

*Privy Council Appeal No. 36 of 1933.*

Khan Bahadur Mian Pir Bux - - - - - *Appellant*

*v.*

Sardar Mahomed Tahar - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF SIND.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL DELIVERED THE 23RD JULY 1934.

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*Present at the Hearing :*

LORD TOMLIN.

LORD MACMILLAN.

SIR JOHN WALLIS.

[*Delivered by* LORD MACMILLAN.]

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The plaintiff in this suit, who is the respondent in the appeal, prays the Court (1) to declare him to be the rightful owner of the southern half of a plot of land in New Sukkur, and (2) to put him in possession thereof by dispossessing the defendant, who is the present appellant. The action was also directed against the Secretary of State for India in Council who, however, took no part in the proceedings.

The District Judge dismissed the suit. On appeal, his judgment was reversed by the Court of the Judicial Commissioner of Sind, and a decree for possession granted in favour of the plaintiff. Hence the present appeal by the unsuccessful defendant. It will be convenient to refer to the parties in their original characters of plaintiff and defendant, bearing in mind that the plaintiff is now the respondent and the defendant now the appellant.

The circumstances in which the defendant came to be in possession of the half-plot of land from which the plaintiff seeks to eject him may be shortly stated. In the year 1919 the plaintiff

and the defendant were both applicants for a grant of the same plot of building ground in New Sukkur. The Collector by order dated the 25th February, 1919, granted the northern half of the plot to the defendant, and the southern half to the plaintiff. Instruments giving effect to the grants were duly executed and registered. Each party entered into possession of his respective half-plot and began building operations.

The plaintiff is an Afghan refugee and political pensioner who formerly resided at Quetta, but at the date of the grant in his favour was living under orders at Sukkur. He was understood to be desirous of returning to Quetta, and the Collector accordingly directed in the order making the grant to him of the southern half-plot that he "should be requested to execute a private agreement with [the defendant, the grantee of the other half-plot] to sell him his half of the land at cost price if he gets permission to go to Quetta by the middle of May next." In compliance with this request, the plaintiff on the 25th March, 1919, executed an agreement declaring that if during May, 1919, he should get permission to live permanently at Quetta as before he would sell his half-plot to the defendant at cost price.

On the 23rd May, 1919, the Collector addressed a communication to the plaintiff informing him that he had been allowed by the Government to return to Quetta, and on or about the 4th June the plaintiff and his family left for Quetta. He was then called upon to execute a conveyance of his half-plot in favour of the defendant in terms of his agreement. He appears to have raised some question as to whether the permission which he had received entitled him to reside permanently at Quetta, and the Collector was authorised to inform him that this was so. Nevertheless, he failed to execute a conveyance in favour of the defendant, and on the 22nd December, 1920, the Collector made an order cancelling the grant in his favour of the southern half-plot. The plaintiff appealed against this order to the Commissioner, who declined to recall it. On the 17th March, 1921, the Collector made a new grant of the southern half-plot to the defendant, who entered into possession and proceeded to carry on building operations upon it.

The plaintiff then raised the present action of ejectment. In his plaint, which is dated the 20th December, 1921, he pleaded *inter alia* that he had committed no breach of the terms of his grant or of his agreement, that the order of the Collector cancelling his grant was *ultra vires*, and that the defendant was a trespasser who should be ejected. The defendant, in his written statement dated the 7th May, 1922, pleaded that the plaintiff had failed to observe the terms of his agreement, that the Collector's cancelling order was legal and justified, and that the plaintiff was not entitled to dispossess him. Having apparently some doubt as to whether in his written statement he had sufficiently and properly pleaded by way of defence the plaintiff's

agreement to convey the southern half-plot to him, the defendant asked leave to amend, and on the 3rd August, 1925, he was allowed by the Acting District Judge to add the following paragraph: "That this defendant further pleads that as plaintiff has agreed to convey the [half] plot to this defendant, and as possession [is] with him he could not be legally evicted."

The District Judge held that the condition on which the plaintiff had agreed to sell his southern half-plot to the defendant had been satisfied by the permission granted to him to return to Quetta. He further held that the Collector's order cancelling the grant in favour of the plaintiff was illegal and void. These findings were not contested in the Court of the Judicial Commissioner or before their Lordships. It is now also common ground that at the date of the institution of the present suit, an action by the defendant for specific performance of the plaintiff's agreement to sell to him the southern half-plot would have been in time, but that by the 3rd August, 1925, when the defendant was allowed by the Acting District Judge to amend his written statement, such an action would have been barred by the Limitation Act, section 3, First Schedule, Article 113. The effective decision of the District Judge was that the defendant having become entitled to specific performance of the plaintiff's agreement to sell the southern half-plot to him, "the possession of the defendant, coupled with the existence of the agreement in his favour, is a complete defence to the suit."

In the Court of the Judicial Commissioner on appeal the decision of the District Judge was reversed, and the plaintiff held entitled to succeed, mainly on the ground that the defendant's possession of the half plot was not attributable to the plaintiff's agreement to sell it to him but to the Collector's unwarranted grant in his favour, and therefore could not be founded upon by the defendant as part performance of the agreement of sale. It was also pointed out that the defendant had not made a counter claim for specific performance, assuming such to be competent, or taken any action to enforce the agreement of sale, and that as he could not now do so it afforded him no valid defence.

When the case was before the Judicial Commissioner's Court the judgment of the High Court at Calcutta in *Ariff v. Jadunath Majumdar* had not been reversed, as it subsequently was, by this Board, and the Judicial Commissioner's Court had not the benefit of the elucidation of this branch of the law contained in the judgment of Lord Russell of Killowen, who expressed the views of the Board in that appeal (1931, 58 I.A. 91). In the light of the principles there enunciated their Lordships have no hesitation in holding that the plaintiff is entitled to eject the defendant, and in thus affirming the decision of the Court of the Judicial Commissioner, though on other grounds which they will now proceed to state.

The plaintiff is the registered proprietor of the half-plot in question. *Prima facie* he is entitled to possession of it. The defendant whom he seeks to eject does not put forward any title to possession; he merely pleads that the plaintiff has agreed to sell him the half-plot, and that he is in fact in possession of it. Their Lordships will assume without deciding that the defendant sufficiently pleaded the agreement of sale in his written statement of the 7th May, 1922, when an action for specific performance would still have been in time, and that the amendment of the 3rd August, 1925, by which date the defendant could no longer have sued for specific performance was an unnecessary precaution.

As the law of India stood at the date of this case, it is, in their Lordships' opinion, no relevant defence to an action by a landowner for ejectment to plead that the plaintiff has agreed to sell to the defendant the land of which the plaintiff seeks to obtain possession. By section 54 of the Transfer of Property Act, a transfer by sale of tangible immovable property of the value of Rs. 100 and upwards can be made only by a registered instrument. The land in question is admittedly worth more than Rs. 100, and the defendant has no registered instrument of transfer in his favour. The section expressly enacts that a contract for the sale of immovable property "does not of itself create any interest in or charge on such property." There is therefore no room for the application of the English equitable doctrine that "a contract for sale of real property makes the purchaser the owner in equity of the estate." The underlying principle upon which this rule depends is inapplicable to the sale of real estate in India in view of the express enactment just quoted. (See *per* Lord Buckmaster in *Maung Shwe Goh v. Maung Inn*, 1916, 44 I.A. 15, at p. 19). In English practice, the defendant in an action of ejectment, who is in a position to plead that the plaintiff has by an enforceable agreement contracted to sell to him the land in question, may counterclaim for specific performance and make good his claim without raising a separate action. In India, at any rate in the mofussil, such a counterclaim is not competent. The defendant's proper course in the present case, as Lord Russell of Killowen points out at p. 101 in *Ariff v. Jadunath Majumdar* (*cit. sup.*), would have been to have founded on the agreement of sale and to have applied for a stay of the proceedings in order to enable him to compel the plaintiff to execute an instrument in his favour which he could have duly registered. The remedy thus available to the defendant would not have depended on any recognition of the agreement of sale as in itself a defence to the action of ejectment, but rather on the principle that the Court will not grant a decree of ejectment which can at once be rendered ineffective by the same Court being required to grant a decree of specific performance resulting in reinstatement. But the defendant did not ask for a stay, and did not raise any action for specific

performance. Now he is too late to do so ; the agreement of sale has become unenforceable.

The English doctrine of part performance, as Lord Russell of Killowen explained in *Ariff's* case, is not available in India by way of defence to an action of ejectment (apart from the subsequent statutory alteration of the law mentioned hereafter). The fact that the plaintiff has agreed to sell the land in question to the defendant is not rendered an effective defence by reason of the plaintiff having in part performance of the agreement permitted the defendant to take possession. The function of the plea of part performance in England is to enable the defendant to elide the Statute of Frauds and claim that his contract of sale is enforceable notwithstanding the statute by reason of the part performance. It is pleaded to overcome a statutory obstacle in the way of the proof of the contract of sale. In India there is no Statute of Frauds. "That an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument appears to their Lordships, in the absence of some binding authority to that effect, to be impossible." So said Lord Russell of Killowen at p. 101 in *Ariff's* case, and proceeded to show that there was no such authority.

The result is that, under the law applicable to the present case, an averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract, is not a relevant defence to an action of ejectment in India. If the contract is still enforceable the defendant may found upon it to have the action stayed, and by suing for specific performance obtain a title which will protect him from ejectment. But if it is no longer enforceable, its part performance will not avail him to any effect. (See *Currimbhoy & Co. v. Creet*, 1932, 60 I.A. 297, *per* Lord Thankerton at pp. 303-4.)

In the present instance, as was pointed out in the Judicial Commissioner's Court, the defendant's possession was not even referable to the agreement of sale, but their Lordships do not proceed upon that circumstance. Their ground of judgment is more fundamental.

It remains to take note of the fact that since the present suit was brought the law in India has been altered by the Transfer of Property (Amendment) Act 20 of 1929, which has inserted a new section 53A in the principal Act, whereby a defendant in an action of ejectment may, in certain circumstances, effectively plead possession under an unregistered contract of sale in defence to the action. Their Lordships' views, as expressed in the present case, must therefore be understood to be referable to the state of

the law before this partial importation into India of the English equitable doctrine of part performance.

As regards the compensation payable to the defendant for improvements, and as regards the mesne profits payable to the plaintiff, no objection was stated before their Lordships to the manner in which these matters are dealt with in the judgment of the Judicial Commissioner's Court, which will accordingly stand.

Their Lordships will humbly advise His Majesty that the judgment of the Court of the Judicial Commissioner be affirmed and the appeal be dismissed. In both of the Courts below the parties were ordered to bear their own costs. This will remain unaffected by their Lordships' judgment, but in the present appeal the respondent will have his costs from the appellant.



In the Privy Council.

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KHAN BAHADUR MIAN PIR BUX

o.

SARDAR MAHOMED TAHAR.

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DELIVERED BY LORD MACMILLAN.

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