purchase. Having regard to the last clause of the bargain paper in this case, I am unable to construe the contract as providing that the plaintiff shall show only such title as he can give. In the absence of such a special contract as this, or of any other special contract as to the title, the general law to which I have referred must prevail.

That being so, then the question is, can the plaintiff show a good title? It is not disputed that Nanabhoy Trikamdas had a good title. We start from that point. Nanabhoy mortgaged the property to Vizbhukandas on the 7th April, 1880. It is then [668] alleged that by deed dated the 26th October, 1882, Nanabhoy and his mortgagee Vizbhukandas sold to Cassumbhoy Ahmedbhoy. That deed, however, is not registered, and it is, therefore, not admissible in evidence, and cannot be referred to. It was alleged, that Cassumbhoy entered into possession and retained possession until 1885, and it was contended that Cassumbhoy might be called as a witness orally to prove the fact and character of his possession. It is clear, however, that that could not be done. It is admitted that the transaction was by deed, and that the deed was not registered. Section 91 of the Indian Evidence Act, I of 1872, expressly provides that in such a case no oral evidence shall be given. Admitting, however, the fact of Cassumbhoy's possession of the property, we have no evidence of the character of his possession; and being unable to look at the deed of 26th October, 1882, we must still regard Nanabhoy as the mortgagor and Vizbhukandas as the mortgagee of the property, Cassumbhoy Ahmedbhoy having in some capacity or other the actual possession.

That being the state of things, Nanabhoy died in 1883. It is said that he left a will, dated the 2nd February, 1883, by which he bequeathed his property to Vizbhukandas and appointed him his executor. No probate of that will has been obtained.

(1) 2 B.H.C.R. 406.

On the 6th May, 1885, Cassumbhoy Ahmedbhoy sold the property in question to Hansraj Callianji, and a deed of conveyance of that date was duly executed by Cassumbhoy, which has been put in evidence. In that deed, Vizbhukandas joined as a conveying party. He is a party both in his own right and *as executor of Nanabhoy's will*. We have seen that in consequence of the non-registration of the deed of the 26th October, 1882, the equity of redemption of this property was not conveyed by it to Cassumbhoy, but remained in Nanabhoy up to the time of his death. On his death, then, it passed to his executor, Vizbhukandas, and it is clear that, unless Vizbhukandas joined as executor in the conveyance, Cassumbhoy could not give a complete title to Hansraj Kallianji in 1885. Hansraj Kallianji in 1887 sold to the plaintiff, and now the plaintiff sells to the defendant. To prove his own title the plaintiff must show that his predecessor, [669] Hansraj Kallianji, had a good title. In order to do that he must show not merely that Vizbhukandas did convey, but also that he had a right to convey the equity of redemption to Hansraj Kallianji. By s. 187 of the Succession Act, X of 1865, the only mode of proving this is by probate of Nanabhoy's will, and this, it is admitted, has never been obtained. This is the flaw in the plaintiff's title of which the defendant complains. We may presume that an heir of Nanabhoy Trikamdas is in existence. Suppose he were to sue the person in possession to redeem the property from the mortgage of the 7th April, 1890, the defendant in such a suit would have no defence as against the heir, unless he could prove that he had acquired the equity of redemption. This, however, he could not do unless he proved that Vizbhukandas, as Nanabhoy's executor, had conveyed the equity of redemption to his predecessor in title. For this purpose by s. 187 of the Succession Act, X of 1865, probate would be necessary, and he would consequently be obliged to prove the will and pay duty upon all the property included in it. That would be a liability which this Court could not impose upon a defendant resisting specific performance of a contract like this, but that would be the effect of giving the plaintiff the decree he prays for in his plaint.

This suit, therefore, must be dismissed with costs, and the plaintiff must return the earnest money to the defendant, with interest as claimed in the written statement; the defendant to have a lien on the property for the amount, as provided in s. 18 of the Specific Relief Act I of 1877.

I may add that, in my opinion, the case of *Pinney v. Pinney* (1) shows that the law in England is the law laid down in s. 187 of the Succession Act X of 1865.

Suit dismissed.

Attorneys for plaintiff: Messrs. *Thakurdas Dharamsi and Cama*.

Attorney for defendant: Mr. *Shamrav Pandurang*.

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