

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

BHAGWAN BHAI INDAP AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v* KRISHNAJI JANOLI INDAP (ORIGINAL PLAINTIFF), RESPONDENT.*

1920.

January 29.

Hindu Law—Joint Family Property—Contract for sale of his interest by a co-parcener—Death of the co-parcener before completion of the sale—Suit for specific performance against sons—Specific Relief Act (I of 1877), section 27, clause (c) and illustration.

One B and his three sons jointly owned one anna share in a Khoti village. B agreed to sell his three pies share to the plaintiff. Before the sale could be completed B died and a suit for specific performance was brought against his sons.

Held, that the plaintiff could enforce the contract for sale of B's interest by a suit for specific performance against B's sons.

The second illustration to clause (c) of section 27 of the Specific Relief Act applies to the case of all joint tenants, whether members of a joint Hindu family or not.

SECOND appeal against the decision of C. C. Dutt, District Judge at Ratnagiri, reversing the decree passed by V. V. Bapat, Subordinate Judge at Devgad.

Suit for specific performance of contract.

One Bhai Indap and his three sons were members of a joint Hindu family. They owned one anna share in the *khoti* village of Koloshi. On the 7th July 1916 Bhai entered into an agreement with the plaintiff to sell him his three pies share in the Khoti village for Rs. 250 and received Rs. 20 as earnest money. The plaintiff alleged that according to the terms of the agreement the balance of the price Rs. 230 was to be paid and the sale deed was to be executed soon after the end of the rainy season of that year. Bhai Indap having died in the meanwhile the plaintiff called upon his sons, the defendants, to execute the sale deed and to perform the

* Second Appeal No. 1045 of 1918.

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agreement. They having failed to do so, the plaintiff sued for specific performance of the agreement.

The defendants contended that Bhau had no necessity to sell the property; that the agreement if proved was not binding on them; that the value of Bhau's three pies share was more than Rs. 250; and that they were ready and willing to pay plaintiff Rs. 20 with interest.

The Subordinate Judge held that the agreement set up by the plaintiff was proved but dismissed the plaintiff's claim for specific performance on the ground that no necessity was proved for alienation of the family property by Bhau and on his death whatever interest he had in the property ceased to exist; it did pass to the defendants who were full owners in their own right by right of survivorship. He decreed that the plaintiff do receive Rs. 20 paid into Court by the defendants.

On appeal the District Judge reversed the decree and allowed the plaintiff's suit for specific performance observing as follows:—Here Bhau did not agree to alienate more than his share; so I do not see how according to Hindu law or by analogy of the illustration under section 27 of the Specific Relief Act the sons can escape the agreement.

The defendants appealed to the High Court.

B. V. Desai, for the appellant:—Bhau had no antecedent debts nor was he in any necessity to contract to alienate the portion of the ancestral joint property. The agreement entered into by Bhau purports to contract to sell only his three pies share in the one anna Khoti Takshim which belonged to the joint family. As there is no mention of the word "my" before "three pies share" it cannot be said that there was even an intention to partition the joint property. Bhau did not till his death actually alienate any property, not even

his three pies share. The moment Bhau died, whatever interest he had in the property ceased to exist and the defendants, the sons of Bhau, became owners of the whole property in their own right. The property agreed to be sold is not extant and no specific performance can therefore be granted.

S. R. Parulekar for *A. G. Desai*, for the respondent:—Bhau, being a co-parcener had every right to alienate his share for valuable consideration: *Vasudev Bhat v. Venkatesh Sanbhav*⁽¹⁾. His share in this case is three pies. It does not matter if he has not used the words “my three pies share.” He has not contracted to alienate more than his own share. This amounts to the intention of partition: *Girja Bai v. Sadashiv Dhundiraj*⁽²⁾.

Apart from this, even supposing there was no division Bhau had a right to alienate his share for valuable consideration. He and his three sons can be said to be joint tenants of the land. Bhau can contract to alienate his undivided share. Then the land would devolve upon the surviving co-parceners, after Bhau's death subject to the contract: see illustration to clause (c), section 27 of the Indian Specific Relief Act.

[HEATON, J. :—This is the English principle of joint tenancy. You cannot say that the principle applies to the Hindus.]

The Specific Relief Act is a general Act and applies to all. Had the intention of the Legislature been not to apply it to the Hindus they would have said so specifically.

[MACLEOD, C. J. :—But the illustration does not fit in. It is rather inconsistent with clause (c) of section 27.]

I submit that the illustrations to sections form part and parcel of the sections itself and the section must be

⁽¹⁾ (1873) 10 Bom. H. C. 139 at p. 162. ⁽²⁾ (1916) 43 Cal. 1031.

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so construed as to conform to the illustrations: *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*⁽¹⁾. The wording of the clause no doubt seems to be defective. The words "by the defendants" ought to be "by other party to the contract." Otherwise the clause as it stands can have no meaning. The clause applies to this case. Here the plaintiff claims under the title accruing to him under Exhibit 22. The specific performance can be granted against the sons who had no doubt interest in the property of their father prior to the execution of Exhibit 22, and though this title of the defendants is known to the plaintiff, this interest of the sons in the father's property might have been displaced by the father, the other party to Exhibit 22.

I submit that this section construed together with the illustration exactly applies to the facts of this case and the defendant cannot in any way escape it.

Desai, in reply:—A Hindu father cannot contract to alienate his share in the undivided property. On his death, his share survives to his sons, it loses its identity and nothing is left of which specific performance can be sought: *Nathaji v. Sitaram*⁽²⁾.

MACLEOD, C. J.:—The plaintiff sued to obtain specific performance of an agreement to sell the plaint property passed between him and one Bhau Indap, dated the 7th July 1916. The plaintiff had paid Rs. 20 to Bhau, the contract clearly being a contract for sale to the plaintiff of Bhau's interest, which was three pies in the joint family property. Before the sale could be completed Bhau died, and the suit is brought against his sons for specific performance. The 3rd defendant paid Rs. 20 into Court, the sum which had been paid to his father, and the trial Court directed that the plaintiff should receive that amount, and his claim for specific

(1) (1916) 19 Bom. L. R. 157, P. C.

(2) (1902) 4 Bom. L. R. 587.

performance was refused. In the lower appellate Court this decree was reversed, and the plaintiff's suit was decreed. The respondent relies on section 27 of the Specific Relief Act, clause (c), 2nd Illustration to that clause. It is difficult at first sight to see how that Illustration fits in with clause (c). I think the argument is this, that if A and B are joint tenants of joint family property, A has the expectation of succeeding on the death of B to the whole, and A, therefore, may be said, though somewhat inaccurately, to have a title to that undivided moiety, although that title, whatever it may be called, is liable to be displaced by B. That seems to be the argument although it is not perfectly clear how B can displace A's title, for the only thing that could happen to prevent A succeeding to B's half would be the event of A dying before B. In that way it may be said that B would be displacing A's title. However that may be, the Illustration distinctly covers the case of one joint tenant agreeing to sell his undivided moiety, and then dying, for it states that his purchaser could bring a suit for specific performance against the survivor, and unless we place co-parceners in a joint Hindu family in a different category to joint tenants, we should have to hold that the Illustration is binding upon us. The Illustration itself is perfectly clear. There is no ambiguity about it, and there is no reason why we should not follow it in the case of all joint tenants, whether members of a joint Hindu family or not. If we did not do so, a certain amount of uncertainty would arise in future, and it is always desirable to avoid that. In my opinion, therefore, the decision of the lower appellate Court must be upheld, and the appeal must be dismissed with costs.

HEATON, J. :—I think the 2nd Illustration to clause (c) of section 27 of the Specific Relief Act must be taken to refer, not merely to joint tenants in the English sense, but to co-parceners in a joint Hindu family.

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I think so, because the Specific Relief Act is applicable to India, and enacted for India, where the majority of the population are Hindus, and throughout the whole of which country the idea of a joint Hindu family is well understood. But I rather regret that it is so for this reason: we have to decree specific performance, and what will be the result. The result will be that the plaintiff will obtain a transfer to himself of a three piés share in a certain property. He will have no right to joint enjoyment of that property, and he will be unable to obtain separate possession of it without bringing a suit for partition. So that we are giving the plaintiff a decree which at best, in all human probability, will only lead to further disagreement and further litigation. That is not the kind of case in which I personally should be disposed to decree specific performance. But the Legislature have thought otherwise, and after all our own personal views are nothing, the intentions of the Legislature everything. I think, therefore, that the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

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February 10.

BAI PARWATI, WIFE OF MANSUKH JETHA (ORIGINAL DEFENDANT NO. 1),
APPELLANT v. GHANCHI MANSUKH JETHA (ORIGINAL PLAINTIFF),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXI, Rule 33—Decree for restitution of conjugal rights—Decree should not be executed by detention in prison—Husband protected against civil or criminal proceedings for maintenance if wife disobeys Court's order to live with husband.

A decree for restitution of conjugal rights was passed in favour of the plaintiff, the husband, by the lower appellate Court. It directed that the

* Second Appeal No. 1085 of 1918.