

Privy Council Appeal No. 84 of 1914.

Jatindra Nath Basu and Others - - - - *Appellants,*

v.

Srimati Peyer Deye Debi and Others - - - *Respondents,*

FROM

**THE HIGH COURT OF JUDICATURE AT FORT WILLIAM
IN BENGAL.**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 28TH MARCH, 1916.**

Present at the Hearing :

LORD SHAW.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal from the decree, dated the 1st March, 1909, of the High Court at Calcutta, which in appeal set aside the decree, dated the 6th April, 1908, of Mr. Justice Chitty, who had tried the suit under the original jurisdiction of that Court.

The suit was brought to obtain a decree for the specific performance of an agreement, dated the 21st June, 1895, by which the original defendant Trailokya Nath Bhowe, now deceased, had agreed to purchase from the executors and the executrix (hereinafter referred to as the executors) of Lala Bangsa Gopal Nandey for the price of 19,000 rupees a decree and all the rights appertaining thereto which the said executors had obtained on the 17th July, 1893, against Pandit Nrisingha Prokash Misra on a mortgage. Mr. Justice Chitty dismissed the suit. The High Court in appeal made a decree for specific performance.

The appeal has been argued at considerable length, but the material facts upon which the suit and this appeal depend may be briefly stated. The decree which it was agreed that the executors should assign to Trailokya Nath Bhowe was a decree for sale of certain immovable hypothecated properties, which could also in certain events be executed against the person and

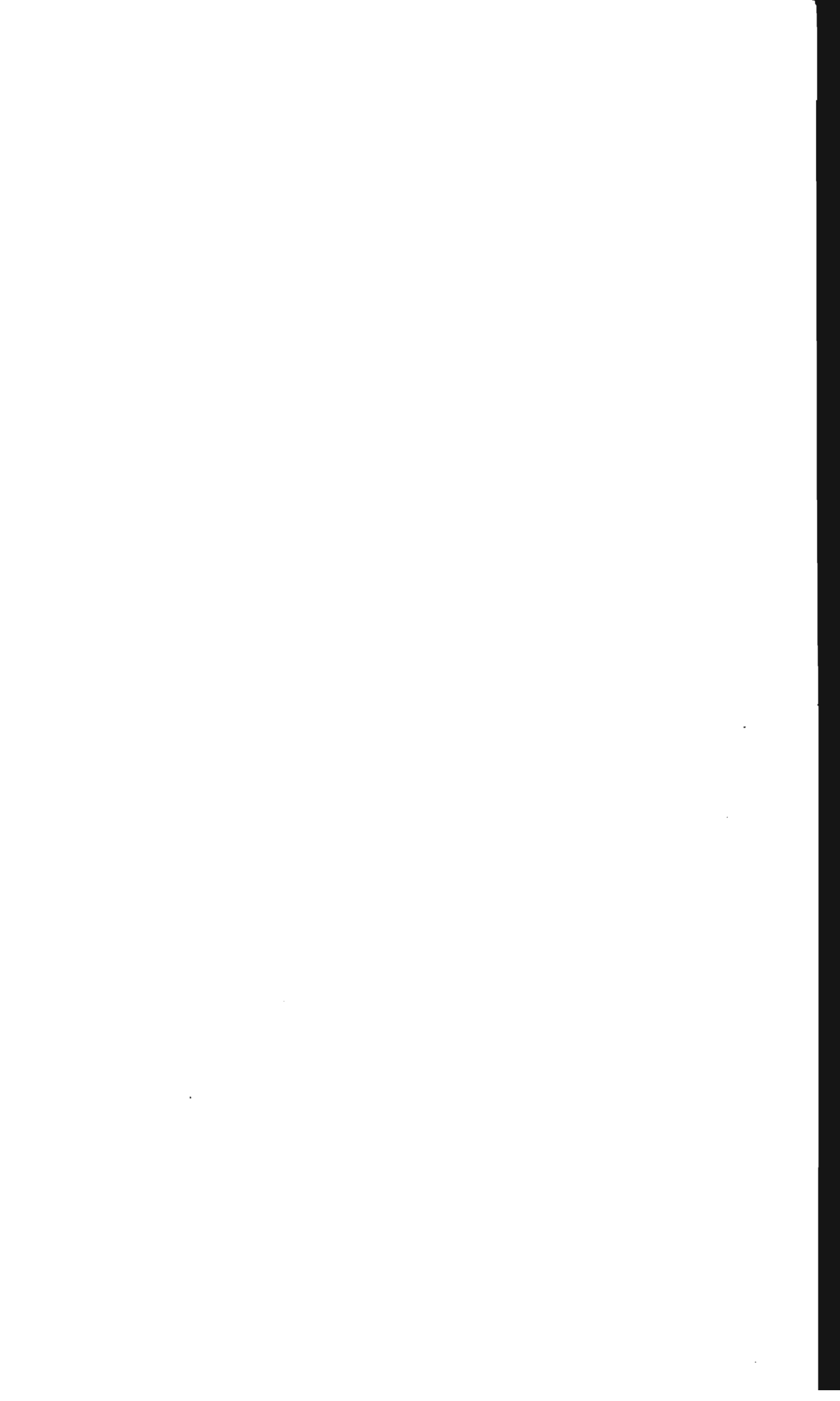
other property of the defendant to the suit in which it was made. Owing to the bar of limitation the decree for sale became incapable of execution on the 1st June, 1898, and thereupon Trailokya Nath Bhowe refused to pay the agreed price and to take an assignment of the decree, hence this suit for specific performance.

The agreement of which it is sought to obtain specific performance was an executory agreement, for the completion of which something remained to be done in order to put the parties in a position relative to each other in which, by the preliminary agreement of the 21st June, 1895, they were intended to be placed. As was pointed out by Lord Selborne, L.C., in *Wolverhampton and Walsall Railway Company v. London and North-Western Railway Company* (L.R. 16, Eq. 433), "the expression 'specific performance,' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other, in which by the preliminary agreement they were intended to be placed." In this case what remained to be done was, on payment by Trailokya Nath Bhowe of the agreed price, the transference to him of the decree for sale of the 17th July, 1893. Such a transfer of the decree to Trailokya Nath Bhowe could, by reason of Section 232 of the Code of Civil Procedure, 1882, be effected only by an assignment in writing. On and after the 1st June, 1898, the decree, as a decree capable of being executed, could not by reason of the bar of limitation be assigned to Trailokya Nath Bhowe. It had become a dead decree: whereas the decree, whatever might be its value, which he had agreed to purchase, and which the executors had agreed to assign to him, was a decree capable of execution.

It has been contended on behalf of the respondents to this appeal that it was the duty of Trailokya Nath Bhowe, and was not the duty of the executors, to keep the decree alive after the 21st June, 1895. That is a contention which, in their Lordships' opinion, cannot be maintained. As the decree had not been transferred by an assignment in writing to Trailokya Nath Bhowe, he could not by any application to the Court have kept the decree alive.

The respondents are asking for a decree for the specific performance of an agreement which they, on their part, are unable to perform. Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court in appeal should be set aside with costs, and the decree of Mr. Justice Chitty should be restored.

The plaintiff-respondents must pay the costs of this appeal.



In the Privy Council.

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v.

SRIMATI PEYER DEYE DEBI
AND OTHERS.

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SIR JOHN EDGE.

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