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the failure to pay any instalments. I see no difficulty in holding that that is the limit of the concessions which the Legislature was making in his behalf, and in my view neither the principle of those concessions nor the words of the Statute suggest that the intention was that, on the failure to pay each particular instalment, the mortgagee would not only have to obtain a definite order under sub-section 2 of section 15B, but would also have to follow it up at some later period by making a fresh application in each case and obtaining from the Court a fresh order. I am of opinion that the order made by the Court under sub-section 2 is the order contemplated by the Legislature as effecting without more the sale of the requisite portion of the property.

SHAH, J. :—I agree.

Answer accordingly.

R. R.

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March 15.

Before Sir Basil Scott, Kt. Chief Justice and Mr. Justice Heaton.

GANGARAM VALAD GANPATI BHOPALE (ORIGINAL DEFENDANT),
APPELLANT v. LAXMAN GANOBA SHET CHANDOLE (ORIGINAL
PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), section 40—Specific Relief Act (I of 1877), section 3—Indian Trusts Act (II of 1882), section 91—Suit for declaration and possession—Sale—Prior agreement of purchase—Notice—Subsequent purchaser, a trustee.

Plaintiff sued for a declaration of title to and for possession of immovable property from the defendant. He based his title upon a registered sale deed dated the 5th December 1911 from one N. Prior to this date the plaintiff had notice of the execution of a contract of sale of the same property by N to the defendant. The defendant relied upon his possession under the contract of

* Second Appeal No. 151 of 1915.

sale and contended that he had paid to N portion of the purchase money agreed upon and the balance was to be paid after the sale deed was passed. Both the lower Courts allowed the plaintiff's claim for possession though it was found that the plaintiff had notice of the defendant's contract of sale and that nearly half the purchase money was in fact received by N from the defendant under the contract. The defendant having appealed,

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Held, that the plaintiff having purchased with notice of the defendant's contract, his suit for possession must fail. He stood in the position of a trustee for the defendant of the land purchased by him and could not profit by his conveyance except to stand in the shoes of his vendor and receive the balance of the purchase money due, on payment of which he would have to convey to the defendant.

Lalchand v. Lakshman⁽¹⁾ and *Kurri Veerareddi v. Kurri Bapireddi*⁽²⁾ doubted.

SECOND appeal against the decision of K. H. Kirkire, First Class Subordinate Judge, A. P. of Nasik, confirming the decree passed by S. A. Gupte, Subordinate Judge at Malegaon.

Suit for declaration and possession.

The plaintiff sued for a declaration that the immoveable property situate at Bhokergaon belonged to him and for possession of the same from the defendant. He alleged that he purchased the plaint property from Narayan Ganpati for Rs. 1,000 on the 5th December 1911 by a registered sale deed ; that the said Narayan had leased the property to the defendant under an oral agreement for one year in 1904 ; and that since then the defendant continued to be in possession illegally.

The defendant contended that prior to the plaintiff's purchase he had entered into an agreement with Narayan for the purchase of the plaint property for Rs. 410 ; that under the said agreement he had already paid Narayan Rs. 275 and the balance of Rs. 135 was to be paid after the sale deed was passed ; that the

⁽¹⁾ (1904) 28 Bom. 466.

⁽²⁾ (1906) 29 Mad. 336.

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plaintiff knew of the above fact and that his sale deed was fraudulent and without consideration.

The first Court awarded the plaintiff's claim for possession although it held that the defendant's agreement to purchase the property from Narayan was proved; that he had paid part of the purchase money to Narayan and that the plaintiff purchased the property with full notice of the defendant's equities.

The lower appellate Court confirmed the decree.

The defendant appealed to the High Court.

K. H. Kelkar, for the appellant:—Both the lower Courts find that the plaintiff had notice at the time of his purchase of my contract of sale; further I am in possession of the property. The plaintiff has, therefore, to prove superior title as against me; even in the absence of a registered deed in my favour my possession ought to be protected. The plaintiff-respondent is merely a trustee for me. I rely on *Karalia Nanubhai v. Mansukhram*⁽¹⁾; section 40 of the Transfer of Property Act; section 91 of the Indian Trusts Act; and section 3 of the Specific Relief Act.

W. B. Pradhan, for the respondent:—We say that the decree of the lower Court is correct. Section 54 of the Transfer of Property Act is peremptory and there is no transfer of property in favour of the defendant as there is no registered conveyance in his favour: see *Immudipattam Thirugnana Kondama Naik v. Periya Dorasami*⁽²⁾; *Kurri Veerareddi v. Kurri Bapireddi*⁽³⁾; and *Timangowda v. Benepgowda*.⁽⁴⁾ The fact that the defendant is in possession makes no difference; he is only entitled to have his agreement specifically enforced against his vendor: see *Mahadeo v. Vasudev J.*

⁽¹⁾ (1900) 24 Bom. 400.

⁽³⁾ (1906) 29 Mad. 336.

⁽²⁾ (1900) 24 Mad. 377 at p. 384.

⁽⁴⁾ (1915) 39 Bom. 472.

Kirtikar⁽¹⁾ and *Lalchand v. Lakshman*.⁽²⁾ The agreement being in respect of immoveable property will not affect a registered conveyance : see *Hormasji Manekji Dadachanji v. Keshav Purshotam*.⁽³⁾ The case of *Karalia Nanubhai v. Mansukhram*⁽⁴⁾ is not against us ; there the purchaser's title was perfected by a registered sale-deed before the decision by the first Court and so the present point was not before the Court in that case.

Section 40, clause (2) of the Transfer of Property Act has no application because the right, which the defendant has under his contract of sale, is not "an obligation annexed to the ownership of the immoveable property." It is an interest created in the ownership of the immoveable property which the defendant has a right to have it specifically enforced ; such a right can be created only by a writing duly registered.

It is further clear that a suit for specific performance is time-barred. At any rate we step in the shoes of our vendor and as such ought to get the balance of the unpaid purchase money lying with the defendant.

SCOTT, C. J. :—The plaintiff sued for a declaration that a certain immoveable property belonged to him and for a decree that possession of the same should be delivered to him by the defendant. He bases his title upon a purchase of the properties in question from Narayan Gunpati on the 5th of December 1911. It has been held by the lower appellate Court that prior to this date the plaintiff had notice of the execution of a contract for the sale of the same property by Narayan to the defendant. The defendant contends that he has paid to Narayana portion of the purchase money agreed upon and that the balance was to be paid after the sale

⁽¹⁾ (1898) 23 Bom. 181.

⁽²⁾ (1904) 28 Bom. 466.

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⁽³⁾ (1893) 18 Bom. 13.

⁽⁴⁾ (1900) 24 Bom. 400.

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deed was passed. It is found by the lower appellate Court that nearly half of the purchase moneys was in fact received by Narayan from the defendant under the contract of sale.

The question is whether the defendant has a good defence to a suit by a purchaser from Narayan who can rely upon a registered sale deed and whether he can, notwithstanding the sale deed, retain possession of the property on the ground that the plaintiff purchased with notice of the defendant's contract.

The defendant's right to enforce the benefit of the obligation of his intended vendor against the purchaser with notice is expressly affirmed by section 40 of the Transfer of Property Act, as explained by the illustration. The plaintiff is, moreover, according to the Specific Relief Act, section 3, a trustee for the defendant of the land purchased by him : see illustration (g). Section 91 of the Trusts Act affirms the same rule as the Specific Relief Act. The Legislature has herein adopted the law applied in the cases of *Daniels v. Davison*⁽¹⁾ and *Potter v. Sanders*.⁽²⁾ It is not contended that in the defendant's contract any date is fixed for performance nor is there any evidence that before he learnt of the plaintiff's purchase, the defendant had any notice that the vendor would refuse performance. Therefore, at the date of the plaintiff's suit, namely, the 16th of April 1912, a suit by the defendant against his vendor for specific performance would have been within time and if the plaintiff was at the date of suit in the position of a trustee for the defendant, the latter is clearly entitled to enforce that position up to the end of the litigation. It must not be taken from the above

(1) (1809) 16 Ves. 249.

(2) (1846) 6 Hare 1

remarks that the defendant would be in a worse position in relation to the plaintiff if at the date of suit his right to sue his vendor for specific performance had been barred, since he is a defendant now relying upon his possession. In this connection reference may be made to *Orr v. Sundra Pandia*,⁽¹⁾ *Krishna Menon v. Kesavan*⁽²⁾ and *Rangnath Sakharam v. Govind Narasim*.⁽³⁾

The result is that the plaintiff cannot profit by his conveyance except to stand in the shoes of his vendor and receive the balance of the purchase money due, on payment of which he would have to convey to the defendant. This, however, is not the relief which he seeks, and the result is that his suit for possession must fail.

This decision may appear to be inconsistent with the result arrived at in *Lalchand v. Lakshman*⁽⁴⁾ and in *Kurri Veerareddi v. Kurri Bapireddi*⁽⁵⁾ from which, if rightly decided, it would appear that the defendant would have no defence against a suit by his vendor for possession although by reason of the statutory provisions above referred to, he has a complete defence against his vendor's assignee, notwithstanding that the latter has no greater knowledge than the vendor possessed.

It may be necessary hereafter, when a suitable occasion arises, to consider in a Full Bench whether the Transfer of Property Act, necessarily involves such inconsistent positions. The facts of the present case do not raise the question decided in *Lalchand v. Lakshman*.⁽⁴⁾ When the question does arise for consideration the observations of the Privy Council in *Immudipattam Thirugnaña Kondama Naik v. Periya Dorasami*⁽⁶⁾ and the words "of itself" in the last clause

⁽¹⁾ (1893) 17 Mad. 255.

⁽²⁾ (1897) 20 Mad. 305.

⁽³⁾ (1904) 28 Bom. 639.

⁽⁴⁾ (1904) 28 Bom. 466.

⁽⁵⁾ (1906) 29 Mad. 336.

⁽⁶⁾ (1900) 24 Mad. 377 at p. 384.

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of section 54 of the Transfer of Property Act to which attention was called by Sir Lawrence Jenkins in *Karalia Nanubhai v. Mansukhram*⁽¹⁾ will doubtless be considered.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

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March 17.

NABIBHAI VAZIRBHAI (ORIGINAL DEFENDANT), APPELLANT v. DAYA-BHAI AMULAKH AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Execution of the decree passed by Baroda Court—Application for execution presented to Baroda Court though within time according to Baroda law, still out of time according to British Indian law—Transfer of decree to British Indian Court—Execution barred by limitation.

A decree was passed by the Baroda Court in 1909. The first application to execute the decree was made in 1913, it being within the time prescribed by the law in Baroda. The decree was transferred to the Ahmedabad Court (British) for execution in 1915, where the judgment-debtor contended that no application to execute the decree having been made within three years of its date, the execution of the decree was barred.

Held, that the decree was incapable of execution in the Ahmedabad Court having been barred according to the British Law of Limitation which governed the case.

APPLICATION under extraordinary jurisdiction against an order passed by V. M. Mehta, First Class Subordinate Judge at Ahmedabad.

Execution proceedings.

The plaintiff obtained a money decree in the Kalol Court (a Court within the Native State of Baroda) on the 11th December 1909. He first applied to execute the decree in 1913, the application having been within time allowed by the law in Baroda. In 1915, the

(1) (1900) 24 Bom. 400 at p. 402.

* Civil Extraordinary Application No. 329 of 1915.