

(1911) 07 CAL CK 0002**Calcutta High Court****Case No:** None

Janki Pershad Singh and Others

APPELLANT

Vs

Syed Yahia Hossain and Others

RESPONDENT

Date of Decision: July 7, 1911**Acts Referred:**

- Specific Relief Act, 1877 - Section 22, 27

Citation: 13 Ind. Cas. 637**Hon'ble Judges:** Mookerjee, J; Carnduff, J**Bench:** Division Bench**Judgement**

1. This appeal is directed against a decree in a suit for specific performance of a contract of sale of property which admittedly belonged to the first defendant, a parda-nashin Mahomedan lady. The case for the plaintiffs is that a contract was made with them in Junary 1905 for the sale of this property to them at the rate of Rs. 50 per dam. It was agreed at the time that the conveyance should be executed upon payment of the consideration in May following. The plaintiffs alleged that they were unable by reason of mishaps in their family and the advent of plague in that part of the country to perform their part of the contract and the vendor consented to have the conveyance executed in August or September 1905. It is admitted that the conveyance was not so executed, and it was not till the 13th December 1905 that the plaintiffs were in a position to tender a conveyance to the defendant for execution. Meanwhile, negotiations appear to have taken place between the vender and the defendants-appellants before us, and on the 27th January 1906 a conveyance was actually executed by the first defendant in their favour. There is evidence to show that on the 13th January 1905 the defendants had purchased the stamp-papar on which the conveyance was subsequently executed. This indicates plainly that the negotiations with them had been completed on or before that date. On the 27th March 1907, the plaintiffs commenced this action to enforce specific performance of the alleged contract of sale in their favour. The claim was resisted by the purchasers

on various grounds, but their objections were overruled by the Court of first instance and a decree made in favour of the plaintiffs. Upon appeal that decree has been confirmed by the District Judge. On the present appeal, the decree of the District Judge has been assailed substantially on three grounds, namely, first, that the plaintiffs are not entitled to succeed because the authority of the husband of the first defendant to bind her by the agreement has not been established; secondly, that the facts found do not show that the defendant's are purchasers with notice of the alleged prior contract in favour of the plaintiffs; and, thirdly, that under the circumstances of the case the Court, in the exercise of its discretion u/s 22 of the Specific Relief Act, ought not to decree specific performance.

2. In so far as the first of these grounds is concerned, it appears to have been the case of the plaintiffs in the Courts below that the second defendant (the husband of the first defendant) entered into negotiations with the plaintiffs for the sale of this property on behalf of his wife. The plaintiffs placed reliance upon a power-of attorney, said to have been executed by the wife in favour of the husband. This power-of-attorney was not produced in the Courts below. In fact the attempt of the plaintiffs to enforce its production was unsuccessful, but the defendants could not be blamed for the result, as they were substantially in the same position as the plaintiffs themselves; it is not suggested that the power-of-attorney was in their custody. Apart from this circumstance, it is clear from an extract from the power of attorney, which has been, produced in this Court, that the power-of-attorney did not authorise the husband to bind his wife in this manner. The extract shows that the husband was authorised to execute, amongst other documents, deeds of sale and to admit execution thereof before the Registering Officer. This power-of-attorney obviously does not authorise the husband to enter into an agreement for sale of the property owned by his wife. Clearly, an agreement for the sale of property and the execution of a conveyance after the agreement for sale had been made by the owner of the property, are entirely distinct things. Consequently, the power-of-attorney is of no assistance to the plaintiffs. We may further point out that even if the power-of-attorney had been of any avail to the plaintiffs and even if the original had been produced, it would have been necessary for the plaintiffs, as pointed out by their Lordships of the Judicial Committee in *Sudhisht Lal v. Sheobarat Koer C. 245 : 8 I.A. 39* to show that it had been executed by the wife under circumstances which would make it binding upon a pardanashin lady. In so far, therefore, as the judgment of the District Judge is based upon the assumption that as the power-of-attorney had not been produced, it had been withheld because if produced it would not support the case of the defendants, cannot be upheld. The learned Vakil for the plaintiffs-respondents has, however, contended that there is evidence to show that, apart from the power-of-attorney, the contract was in reality entered into between the plaintiffs on the one hand and the lady on the other directly. He has invited our attention to a passage in the judgment of the District Judge where it is stated that a witness on behalf of the plaintiffs swears that he had

a conversation with the lady on this matter, and she told him that she had allowed her husband to make a contract for sale at the rate of Rs. 50 per dam. But the plaintiffs are placed in a position of obvious disadvantage if they rely upon a contract direct with a pardanashin lady. Even if it is assumed for a moment that the agreement was made directly with her at the final stage of the transaction, there is no finding in the judgment of the District Judge that the subsequent variation was with her consent. As we have already explained, the contract was not performed at the time originally fixed, that is, May 1905. The plaintiffs asked for an extension of time till September following. But even then, they were not ready to perform their part of the agreement and it was not till the middle of December that they were in a position to tender the conveyance to the lady for execution. It is not shown, as we have stated, that the lady either expressly or by implication assented to the variation of one of the most important terms of the contract, namely, the time when it was to be performed. Under these circumstances, we are of opinion that the first ground urged on behalf of the appellants must prevail.

3. In so far as the second ground taken on behalf of the appellants is concerned, there is, in our opinion, no answer to it. u/s 27 of the Specific Relief Act, the contract could not be enforced as against the defendants if they were transferees for value who had paid their money in good faith and without notice of the original contract. On this part of the case, the plaintiffs suggested that written notices had been served upon the defendants. That, however, was of no avail, because it transpired that the notice had been served too late. The alternative case which they put forward was that verbal notices were given to two of the defendants. This also would not avail them, because if the theory is adopted no notice was given to some of the purchasers. But it was ingenuously suggested by the learned Vakil for the plaintiffs -respondents that these purchasers were members of a joint Mitakshira family and that if notice were given to two of them, they might be treated as operative against all. This contention is obviously fallacious. It is clear that the conveyance of the defendants was to be executed in the name and for the benefit of all the members of their family. If the notice was binding upon them all, because the two persons to whom notice was given were the leading member of the family, the other members need not have been joined as parties to this suit. The fact that they have all been joined as parties shows that the contract for sale was made with them and there is no-thing to show that two of them were entitled to represent the others. It was necessary for the plaintiffs to establish notice in time as against them all; this has not been, done. We are, therefore, of opinion that the case has not been brought within the provisions of Section 27 of the Specific Relief Act as explained in Kantian v. Krishnan 13 M. 324. It was pointed out in this case by Mr. Justice Muthusami Ayyar that the intention of Section 27 was to adopt the equitable doctrine of notice in suits for specific performance to protect bona fide purchasers for value, and to treat at the same time purchasers with notice as persons purchasing subject to the vendor's pre-existing contractual obligations or with

notice of a trust in favour of the party entitled to specific performance. But here the facts found by the District Judge do not show that the defendants are persons against whom the contract set up by the plaintiffs may be specifically enforced.

4. In so far as the third ground taken by the appellants is concerned, it must clearly succeed. We are invited to enforce specific performance of a contract for sale of land alleged to have been made with a parda-nashin Mahomedan lady. The purchase money, althought it might be treated as not insufficient, is considerably less than what has been offered and paid by the appellants before us. The transaction is surrounded by circumstances by no means free from doubt and suspicion. The authority of the husband to bind the lady has not been proved. The variation of the time at which the contract was to be performed has not been shown to have been assented to by the lady herself. Under these circumstances, we are of opinion that we may, u/s 22 of the Specific Relief Act, properly refuse to enforce this contract. That Section provides that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so; the discretion of the Court, however, is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a Court of Appeal. We are not unmindful that, as pointed out by their Lordships of the Judicial Committee in the case of *Jaipal Kunwar v. Indar Bahadur* 31 I.A. 67 : 26 A. 238 an Appellate Court will not in this respect lightly interfere with the exercise of discretion by the primary Court. In the case before us, however, the District Judge has refused to exercise his discretion u/s 22 on the ground that the vendor herself was not the appellant in his Court. That view clearly cannot be sustained. It was pointed out by the Full Bench of the Madras High Court in the case of *Gurusami Sastrial v. Ganapathia Pillai* 5 M. 337 that the fact that subsequently to and in breach of his contract to sell, the vendor has sold the same land to third parties having notice of the contract, and that, if the relief is refused to the plaintiff, the land may remain in possession of such third parties, does not affect the question as to the propriety of the exercise by the Court of its discretionary power to enforce the contract. This view was also accepted as well founded in the case of *Baikantha Bank v. Shib Dass* 2 C.L.J. 321. We, therefore, do not feel inclined to remand the case, as we might possibly have done, if the District Judge upon a consideration of all the circumstances of the case had refused to exercise the discretion vested in him u/s 22 of the Specific Relief Act.

5. The result is that this appeal is allowed, the decree of the District Judge set aside and the suit dismissed, but, under the circumstances, without costs.