

(1919) 05 CAL CK 0036**Calcutta High Court****Case No:** None

Meher Ali Khan

APPELLANT

Vs

Srimati Aroatannessa Bibi and
Others

RESPONDENT

Date of Decision: May 20, 1919

Citation: 67 Ind. Cas. 167

Hon'ble Judges: Syed Shamsul Huda, J

Bench: Single Bench

Judgement

Syed Shamsul Huda, J.

This appeal arises out of a suit for joint possession on declaration of title. Plaintiff alleged that the land described in schedule ka of the plaint belonged to her grandfather and that upon his death by a partition among his heirs her father Gholam Hossain got the whole of plot kha. She accordingly as the daughter of Gholam Hossain claimed her legal share of this plot according to the Muhammadan Law of inheritance. It has not been disputed that if plot kha belonged exclusively to Gholam Hossain, plaintiff is entitled to the share claimed by her. Defendant No. 2 who contested the suit on the plea that he had purchased the land in suit from defendant No. 3, admitted that this plot had fallen exclusively to the share of Gholam Hossain upon partition but alleged that Gholam Hossain subsequently exchanged this plot with defendant No. 3 and received from her in exchange another piece of land that had fallen to her share. The learned Munsif found that the land on partition had fallen to the share of Gholam Hossain, that the story of exchange alleged by the defendant had not been established, that even if the exchange really took place it was ineffectual without a registered-deed and lastly that the fact of purchase by defendant No. 2 from defendant No. 3 had not been satisfactorily proved. Upon these findings the learned Munsif decreed the plaintiff's suit. On appeal by defendant No. 2 the decree was upheld. The lower Appellate Court, however, found the story of exchange to be true but agreed with the Munsif that without a registered document the exchange was void. He expressed no clear

opinion on the question whether the defendant No. 2 had succeeded in proving his purchase from defendant No. 3, The defendant No. 2 has preferred this appeal and on his behalf it is argued that notwithstanding the absence of a registered document on the equitable doctrine of part performance plaintiff as the heir of Gholam Hossain cannot question the validity of the exchange. It seems to me that on the authority of *Walsh v. Lonsdale* (1822) 21 Ch. D. 9 : 52 L.J. Ch 2 : 46 L.T. 858 : 31 W.R. 109 and the decisions of this Court in which the principle laid down in that case was followed this contention must prevail. It is, however, urged on behalf of the respondent that the findings are not sufficient to justify the application of the doctrine. Reliance is placed on the decision of Mr. Justice Farwell in *Manchester Brewery Co. v. Coombs* (1901) 2 Ch. 608 : 70 L.J. Ch. 814 : 82 L.T. 347 : 16 T. L.R. 299 that the doctrine is applicable only in those cases where specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined. On this point there are no findings and I was at first inclined to send the case back but after looking to the more recent authorities and having heard further arguments on the point I am of opinion that such a course is not necessary. It is true that in some of the earlier cases decided by this Court, this limitation on the applicability of the doctrine was distinctly recognised. See *Bibi Jawahir Kumari v. Chatterput Singh*. 2 C.L.J. 343 *Secretary of State for India v. Forbes* 17 Ind Cas. 180 : 16 C.L.J. 217 and *Singheeram Poddar v. Bhagbat Chander Nundi* 6 Ind. Cas. 632 : 11 C.L.J. 543. However, in the case of *Puchha Lal v. Kunj Behari Lal* 20 Ind. Cas 803 : 18 C.W.N. 445 : 19 C.L.J. 213 where, as in the present case, the findings were not sufficient to show whether a suit for specific performance could be maintained. Jenkins, C. J., observed as follows: "It is quite true that the question whether the defendants, first party, were entitled to bring a suit for specific performance in vindication of their rights was not debated before the lower Appellate Court, but there is no matter brought to our notice which can throw any serious doubt upon the defendants' right to complete their right by such a suit"

2. The same remark applies to this case.

3. In a very recent case to which I was a party a different view was taken but in that case the later decisions bearing on the point to which I am about to refer were not placed before the Court.

4. In *Mahomed Musa v. Aghore Kumar* 28 Ind Cas. 930 : 42 C. 801 : 17 Bom. L.R. 420 : 21 C.L.J. 231 : 28 M.L.J. 548 : 19 C.W.N. 260 : 13 A L.J. 229 : 17 M.L.T. 143 : 2 L.W. 258 : (1915) M.W.N. 621 : 42 I.A. 1 (P.C.) their Lordships of the Judicial Committee laid down the principle without any such limitation. Their Lordships observed quoting the dictum of Sir Strange in *Potter v. Potter* (1750) 1 Ves Sen 437 : 27 E.R. 128 that a contract if confessed or carried in part into execution will be binding on the parties and carried into further execution in equity. In *Khagendra Nath Chatterjee v. Sonatan Guha* 31 Ind. Cas. 987 : 20 C.W.N. 149 Sanderson C. J., (Roe, J. P) and Mr.

Justice N.R. Chatterjee applied the doctrine without any reference to the question whether the right to claim specific performance was or was not subsisting.

5. It was argued on behalf of the respondent that although their Lordships of the Judicial Committee did not expressly refer to this Question the case of *Potter v. Potter* (1750) 1 Ves Sen 437 : 27 E.R.128 on which they rely recognises this limitation of the doctrine. This is no doubt correct as will appear from the following passage in the judgment of the Master of the Rolls

It will be the same, where vendor comes for specific performance and the agreement is admitted. No doubt, but on such admission it will be considered as an agreement from the time of transaction so that on a bill by either party, the Court must have decreed execution, the estate as testator's from June 1744, and the money the vendor's.

6. But at the same time the fact cannot be overlooked that their Lordships of the Judicial Committee were dealing with an agreement entered into 30 or 40 years before the suit and if the question of limitation for enforcing a claim for specific performance was considered material their Lordships would have referred to it. There is the further fact in this case that the defendant No. 2 is in possession of the land in suit. If the plaintiff's claim is to be decreed by reason of the transaction not being clothed in these legal forms to which finality attaches after the bargain has been acted upon, she could only do so in equity by making restitution in respect of the property which Gholam Hossain obtained from defendant No. 3. Such restitution is now impossible by the reason of the fact that the property has been sold to a third party. I, therefore, think that on these grounds the plaintiff is not entitled to a decree.

7. It is next argued on behalf of the respondent that the plaintiff had denied in the plaint that the defendant No. 2 was a bona fide purchaser from defendant No. 3 and although the First Court decided this issue against the plaintiff, she was entitled to a decision of the Appellate Court on the point. It seems to me that there is no substance in the argument. The lower Appellate Court expressly find that defendant No. 2 was in possession and not defendant No. 3 and clearly meant to find that the defendant No. 2 was a bona fide purchaser, Besides even as benamidar of defendant No. 3 he is entitled to take any defence that the defendant No. 3 might have taken and it is immaterial whether the title vests in the one or the other. *Gur Narayan v. Sheo Lal Singh* 49 Ind. Cas. 1 : 17 A.L.J. 66 : 86 M.L.J. 68 : 9 L. W: 830 : 1 U.P.L.R. (P.C.) : 46 C. 568 : 23 C.W.N. 52I : 12 Bur. L.T. 122 : 46 1. A. 1 (P.C.).

8. Upon this view of the case I decree the appeal and dismiss the plaintiff's suit. But in view of the fact that if this question had been raised before the lower Appellate Court an appeal to this Court might not have been necessary, the defendant-appellant though successful must pay the costs of the respondents in this appeal. He is, however, entitled to the costs of the Courts below from the

plaintiff.