

(1880) 08 CAL CK 0005

Calcutta High Court

Case No: None

T. F. Brown and
Another

APPELLANT

Vs

G. M. Cutts and
Another

RESPONDENT

Date of Decision: Aug. 11, 1880

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 44
- Evidence Act, 1872 - Section 92

Citation: (1881) ILR (Cal) 328

Hon'ble Judges: Richard Garth, C.J; Pontifex, J

Bench: Division Bench

Judgement

Mr. Phillips.

1. It was not necessary to obtain the leave of the Court u/s 44, Rule (a) of the Civil Procedure Code, to join the different causes of action upon which the plaintiffs rely. A suit for the specific performance of an agreement to sell a share in a house is not a "suit for the recovery of Immovable property" within the meaning of that section. Possibly this might be held to be a "suit for land or other Immovable property" within Section 12 of the Charter, but those words are more comprehensive than the words used in Section 44, Rule (a). The defendants contend that the plaintiffs cannot obtain specific performance of the agreement until they have performed certain terms and conditions which are not stated in the agreement. Those terms and conditions would have to be proved by parol evidence, and the case of *Daimoddee Paik v. Kaim Taridar* (I. L. R. 5 Cal. 300) is an authority to show that parol evidence cannot be given to vary the terms of the written agreement.

2. Mr Bonnerjee for the defendants.--The causes of action have been wrongly joined, and the suit must be dismissed. The Court has no jurisdiction to entertain a suit in

this form---Pitcher v. Hine [24 W. R. (Eng.) 619] and Delhi and London Bank v. Wordie (I. L. R. 1 Cal. 249). Clause (c) of Section 44 can only refer to foreclosure. [Wilson, J.--Could you call a suit to compel registration a suit for land ?] No, because the title passes by the conveyance. [Mr. Phillips called attention to Act III of 1877, Section 49, as showing that the conveyance had no effect without registration.] Then such a suit would be for the recovery of land. The plaintiffs rely upon and seek performance of a verbal agreement. There must have been some agreement for a lease. "Certain conditions as agreed upon" cannot refer to the condition in the document. These words were inserted by the defendants themselves in the draft. [WILSON, J.--Suppose you are right in saying you can give evidence of the terms you set up; is that any answer to the suit ?] The transaction would not be a mortgage. The plaintiffs' agreement to re-sell is as much a part of the agreement as their & paying the price. We say they must covenant to re-sell. [Wilson, J.--I suppose I may take it that the words "under certain conditions" refer to the document annexed to the plaint ?] Yes.

3. Wilson, J.--As between the plaintiffs and Mr. Bonnerjee's client it appears to me that no issue of fact has to be decided.

4. The suit is for the specific performance of a contract for sale of land. The objections are two-fold. The first is an objection to procedure, the other goes to the substance of the suit.

5. It is said the suit cannot be entertained in its present form by reason of Section 44, Rule (a) of the Civil Procedure Code. That section says:--"No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of Immovable property, or to obtain a declaration of title to Immovable property, except--(a) claims in respect of mesne profits or arrears of rent in respect of the property claimed: (b) damages for breach of any contract under which the property or any part thereof is held; and (c) claims by a mortgagee to enforce any of his remedies under the mortgage."

6. Mr. Bonnerjee has cited the case of the Delhi and London Bank v. Wordie (I. L. R. 1 Cal. 249) which probably would be sufficient to justify him in saying that this is a suit for land within the meaning of the words of the Charter. The terms of the section are narrower. It seems to me that a suit for "the recovery of Immovable property" is a suit founded upon an existing title in which the plaintiff seeks to get possession of the property, itself. The words "to obtain a declaration of title to Immovable property" seem to me to apply to a case where a title exists, and the plaintiff asks to have that fact declared, not to a case where he seeks to have something done, which, when done, will give him a title.

7. I think the first objection of the defendants fails. If it were otherwise, I think there would be power u/s 53 to amend the plaint by striking out the part which is not properly joined.

8. The other ground of defence goes to the substance of the case. The defendants say the contract alleged by the plaintiffs was not the real contract; but that there were other terms which had to be fulfilled before they could obtain specific performance.

9. The plaint sets up a written contract for sale of a share in the premises in question, the parties assuming that the share of the female defendant was a one-third share. Accordingly, the contract was for sale of a one-third share. The plaint (para. 3) says--"It being subsequently discovered that the defendants had only a one-fourth share in the said house, a verbal agreement was by consent of the plaintiffs and defendants entered into, whereby the defendants agreed to sell their shares in the said house and premises to the plaintiffs for Es. 5,000." I think the true meaning of that paragraph is, that the written agreement for sale of the one-third share continued intact, except that when the mistake was discovered, the written agreement was varied by one-fourth being sold instead of one-third, and the price being Rs. 5,000 instead of the larger sum. And that is the view taken by the defendants themselves in their written statement.

10. Then we have to come to the written document to see what the original contract was. That must be determined on the words of the document itself. The written document seems to me to be a complete contract of sale. Mr. Bonnerjee has called attention to the words "under certain terms and conditions as agreed upon." But these words do not, in my opinion, refer to anything outside the document, but to terms therein contained. They are an indication that there are conditions which are to be attended to, and the latter part of the deed sets out these terms. It would be entirely contradictory of the document if evidence were now to be given that the contract was subject to terms or conditions not set out in the document. The case of *Dairnoddee Paik v. Kaim Tarider* (I. L. R. 5 Cal. 300) seems to be an authority that evidence cannot be given to vary what in a case like this is expressed in the document, and I should have come to the same conclusion in the absence of such an authority.

11. Even if the evidence were given, it is by no means clear that the defendants have any defence to the action. It is by no means clear that the existence of such a term entitled the defendants to the covenant they suggest. A man may be entitled under a contract to have a thing done; but it does not of necessity follow that he is entitled to have a covenant about it inserted in a deed. As between the plaintiffs and the first defendant no question of fact in my opinion arises.

12. From this decision the defendants appealed.

13. Mr. Bill for the Appellants.

14. Mr. Phillips and Mr. Trevelyan for Respondents.

Mr. Hill.

15. Leave should have been obtained to join the cause of action on the promissory notes, as this is in reality a suit for land--Delhi and London Bank v. Wordie (I. L. R. 1 Cal. 249). The plaintiffs sue the whole agreement between the parties and in such a case the defendant is always allowed to give parol evidence to defeat the plaintiff's suit: Specific Belief Act, Section 26; Dart on Vendors and Purchasers, p. 1039; Marquis of Townshend v. Stangroom (6 Vesey 328); Woollam v. Beam 7 Vesey 211. s.c. 2 W. and T. L. C. 481 n. The evidence offered does not contradict the writing, and Section 92 of the Evidence Act does not apply.

Mr. Phillips.

16. Admitting that we agreed to re-sell to the defendants at the end of three years, the defendants are not entitled to have a covenant to that effect inserted in the deed of sale. They never asked this, and it would be unreasonable to grant it now. The evidence was properly rejected, as no case of fraud was shown--Marquis of Townshend v. Stangroom (6 Vesey 328). [Pontifex, J., referred to Clarke v. Grant (14 Vesey 519) The evidence offered would turn the writing, which appears to be an absolute sale, into a mortgage, and could not therefore be received--Evidence Act, Section 92.

17. Mr. Trevelyan on the same side.

18. The following Judgments were delivered:--

Pontifex, J.

19. The plaintiffs in this case sue for specific performance of a written agreement by the defendants to sell a share in a house. The defendants, in their written statement, allege that, in addition to the written agreement, there was a further parol agreement, that the plaintiffs should let the property to the defendants for three years, and should give them a right to purchase at the end of the three years.

20. The defendants also claimed that the suit should be dismissed, because, in contravention of Section 44, Rule (a) of the Procedure Code, the plaintiffs had, without the leave of the Court, improperly joined a separate cause of action with their suit for Immovable property. But I agree with the Court below that this objection cannot prevail, because there is in fact no joinder of separate; causes of action, but only a demand for alternative relief.

21. The written agreement which the plaintiffs seek to enforce commences its witnessing part as follows:--

22. "Witneseth that the said defendants do sell under certain conditions as agreed upon to the plaintiffs all that, &c." The learned Judge has held that, upon the proper construction of the document, the words above mentioned only apply to the terms subsequently contained in the document itself. Probably this would be the ordinary construction; but I think that, under proviso 6 to the 92nd Section of the Evidence

Act, the defendants are entitled to go into evidence to prove the contrary.

23. But the learned Judge has further held, that, u/s 92 of the Evidence Act, the defendants are not entitled to go into evidence to prove the case set up in their written statement, on the ground, that to allow them so to do would be to allow them to contradict, Vary, add to, or subtract from the terms of the written agreements. I am, however, unable to agree with him for two reasons. In the first place, I think that the agreement set up in the written statement falls within proviso 1 to Section 92. For, if the plaintiffs really agreed verbally to the conditions alleged by the defendants, it would be a fraud on their part to insist on performance of the written agreement without at the same time securing to the defendants the performance of the other conditions which they had promised. In the words of the Masters of the Rolls, in *Clarke v. Grant* (14 Vesey 519)--"but for the promise there would, probably, never have been any agreement at all. It would then be against equity, and a fraud on the defendant, to insist upon his performance of an agreement which he only signed on the faith" of certain additions.

24. Secondly, I think that, according to the authorities at least, the agreement Set up in the written statement falls within proviso 2 to Section 92 that, if true, the oral agreements alleged are separate [336] agreements, collateral to and not inconsistent with the terms of the written agreement, just in the same way as I think it would still be open to prove that what is ostensibly a conveyance was in fact intended to be a mortgage. The cases of *Morgan v. Griffith* (L. R. 6 Exch. 70) and *Erskine v. Adeane* (L. R. 8 Ch. App. 756) seem to me very strong illustrations of this proposition.

25. Moreover, it is of the essence of specific performance that, except under special circumstances, part only of an agreement ought not to be decreed to be performed. So strong is this influence, that it has been held that, even when the defendant does not allege a parol variation, but it comes out in the evidence, the Court will direct an enquiry in regard to it before disposing of the case- *Parken v. Whitby* (T. and R. 366), *London and Birmingham Railivay Co. v. Winter* (Or. and Ph. 57), *Helsham v. Langley* (1 Y. and C C. C 175); and indeed the Court will direct an enquiry when the variation is alleged by the defendant, but only so far proved as to raise a suspicion of the existence, and yet not to satisfy the Court-*Van v. Corpe* (3 M. and K. 269). So careful is the Court in decreeing specific performance. The 17th section of the Specific Belief Act recognises this principle; and the 22nd section gives the Court complete discretion. Indeed, the 26th section of the Specific Belief Act was, in my opinion, enacted to meet this very case, which, as I read it, falls within Clouse (e) to that section. It is true that the words "upon some stipulation on the plaintiff's part which adds to the contract, but which he refuses to fulfil," are not (according to the ordinary untechnical meaning of the word stipulation) very apt words to express what was intended, namely, some condition "in favour of the defendant agreed to by the plaintiff which he refuses to fulfil." Butcls. (a), (b) and (c) have been

pitchforked verbatim into the Act from Mr. Dart's book on Vendors and Purchasers p. 1039 Edn. 5. I can but suppose that they are intended to have the same effect as Mr. Dart ascribes to them.

26. Upon the whole, therefore, I am of opinion that the defendants in this case ought at least to have been allowed to go into evidence, and the case must, therefore, be returned to the lower Court for that purpose. Whether the defendants, supposing them to prove their case, will be entitled to have a power or proviso for repurchase inserted in the conveyance to the plaintiffs, is a question for the lower Court to decide. I can only express my opinion now, that if the defendants prove their case, the plaintiffs are seeking by their plaint performance of only part of an agreement, to which they are not entitled ; and that they can be entitled to specific performance of the terms in their own favour of the whole agreement proved, only upon the terms in the defendants' favour being properly secured to them. If the defendants succeed in the lower Court in proving the case set up by them, they must, I think, have the costs of the appeal; otherwise the plaintiffs will be entitled to such costs. The Court below ought to deal with the costs of the original hearing in that Court.

Garth, C.J.

27. I agree with my brother Pontifex upon both points, as well as in the form of the decree which he proposes to make.

28. But I would decide the second point, as to the admissibility of the oral evidence, upon this one ground only.

29. I think the defendant ought to be allowed to show, if he can, that the words in the contract "under certain conditions" refer to conditions outside the contract, and not to those contained in it. There is nothing in the contract itself to show that the conditions so referred to are those which are mentioned in it, and if the conditions were in fact made orally, and the contract was expressly made subject to those conditions, it seems clear to me that they are not inconsistent with it. It is not necessary that the whole agreement should be in writing ; and if, upon the face of that part of it which is in writing, it appears that there are other conditions, oral or otherwise, which go to make up the entire contract, there is no reason why those conditions, if made orally, should not be orally proved. The rule laid down in Section 92 of the Evidence Act applies only, as I consider, where, upon the face of it, the written instrument appears to contain the whole contract.

30. I quite agree with my brother Pontifex that Section 26 of the Specific Relief Act is intended to provide for just such a case as the present.

31. But I do not think that proviso 1 of Section 92 is applicable here. That proviso seems to me to apply to cases where evidence is admitted to show that a contract is void, or voidable, or subject to re-formation, upon the ground of fraud, duress,

illegality, &c., in its inception ; and not to cases where the agreement being in itself perfectly valid and free from any taint of that kind, one of the parties attempts to make a fraudulent use of it as against the other. It will be found that the rule laid down in Section 92 of the Evidence Act is taken almost verbatim from Taylor on Evidence (1st Edn.), Section 813 ; and the exceptions which follow in the several provisoes are discussed in Sections 816 to 841 of the same work. That being so, I think it is quite legitimate to refer to those sections, as one means of ascertaining the true meaning of the provisoes. The substance of the proviso, and the examples showing the meaning of that proviso, are contained and explained in Sections 816 to 819 ; and it will be found that they all relate to the reception of evidence for the purpose of invalidating contracts, by reason either of fraud, illegality, &c., in their inception, or of some subsequent failure of consideration.

32. For this reason, as well as from the language of the proviso itself, I think that it is not intended to apply to a case where the contract itself being valid, one of the parties wishes to make an improper use of it.

33. Then again, I cannot think that the additional terms relied upon by the defendants are admissible under proviso 2, as being a "separate oral agreement not inconsistent with the terms of the principal contract."

34. It seems to me, that an absolute sale of a property, such as the plaintiffs ask us to enforce against the defendants, is a totally different thing from a sale, which is subject in the first place to an obligation on the part of the purchaser to let the property to the vendor for three years from the time of the sale ; and in the next place, to the additional obligation to re-sell to the vendor at the end of the three years at a specified price. The interest which the purchaser would take in the one case would be a very different thing, and worth a very different price, from what he would take in the other ; and I, therefore, think that the additional terms do vary and are inconsistent with the principal contract.

35. The case of *Morgan v. Griffith* (L. E. 6 Exch. 70), which is referred to by my brother Pontifex, seems to me entirely different from this. In that case an action was brought by a tenant against his landlord for damage done to his land by rabbits. The lease, which was in the usual form, reserved all the game and rights of shooting to the landlord; but as the tenant, who had entered upon the property before the lease was executed, found the land completely overrun with rabbits, he refused to sign the lease, until the landlord had orally promised that he would have the rabbits destroyed. Upon the promise being made, the tenant signed the lease; but the rabbits were not destroyed, and consequently the tenant's crops were seriously injured. It was held that he had a right to sue for that damage, the oral agreement being collateral to the lease, and not inconsistent with it. The oral agreement there seems to me perfectly consistent with the landlord having all the game to himself, and the exclusive right to shoot it.

36. The case of Ershine v. Adeane (L. R. 8 Ch. App. 756) was very similar to Morgan v. Griffith (L. R. 6 Exch. 70) ; and the oral agreement there, so far as it was sought to be enforced against the landlord, was for the same reason, which I have explained in Morgan v. Griffith (L. R. 6 Exch. 70), consistent with the terms of the lease.

37. Subject to these observations, I agree with the Judgment which has just been delivered.