

(1909) 11 CAL CK 0010
In the Calcutta High Court

Rajah Ranjit Sinha Bahadur

APPELLANT

Vs

Kalidasi Debi and Others

RESPONDENT

Date of Decision : 25-11-1909

Acts Referred:

Citation : (1909) 11 CAL CK 0010

Judgement

1. The defendant No. 1 is the zsmiliar of a certain mous"ih called Kaytlia now in the district of Birbhum. Defendants Nos. 2 and 3 are the pitnidars and plaintiff is the durpatnidar of the said mouzah. Subsequently to the creation of these tenures, the Government resumed the chowkidari chakran lands of the mouzah under Act VI of 1870 B.C. and made a transfer of the same to defendant No. 1 u/s 50 of the said Act on several dates in 1898, 1899 and 1900 at a total jama of Rs. 215 and defendant No. 1 made raiyati settlement of the said"lands with defendants Nos. 4--18, who are in possession. The plaintiff brings this suit on the allegation that the defendant No. 1 having transferred all his rights in respect of the mouzah to the patnidars and the patnidars having similarly transferred all their rights to the dur-patrnlars, subject of curse to the payment of the respective head rents, she as dur-patnidar was entitled to khas possession of the said lands at the juma payable to the Collector. She prays that she may recover khas possession and that proper deeds of transfer may be executed in her favour by defendant No. 1. The Subordinate Judge gave a decree for recovery of possession with mesne profits from date of decree but left to a future suit the determination of the terms on which the plaintiff was to hold the lands. On appeal the District Judge of Birbhum has upheld the decree of the Subordinate Judge and in second appeal, it is contended on behalf of defendant No. 1 (1) that the suit has been wrongly framed, it ought to have been one for the specific performance of a contract pure and simple without any prayer for possession and that it should be dismissed on this ground alone: and (2) that the suit is barred by limitation.

2. In support of the first pica the learned Vakil for the appellant contends, that defendant No. 1 had no title in the disputed lands before the transfer by the

Collector and he could not, therefore, have made any valid transfer of the same at the time of the patni nor on the same ground could the patnidar transfer any title to the dur-patnidar, that the jural relation created by the patni and the durpatni leases, in respect of the disputed land, was no more than that of a mere agreement to grant, contingent upon a subsequent transfer and this agreement must be specifically enforced before the plaintiff could have a title which would entitle her to treat defendant No. 1 or his lessees as trespassers and to sue for recovery of possession. He relies upon two cases as supporting his contention *Ranjit Singh v. Radha Charan Chandra* 34 C. 564, *Kashim Sheikh v. Prosuno Kumar Mukerjee* 33 C. 596 : 10 C.W.N. 598. It is conceded that the former case has been dissected from in a later case that of *Banwari Mukunda Deb v. Bidhu Sundar Thakur* 35 C. 346 : 7 C.L.J. 439 : 12 C.W.N. 459," and the latter case distinguished by one Judge and dissented from by another in the case of *Kazi Newaz Khoda v. B'imgadu Dey* (4), and it is contended that a reference ought to be made to the Full Bench in consequence of this conflict. The second ground depends upon the decision of the first. The learned Vakil for the respondents contends that the suit is. rightly conceived" in that it does contain a prayer for specific relief by way of execution of a proper deed of settlement and contains a further prayer for consequential relief by way of possession, so that even if the right view of the law were that enunciated in the case of *Ranjit Singh v. Uadha Charan Chandra* 34 C. 564, there is no defect in the form of the suit and no reference to the Full Bench is necessary: he also contends that if that view is not right still his suit is well conceived in that he prays for recovery of possession as his main relief and the other reliefs as ancillary thereto.

3. We have carefully considered the plaint and we have no doubt it is rightly conceived in either view of the law. We do not think that the joining of the two prayers for execution of a deed of transfer and for recovery of possession is in any way repugnant to any rule of law. In the case of *Nathu valad Pandu v. Budhu valad Bhiku* 18 B. 537, Sir Charles Sargent, C.J., held that a claim to possession on the contract might be barred by Section 43, Civil Procedure Code, as not included in a previous suit for specific performance but a suit for possession based on the deed of sale executed as a result of the suit for specific performance was a different cause of action and was not so barred. The Madras High Court, in the case of *Narayana Kavirayan v. Kandasami Goundan* 22 M. 24, held that a separate suit for possession would be barred as tho right to possession arose at the same time as the right to the conveyance. Although Sir Charles Sargent in the Bombay case held that the conveyance gave a fresh cause of action for a suit for possession he also held that there was a claim, to possession on the contract which was barred by Section 43, Civil Procedure Code, so that there is no conflict between the said two cases as to there being a cause of action for possession on the contract, which ought to be impleaded in the suit for specific performance. In this view of the cases it is not necessary in this case to consider whether there is a fresh cause of action on the conveyance and a fresh suit for recovery of possession would be maintainable. It is sufficient

to say that in this case the prayers are rightly joined and both. The above cases support this view.

4. The suit, therefore, is not liable to be dismissed on the ground that; there is no case of action for recovery of possession.

5. It is contended, however, that had the parties gone to trial on the issue of specific performance, the defendant No. 1 would have been in a position to prove by evidence that he had given notice of refusal long before. The question of limitation in a suit for specific performance was not considered in the Court of first instance but it is clear from the judgment of the lower appellate Court that the plaintiff did put in documentary evidence to show that the demand and refusal were within time and there appears to have been no reason why the defendant No. 1 should not have put in rebutting evidence showing a previous refusal if there was one. The necessity for bringing a suit for specific performance as a condition precedent to any relief was never pressed until the case was being argued before us and we do not think that any such question arose in the lower Courts or that the lower appellate Court committed any error in law in deciding as it did on the materials before it. The question of limitation and the question of privity of contract were decided on the facts by the lower appellate Court and the appellant now wishes to have a remand to make a new case on the facts as regards limitation to a suit for specific performance, because it is possible that if a Full Bench decided that such a suit was imperative such a defence might have been open to him in the Court of first instance. This we cannot allow. Another contention upon which it is sought to obtain a reference to a Full Bench in this case is that if a suit for specific performance is imperative and if this is regarded as such a suit, the conditions on which the transfer is to be made must be decided in the suit itself. It does not appear to us that this question was raised in any form in the lower appellate Court but it is admitted by the learned pleader for the respondent that the conditions on which the transfer should be made are laid down in *flan Narain Mozumdar v. Mukund Lal Mundal* 4 C.W.N. 814, as matter of law and we are of opinion that the learned Judge in the Court below should in any case, whatever view of the law be taken, decide the conditions in this suit on the principles laid down in that decision. We think that all that is necessary is to remand the case to him now for that purpose upholding the judgments and decrees in other respects and dismissing the appeals.

6. It is admitted that the same result will follow the analogous Appeals Nos. 1093, 1094, 1199, 1200.

7. We allow no costs in those appeals bat the appellants must pay the costs in the lower-Courts.