ORIGINAL CIVIL.

1904.
September 12.
1905.
January 16.

Before Mr. Justice Chandavarkar.

PEER MAHOMED DEWJI (PLAINTIFF) *v.* MAHOMED EBRAHIM AND OTHERS (DEFENDANTS).*

Specific Performance—Issues—Discretion of Court—Delay—Laches—Specific Relief Act (Act I of 1877), section 22—Purchase at Court-sale—Purchase subject to subsisting equities—Right, title and interest of judgment-debtor.

The plaintiff sued for specific performance of an agreement whereby the father of the first defendant and the husband of the second defendant agreed to sell to the plaintiff 500 square yards of land forming part of a property consisting of a chawl and vacant land. The agreement was dated the 29th of June, 1901, and the suit was filed on the 30th November, 1903. The third defendant purchased the entire property at a Court-sale in execution of a money-decree obtained by the creditors of the original vendor against his estate. He had notice of the plaintiff's claim.

Held, that, even if a purchaser at a Court-sale purchases without notice he can only buy what the Court could sell, *i. e.*, the right, title and interest of the judgment-debtor, as these existed at the date of the sale, and as these could have been honestly disposed of by the judgment-debtor himself. *Sobhagchand v. Bhaichand*(1), followed.

Held, further, that the purchase by the third defendant was subject to the equity in favour of the plaintiff to compel specific performance, unless that equity had been lost by the plaintiff. The third defendant did not plead delay as a defence or raise a specific issue on the point.

Held, the purpose of a general issue is certainly not that pleas should be allowed under it which are not clearly included in the other issues, but only to determine the kind of relief to which a plaintiff is entitled as the result of the findings on the issues preceding it. When, however, a decree for specific performance is sought it is the duty of the Court to see, whether having regard to the judicial discretion vested in it under section 22 of the Specific Relief Act (Act I of 1877) it ought to be granted.

The proper issue to be raised in such a case is—"Whether the plaintiff's delay has been such as to show that he had lost his right by waiver, abandonment, or acquiescence?"

Laches to bar the plaintiff's right must amount to waiver, abandonment, or acquiescence and to raise the presumption of any of these, the evidence of conduct must be plain and unambiguous.

The plaintiff sued for the specific performance of an agreement, dated the 29th June, 1901, whereby the father of the first

*Original Suit No. 723 of 1903.

(1) (1882) 6 Bom. 193.

defendant and the husband of the second defendant, one Ebrahim Sumar, agreed to sell and the plaintiff agreed to purchase a piece of land measuring 500 square yards situate at Dádar Road.

The vendor Ebrahim Sumar died very shortly after the execution of the agreement. He left his son and widow his only heirs and legal representatives. As the son (the first defendant) was at the time of his father's death an inmate of Her Majesty's gaol at Yerrowda, the plaintiff endeavoured to get the conveyance executed by the widow and a brother of the deceased. But the latter declined on the ground that he had no interest in the property and had no authority to act on behalf of the first defendant. The plaintiff accordingly took no further step until the release of the first defendant from gaol in March, 1903. In the meantime certain creditors of Ebrahim Sumar filed a suit against his son and widow praying *inter alia* for the administration of the estate of the said Ebrahim Sumar. In that suit Mr. Macleod was appointed a Receiver. On learning of his appointment the plaintiff in this suit requested the Receiver to convey the property to him. This Mr. Macleod stated he had no power to do. The creditors subsequently obtained a money-decree only, and no order for the administration of the estate of Ebrahim Sumar was made. The decree was dated the 25th January, 1902. After the release of the first defendant from gaol in March, 1903, the plaintiff repeatedly called upon him to complete the sale. The second defendant however had re-married in the meantime and her whereabouts was not known. The first defendant however promised to obtain letters of administration to the estate of Ebrahim Sumar and then to convey to the plaintiff as administrator. This however he did not do. In September, 1903, the plaintiff gave instructions to his Solicitors to file a suit for specific performance, but this suit was abandoned at the solicitation of the first defendant who renewed his promise to obtain the necessary letters of administration. On the 12th of September, 1902, the creditors in execution of their decree attached the immoveable property of the deceased Ebrahim Sumar, including therein the property the subject-matter of the agreement for sale to the plaintiff.

The plaintiff alleged that he learnt of this attachment only in November, 1903, when the property was advertised for sale. On

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the 16th of November he wrote to the attornies of the attaching creditors informing them of the agreement. Failing in his efforts to effect a stay of the sale of the property agreed to be sold to him, the plaintiff filed this suit on the 30th November, 1903, against the first and second defendants.

The sale of the entire property took place on the 1st of December 1903. At the sale the plaintiff distributed hand bills informing intending bidders of the agreement of sale to him by Ebrahim Sumar of 500 square yards, part of the property put up for sale. The third defendant purchased the entire property at this auction-sale. The plaintiff called upon him to convey the 500 square yards, part thereof, to him. On his refusal to do so he was added as a defendant in this suit.

Neither the first nor the second defendant filed any written statement, nor did they appear at the hearing. The third defendant by his written statement put the plaintiff to the proof of the agreement for sale. He admitted notice of the plaintiff's claim at the time of his purchase at the auction-sale. He further pleaded that the alleged agreement of sale did not create in the plaintiff any interest in the disputed property, and that he had acquired under the Court-sale a perfect title to the property.

The following issues were raised :—

1. Whether the agreement of the 29th of June 1901 created any and what interest in the disputed property in favour of the plaintiff?

2. Whether the sale to the 3rd defendant under the order of the Court is not binding on the plaintiff?

3. Whether the agreement of the 29th of June 1901 was executed by Ebrahim Sumar in favour of the plaintiff?

4. The general issue.

During the cross-examination of the plaintiff's agent, Counsel for the defendant put certain questions only relevant if an issue as to laches had been raised. The plaintiff objected on the ground that the point was not raised by the pleadings or issues. The cross-examination was allowed to proceed on the ground that the suit being one for specific performance the Court had to exercise a judicial discretion.

Robertson, Lowndes with him, for the plaintiff.

The first issue is unnecessary and does not arise in the case. As to the second issue this was the case of a purchase *pendente lite* with actual notice of the suit and the claim upon which the suit was founded. We rely on *Moti Lal* v. *Karrabuldin*(1), *Lakshmandas Sarupchand* v. *Dasrat*(2), *Parvati* v. *Kisansing*(3), *Kunhi Umah* v. *Amed*(4). The auction-purchaser could only purchase what the judgment-debtor if alive could have honestly sold. *Bapuji Balal* v. *Satyabhamabai*(5). The sale must be taken to have been subject to all existing equities. *Sobhagchand Gulabchand* v. *Bhaichand*(6). There is no difference between a purchaser at an execution sale and an ordinary assignee. *Rajah Enayet Hossain* v. *Girdharee*(7), *Kishan Lal* v. *Ganga Ram*(8), *Ram Lochun Sircar* v. *Ramnarain*(9). Sections 54, 55 and 91 of the Transfer of Property Act, section 27 of the Specific Relief Act, and Collett on Specific Performance, (3rd Edn.) p. 226, were referred to.

Bhandarkar, Setalvad with him, for the 3rd defendant.

The agreement for sale did not of itself create any interest in, or charge on, the property, section 54 of the Transfer of Property Act. There has been great delay on the part of plaintiff not sufficiently accounted for. The Court will exercise its discretion and refuse to direct specific performance.

CHANDAVARKAR, J. :—This suit was brought on the 30th of November 1903 to enforce the specific performance of a contract to sell certain land, executed by one Ebrahim Sumar, deceased, on the 29th of June 1901. Ebrahim Sumar having died in about August 1901, the suit has been brought against his son (Mahomed Ebrahim) as the first defendant, his widow as the 2nd defendant, and the 3rd defendant as purchaser of the property at a Court-sale of the 1st of December 1903 in execution of a money-decree obtained by the deceased's creditors against

(1) (1897) 25 Cal., 179.
(2) (1880) 6 Bom., 168.
( ) (1882) 6 Bom., 567.
(4) (1891) 14 Mad., 491.
(5) (1882) 6 Bom., 490.
(6) (1882) 6 Bom., 193 at p. 207.
(7) (1869) 12 Moo. I. A., 366.
(8) (1890) 13 All., 28.
( ) (1877-78) 1 Cal. L. R., 296, at p. 306.

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his estate. One of the issues raised in the case is, whether the agreement of the 29th of June 1901 was executed by Ebrahim Sumar in favour of the plaintiff. On that point, there is the evidence of Mahomedbhoy Bhagubhai, Narottam Bechar, and Nanalal Parbhuram. Upon that evidence, which I accept as trustworthy, and which has not been either shaken in cross-examination or contradicted, I hold that the agreement sued on is proved. I find the third issue in the affirmative.

The effect of such an agreement is that it gave a personal right to the plaintiff against his vendor, or his assignee with notice, to compel either by a suit for specific performance to perform the contract; but he has no direct right over the land: s. 54 of the Transfer of Property Act: *Mahadeo* v. *Vasudev J. Kirtikar*[1]. The first issue, therefore, must be found in the negative. I could not understand at first why this issue was raised at all by the 3rd defendant's Counsel. Neither the plaintiff by his pleadings nor his Counsel in opening his case claimed a direct right over the land by reason of the agreement. At the time I was asked to raise the issue I intimated to the defendant's Counsel that it did not seem to me to arise but he assured me that he would later on make it clear why he wanted it. So I allowed the issue to be raised. But his subsequent argument showed that he laboured under the erroneous impression that, because according to s. 54 of the Transfer of Property Act such an agreement did not, of itself, create any interest in, or charge on, the property, therefore, the plaintiff had no right to bring this suit for specific performance.

The 3rd defendant purchased this property on the 1st of December 1903 at a Court-sale in execution of a money-decree obtained by the deceased Ebrahim Sumar's creditors against his estate, represented by the 1st and the 2nd defendant (the deceased's son and widow respectively). The 3rd defendant's purchase took place while the present suit was pending; it was, therefore, a purchase *pendente lite*; and, the fact that the said defendant purchased at a Court-sale is not sufficient to take it out of the law relating to purchases vitiated by *lis pendens*: *Byramji* v. *Chunilal*[2].

(1) (1898) 23 Bom., 181. (2) (1902) 27 Bom., 263; 5 Bom. L. R. 21.

Further, the 3rd defendant cannot successfully contend that he purchased without notice of the plaintiff's contract. In the third paragraph of his written statement, he admits that just before the auction-sale the plaintiff had circulated among the intending bidders, of whom the defendant was one, printed notices, informing them of the contract and of the present suit. Moreover, even if the 3rd defendant had received no such notice but had purchased in complete ignorance of the plaintiff's contract, he as Court purchaser could buy only what the Court could sell, *i. e.*, the right, title and interest of the judgment-debtor, as these existed at the date of the sale, and as they could have been *honestly* disposed of by the judgment-debtor himself, had he been alive at that date, or on his death by his heirs. That has been held to be the law by a full Bench of this Court in *Sobhagchand* v. *Bhaichand*[1], where it was said:—"When the Court sells the right, title and interest of the judgment-debtor in property.....it cannot be regarded as selling more than the judgment-debtor could himself honestly sell. He could honestly sell only subject to any equities existing against himself on the property.....The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor." This was further held to be the settled law of this Court by Farran, C. J., and Candy, J., in *Maganlal* v. *Shakra Girdhar*[2]. It follows, then, that the 3rd defendant's purchase is subject to the equity in favour of the plaintiff to compel specific performance of the contract entered into by Ebrahim Sumar, unless the plaintiff has lost that equity on some ground, on which the Court, acting under s. 22 of the Specific Relief Act, in the exercise of its discretion, sound and reasonable, guided by judicial principles, declines to decree specific performance.

The ground here alleged is the long delay, amounting to laches, on the part of the plaintiff in instituting this suit. At the outset I ought to mention that no issue, involving this point with sufficient clearness so as to be an intimation to plaintiff's Counsel, was raised by the 3rd defendant's Counsel. It was only when the latter commenced in the cross-examination of the plaintiff's agent to ask questions suggestive of delay that I inquired about

(1) (1882) 6 Bom. 193 at p. 202. (2) (1897) 22 Bom. 945.

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their relevancy. The learned Counsel replied that he intended to rely upon the ground of delay but I brought it to his notice that no issue clearly involving that ground had been raised. He urged that the 2nd issue involved it; but that issue merely was "whether the sale to the 3rd defendant under the order of the Court is not binding on the plaintiff"—meaning that because the 3rd defendant had purchased the property at a Court-sale, under the order of the Court, he had taken it free from all equities in plaintiff's favour. When I explained that to Counsel, he said that the general issue was sufficiently comprehensive to cover his point. But the purpose of a general issue is, certainly not that pleas should be allowed under it which are not clearly included in the other issues, but only to determine the kind of relief to which a plaintiff is entitled as the result of the findings on the issues preceding it. As, however, the 3rd defendant's Counsel seemed to have raised his issues under a misapprehension and the suit was one for specific performance, in which the Court has to exercise its judicial discretion, I allowed him to proceed with his cross-examination. Though he ought to have raised a distinct issue, it was equally my duty to see whether, having regard to the judicial discretion vested in me under section 22 of the Specific Relief Act, this was a case in which I ought to decree specific performance. Though Counsel are responsible for the issues raised, the responsibility is not solely theirs, it being, as pointed out by Westropp, C. J., in *Apaya* v. *Rama*[1], indeed a part of the duty of the Judge, who settles the issues, to ascertain as clearly as he can, on inquiry of the parties or their pleaders, the real points in dispute between them. Accordingly, I intimated to Mr. Robertson, plaintiff's Counsel, before the trial proceeded, that he would have to satisfy me that there had been no unreasonable delay, amounting to laches, on his client's part.

[His Lordship then discussed the question whether the conduct of the plaintiffs amounted to laches, and came to the conclusion that it did. His Lordship then proceeded.]

I must, therefore, disallow the prayer for specific performance. The 3rd defendant's Counsel has admitted the liability of the property in the hands of his client to a charge for the

(1) (1879) 3 Bom. 210 at p. 213.

payment of Rs. 200 (with interest) paid as earnest-money by the plaintiff to the deceased Ebrahim Sumar at the time of the contract. Accordingly there will be a decree in plaintiff's favour to that extent. No personal decree has been asked for as against the 1st and the 2nd defendant for that amount. Even had one been sought, no such decree could have been passed against either. There is no evidence to show that either of these defendants has received any assets of the deceased to make him or her liable to that extent. In fact, in his plaint the plaintiff has claimed no more than specific performance against them.

Order that plaintiff's prayer in his plaint for specific performance of the agreement (Exhibit A) of the 29th of June, 1901, be disallowed.

Declare that the property mentioned in that agreement is subject to a charge for the payment of Rs. 200 with interest at 6 per cent. from the date of the respective payments up to the date of payment to the plaintiff.

Order that, in default of payment of the said amount by the 3rd defendant to the plaintiff within three months from the date of this decree, the said property be sold by order of the Court, and that out of the net proceeds of the sale remaining after deducting the necessary costs, etc., of the sale incurred according to law, Rs. 200 be paid to the plaintiff, should the net proceeds realise a sum in excess of that amount, and the balance be paid to the 3rd defendant. Should the net proceeds be equal to or less than that amount, direct the amount to be paid to the plaintiff and enter satisfaction of the decree.

Order that the plaintiff do pay the costs of this suit to the 3rd defendant.

The plaintiff subsequently applied for a review which was granted on the grounds stated by the learned Judge in the judgment below. The Court on the further hearing raised the following issue:—"Whether the plaintiff's delay had been such as to show that he had lost his right by waiver, abandonment or acquiescence?"

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Robertson for plaintiff.

The equitable doctrine of laches and acquiescence does not apply to suits for which a period of limitation is provided by the Limitation Act. *Rama Rau* v. *Raja Rau*(1); Pollock on Fraud; Tagore Law Lectures, (1882) p. 79, Whitley Stokes, Vol. I, p. 933. As to the exercise of the discretion vested in the Court—*Mokund Lall* v. *Chotay Lall Eyir*(2) referred to. Mere lapse of time is no bar in equity any more than in Law. *Penny* v. *Allen*(3), *Duke of Leeds* v. *Earl Amherst*(4). In any event the period during which the first defendant was in gaol, and the period during which he put off the plaintiff after his release should be excluded. *Southcomb* v. *The Bishop of Exeter*(5), *Mcmurray* v. *Spicer*(6).

Setalvad for third defendant.

When a person is obliged to apply for the peculiar relief afforded by a Court of Equity to enforce the performance of an agreement, there must be no unreasonable delay. *Clarke* v. *Hart*(7). Here there has been culpable delay. He also cited *Levy* v. *Stogdon*(8).

CHANDAVARKAR, J.:—In this suit, in which I had delivered my written judgment on the 12th of September, 1904, declining to pass a decree for specific performance in favour of the plaintiff, I allowed a review for the following reasons.

I had based my judgment on two principal grounds:—(1) that the plaintiff had lost his right to specific performance by delay amounting to laches; and (2) that it would be a hardship on the 3rd defendant if he were deprived of the property in dispute, which he had purchased at a Court-sale in execution of a decree obtained by certain creditors of the plaintiff's vendor, Ebrahim Sumar.

The first of these points raised a question of law dependent upon the facts and at the previous trial Mr. Robertson for the

(1) (1864) 2 Mad. H. C. R., 114.
(2) (1884) 10 Cal., 1061.
(3) (1857) 7 Deg. M. & G. 409 at p. 426.
(4) (1846) 2 Phillips 117.
(5) (1847) 6 Hare 213.
(6) (1863) L. R. 5 Eq. 527.
(7) (1858) 6 H. L. 633 at p. 655.
(8) (1898) 1 Ch. 478 at p. 482.

plaintiff argued the question of law very briefly and urged that upon the facts the delay was not such as to deprive the plaintiff of his right to specific performance. In asking me to review my judgment, Mr. Robertson represented that he had more evidence to call than had been given to explain the delay but that he had not tendered it because he had been left under the impression that I was satisfied with the evidence given. So far as I was concerned, there was no reasonable ground for Mr. Robertson to carry that impression. During the whole of the trial I took care to express no opinion whatever on the evidence given for either party. But it may be that the warning I gave to the 3rd defendant's Counsel at the earliest stage of the trial that he should have got a distinct issue raised on the question of delay led Mr. Robertson to take a sanguine view of his client's case. That, however, is not a sufficient ground for a review. But as Mr. Robertson had not argued the question of law as to delay with thoroughness and as on further consideration it seemed to me that the view I had taken on that question in my judgment was open to doubt, I decided to grant the review applied for—all the more so because I had decided the case against the plaintiff on the additional ground of hardship, which had not been raised clearly by the pleadings.

Under these circumstances, I have allowed both parties to give fresh evidence. Mr. Robertson has now no reason to complain except that I did not allow him to re-examine the plaintiff's grandson, who had already been examined at the previous hearing. The reasons for not allowing that have been recorded by me separately.

The fresh evidence adduced by the plaintiff has not substantially altered the conclusion I arrived at in my previous judgment upon the facts of the case except on the question of hardship. I still think and find that the plaintiff was aware of all the proceedings taken by the creditors of the deceased Ebrahim Sumar in Suit No. 777 of 1901; that till March, 1903, when the deceased's son, the 1st defendant in this suit, came out of gaol, the plaintiff had good excuse for not filing his suit for specific performance; that from March, 1903, to the 30th of November, 1903, on which date this suit was filed, he delayed because the 1st defendant had promised to obtain letters of administration and

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convey the property; that at the auction-sale held on the 1st of December, 1903, the plaintiff was a bidder himself through one of his own sons; but that at the same time to the intending bidders the plaintiff gave notice of his agreement with Ebrahim Sumar. The evidence given before me now, that the plaintiff's son Currimbhoy Peer Mahamed bid for some one else and not for the plaintiff is, in my opinion, unsatisfactory. Currimbhoy and his father, the plaintiff, lived in the same house, and it is hardly probable that the former did not know that his father had agreed to purchase the ground in dispute and that the said ground formed part of the property put up to auction. Joosub Haji Sherif states that the plaintiff's son, Currimbhoy Peer Mahamed, bid for him, though he had previously bid for himself. Currimbhoy, on the other hand, states that Joosub did not bid at all but that he bid for Joosub. I still hold, as I held in my previous judgment, that Currimbhoy bid for the plaintiff.

Upon these facts the question of law is, whether the plaintiff has lost his right to specific performance by reason of his delay in bringing this suit. In my previous judgment I held that the plaintiff had been guilty of "delay amounting to laches." But I did not sufficiently appreciate the legal meaning of the term "laches" which is defined by Lord Ellenborough, C. J., in *Sebag* v. *Abitbol*[1] as "a neglect to do something which by law a man is obliged to do"—a definition approved by Abbot, C. J., in *Turner* v. *Hayden*[2]. Having regard to this definition, the law of limitation compelled the plaintiff to bring his suit within three years from "the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused." (See Art. 113, Sch. II of the Limitation Act.) That was the only obligation cast upon the plaintiff by law; and there is no dispute that there has been no negligence on the part of the plaintiff to bring his suit within the prescribed period of limitation.

Laches in the sense of negligence on the plaintiff's part to do that which the statutory law obliged him to do, being, then, out of the case, the question is, whether there is any other aspect of laches sufficient to deprive the plaintiff of his right to specific

(1) (1816) 4, M. & S. 462. (2) (1825) 4, B. & C. at p. 2.

performance. Mr. Robertson relies in support of his case on *Penny* v. *Allen*[1] and *Duke of Leeds* v. *Earl Amherst*[2], whereas Mr. Setalvad, in reply, cites *Clarke* v. *Hart*[3].

The law as to when and under what circumstances delay is a bar to a legal remedy is very clearly laid down in *Lindsay Petroleum Company* v. *Hurd*[4] where the Judicial Committee of the Privy Council say (per Sir Barnes Peacock) :—

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or, where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

Citing with approval these dicta of the Privy Council, Lord Penzance in *Erlanger* v. *New Sombrero Phosphate Company*[5] observes that delay has two aspects—it may lead to a change in the thing sold or it may imply acquiescence so as to bar a plaintiff's right—and it is essential "to keep these two aspects of it separate and distinct when the consequences of delay come to be considered in connection with the circumstances of an individual case." In *Dalton* v. *Angus*[6] Lord Penzance points out that "in all the cases in which lapse of time is held to stand in the way of the assertion of rights attaching to the ownership of property, it is not the lapse of time itself which so operates but the inferences which are reasonably drawn from the continuous existence of a given state of things during that period

(1) (1857) 7, Deg. M. & G., 409.
(2) (1846) 2, Phillips 117, at p. 125.
(3) (1858) 6, H. L. 633, at p. 655.
(4) (1874) L. R. 5, P. C., 221, at p. 239.
(5) (1878) 3 App. Cas. 1218 pp. 1230, 1231.
(6) (1881) 6 App. Cas. 740 a p. 805.

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of time. These inferences are inferences of acquiescence or consent."

We must test the facts of this case by the light of these principles. Hence it was that I raised the issue at this fresh trial, whether the plaintiff's delay is such as to show that he has lost his right by *waiver*, *abandonment*, or *acquiescence*. Laches must amount to one or other of these to bar the plaintiff's right.

The period of delay in this case runs from the 29th of July, 1901, to the 30th of November, 1903. The agreement to sell was executed by Sumar on the 29th of June, 1901, and one month's time was fixed for performance. So the period of delay began one month after the date of the agreement, *i.e.*, the 29th of July, 1901, and it terminated on the 30th of November, 1903, because that was the date on which the present suit was filed. The delay, then, is of 28 months.

That period, again, may be divided into two heads—the 1st ending in March 1903, when the 1st defendant, the son and heir of Ebrahim Sumar, came out of gaol, and the 2nd ending with the filing of the suit.

During the first of these periods, the plaintiff had, as I have held, good reason for not bringing the suit, as the 1st defendant was in gaol. He could have sued Ebrahim's widow but mere omission to sue unless she had refused to perform the contract is not sufficient to bar the plaintiff's right unless he had done something during this interval by conduct or otherwise, showing that he intended to waive his right. Moreover, by an order of the Court in the creditor's suit, the heirs of Ebrahim Sumar had been restrained from disposing of the property. It is true that the plaintiff knew of the suit brought by the creditors and of all the subsequent proceedings taken in execution of the decree in that suit. But it was a money-decree. He must be presumed to have known the law that at a sale by the Court in execution of such a decree the Court sells and the Court purchaser buys only what the judgment-debtor himself could have honestly sold. It is also true that he did not notify his claim under section 287 of the Code of Civil Procedure: but there was no duty imposed upon him by law to notify it. Section 287 imposed a duty upon the Court—not upon the

plaintiff. His mere omission, therefore, to notify his claim cannot be treated as *waiver*, *abandonment*, or *acquiescence*, unless that omission was coupled with some act or conduct implying one or other of these. There was no such act or conduct on the plaintiff's part; on the other hand, we have the fact clearly established by the evidence that long before the date of the proclamation of sale, the plaintiff had informed the Receiver, appointed in the creditor's suit, of his agreement with Ebrahim Sumar. Up to March, 1903, therefore, the plaintiff had done nothing to charge him with a waiver of his right or with having placed the 1st defendant in a situation in which it was not reasonable to place him. The proceedings taken in execution were, so far as that defendant was concerned, taken *in invitum* and he cannot complain of any conduct on the plaintiff's part which has been to his prejudice. Nor can the decree-holders who brought the property to sale complain. They could only attach and get the Court to sell the right, title and interest of Ebrahim Sumar, as these existed at the date of the attachment. But at that date the right, title and interest of Ebrahim were subject to the plaintiff's right under the agreement now in question.

So much for the period ending with March, 1903, when the 1st defendant came out of gaol. From that time to the 30th of November 1903 is a period of 8 months. What happened during this period, according to my finding, is this. The plaintiff relied upon the 1st defendant's promise that he would take out letters of administration. He, therefore, delayed suing. At the same time, seeing that the property in dispute, along with other property of Ebrahim Sumar, was about to be sold by the Court in execution of the creditor's money-decree, he waited to see whether he could buy at the Court-sale the whole of the properties, consisting of a chawl, a vacant land, and the land in dispute which is 500 square yards. It was on that account that he bid at the sale through his son. At the same time, before the sale he gave notice to intending bidders, and also to the Sheriff, of his agreement with Ebrahim Sumar now in dispute.

Does this conduct of the plaintiff amount in law either to *waiver* or *abandonment*, or *acquiescence*? I do not think it does. Had

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the property brought to sale been only the one in dispute, there might have been some room for argument that the plaintiff by bidding for it at the Court-sale intended to waive his right under the agreement. But it was not. It was but a small portion of what was put up to sale by the Court. The fact that the plaintiff bid for the whole, at the same time giving notice of his right to the portion, is sufficient to negative the inference of *waiver* or *abandonment*, or *acquiescence*. To raise the presumption of any of these, the evidence of conduct must be plain and unambiguous, which here, upon the facts, it is not. It has never been the 3rd defendant's case, and there is no evidence, that he bid for the property and ultimately purchased it, relying upon the fact that the plaintiff by bidding for it through his son *waived* or *abandoned* his right under the agreement, or that he *acquiesced* in the Court-sale so as to encourage the 3rd defendant in the belief that no such agreement existed, or that, if it existed, the plaintiff had given up all rights under it.

My previous judgment also went upon the ground that it would be hard on the 3rd defendant to be deprived of the property which he had purchased, after the purchase-money paid by him had gone in satisfaction of Ebrahim Sumar's creditors. The question of hardship had not been raised by the pleadings at the previous trial but now both parties have adduced evidence. I find that the plaintiff agreed to purchase the property in dispute at Rs. 2-2-0 per square yard, whereas the 3rd defendant has purchased it at Rs. 1-8-0 per square yard. See the evidence of Mukund Sakharam Patkar, Engineer.

On the question of hardship, all that appears upon the evidence is that the 3rd defendant has built some privies, the cess pools of which are situate on the ground in dispute. Whether the privies newly built are on that ground does not appear clearly; but even supposing they were, that is not the kind of hardship contemplated by the Specific Relief Act. They were built after the present suit had been brought and after the 3rd defendant had notice of the plaintiff's claim.

Declare the plaintiff is entitled to have the contract, dated the 29th of August, 1901, executed by Ebrahim Sumar, deceased,

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mentioned in the plaint, specifically performed by the 3rd defendant.

Direct the 3rd defendant to execute a conveyance to the plaintiff in terms of the said contract within 3 months from this date and to deliver possession to the plaintiff of the property forming the subject-matter of the contract on receiving the amount of the purchase-money payable thereunder.

Plaintiff to have the costs of hearing of this suit both before and after the review, from the 3rd defendant, except the costs of the review which shall fall on the plaintiff. The costs which the 3rd defendant is hereby adjudged to be liable to pay shall be the ordinary costs payable by a party added after the filing of the suit.

Liberty to apply.

Attorneys for the plaintiff—*Messrs. Malvi, Hiralal and Mody.*

Attorneys for the defendants—*Messrs. Tyabji, Dayabhai and Company.*

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1904.
October 3.

VAGHOJI KUVERJI (DEFENDANTS), APPELLANTS, *v.* CAMAJI BOMANJI (PLAINTIFFS), RESPONDENTS.*

Letters Patent clause 12—Suit for land—Jurisdiction—Leave of Court—Cause of action—Title—Appeal from order discharging summons.

The plaintiffs asked for a declaration that they were entitled to exclusive possession and enjoyment of a *talao* situated outside the jurisdiction of the Court and that the defendants had no right in or to the same. They also sought an injunction to give effect to that declaration and further prayed that it might be declared that they were the exclusive owners of the *talao*.

Held, that the suit was a suit for land and that under the circumstances the Court had no jurisdiction to entertain it.

Held, also, that an appeal lies from an order dismissing a Judges summons to shew cause why leave granted under clause 12 of the Letters Patent should not be rescinded and the plaint taken off the file.

*Appeal No. 1350, suit 716 of 1903.