

**Nemtulla Tyeballi Vs. Safiabu Allibhai**

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**Court :** Mumbai

**Decided On :** Sep-04-1934

**Reported in :** AIR1935Bom208; (1935)37BOMLR82

**Judge :** Murphy and ;Sen, JJ.

**Appeal No. :** First Appeal No. 371 of 1922

**Appellant :** Nemtulla Tyeballi

**Respondent :** Safiabu Allibhai

**Judgement :**

Murphy, J.

1. This appeal arises out of regular civil suit No. 191 of 1915, which has had a somewhat chequered career. It was an administration suit, filed in 1915, for the administration of the estate of one Tyeballi, who died in 1912, and his father Alibhai, who died in October, 1909. The suit went on, and a preliminary decree was passed in March, 1924. There was an appeal against that decree which was heard by Marten C. J. and Crump J. The appeal was lodged by the present defendant No. 7, who is now one of the respondents before us, and it was dismissed. But cross-objections had been put in by defendant No, 3 and these were considered by the learned Chief Justice, who said :-

As regards the cross-objections, they are based on the allegation that defendant No. 3, Namtulla, never assigned her interest to defendant No, 7, Safiabu. The objections bear date March 16, 1925, but do not seem to have been formally admitted till February 17, 1927. It is consequently rather startling to find this claim put forward, seeing that in the judgment of the learned Subordinate Judge, Mr. Kharkar, on September 15, 1923, it was stated as a matter of fact 'And Safiabu has already bought off, out of Court, the interest of defendant No. 2 Kurban Hussein and his sisters by paying him Rs. 24,000'. Similarly at the further hearing Mr. Desai on March 17, 1934, stated, Safiabu has since managed to buy off the interest of this defendant No. 2 (and his sisters) for Rs. 24,000 as stated in the judgment, exhibit 276, and she accordingly now represents the interest not only of the original defendant No. 1, her mother, but also of defendants Nos. 2 to 5. How the pleader representing the defendant No. 3 allowed those statements to remain unchallenged and the decree to be passed accordingly is not apparent to us.

Mr. Thakor, however, has explained that the decree in the matter is not signed by defendant No. 2's pleader, who had admittedly died, and this is the answer to the learned Chief Justice's query. In consequence of these circumstances the learned

Chief Justice thought that the best course would be to dismiss the main appeal, and to direct that as regards the share of Namtulla, defendant No. 3, there is to be an enquiry as to whether she has assigned it to defendant No. 7.

2. Matters accordingly went down to the lower Court and the learned Subordinate Judge, Mr. Desai, framed two issues. He found that the deed of assignment relied on by defendant No. 7 was not admissible in evidence for want of registration, and that it was not open to defendant No. 7 to adduce any secondary or extrinsic evidence of such assignment. He decided consequently that there had been no valid assignment of defendant No. 3's share of 17/144ths of (b) and (c) properties referred to in the decretal order, which she should recover from the administratrix on payment of the appropriate amount of Court-fees, and that defendant No. 7 should take the remainder after deducting the shares, not only of plaintiff and defendant No. 6, but also of defendant No. 3, as representing the interests of defendant No. 1 and of defendants Nos. 2, 4 and 5 only. This finding came up to this Court in appeal and was disposed of by a Bench of which I was a member. We observed that the learned Chief Justice's judgment, with the issues sent down to the learned Subordinate Judge for a finding, had been treated much too narrowly, and that what should have been done was to hold an enquiry as to whether there had been an assignment, that is, an assignment at law or in equity, by defendant No. 3 to defendant No. 7. The issue was accordingly remanded back to the lower Court. It has now been returned for the second time, the finding being that defendant No. 7 is entitled to receive the original share of defendant No. 3 in the estate of her father Tyeballi and her grandfather Allibhai, on payment of Rs. 12,000 within three months from the date of the finding.

3. The learned Subordinate Judge held that there was no assignment in law, but that on the strength of certain rulings, which he has quoted, defendant No. 7 can resist defendant No. 3's prayer for being put in possession of her share, and referred to Venkatesh Damodar v. Mallappa Bhimappa I.L.R.(1921). 46 Bom. 722 :24 Bom. L.R. 242, and the Privy Council case of Skinner v. Skinner (1929) 32 Bom. L.R. 1 . was, he thought, inapplicable. In the end he said that on the equitable doctrine of part performance defendant No. 7 was not entitled to remain in possession and she cannot claim the equitable relief of being allowed to continue in possession of the share of defendant No. 3 without paying the sum agreed on, on the ground that he who seeks equity must do equity, . Holding, therefore, that there had been an assignment in equity, though not at law, by defendant No. 3, of her share to defendant No. 7, he found that defendant No. 7 was entitled to receive the original share of defendant No. 3 in the estate of her father Tyeballi and grandfather Allibhai, on payment of Rs. 12,000 within three months.

4. Apparently no interest on the Rs. 12,000 was claimed and he has allowed none, and we are informed that Rs. 12,000 have since been paid into Court in accordance with this order, which is now assailed in appeal by defendant No. 3.

5. Mr. Thakor's argument for defendant No. 3 is that the doctrine of part-performance relied on by the learned Judge does not apply to this case. The leading cases on the point in this Court are Bapu Apaji v. Kashinath Sadoba I.L.R.(1916) 41 Bom. 438 : 19 Bom. L.R. 100 and Venkatesh Damodar v. Mallappa Bhimappa. The rule in Bapu Apaji v. Kashinath Sadoba is to the effect that where the plaintiff, being the owner of certain immoveable property, seeks to recover possession of that property, and there are no facts operating to his prejudice, it is a valid defence to the suit that the plaintiff had agreed to sell the property to the defendant, the agreement being at the

date of suit still capable of specific enforcement, but there being no registered conveyance passing the property to the defendant, who has taken possession under the agreement for sale and is willing to perform his part of it with the plaintiff. The qualification here is that at the date of the agreement a suit for specific performance was still available to the defendant. The doctrine is further expounded in Venkatesh Datqodar v. Mallappa Bhimappa, in which on somewhat similar facts Macleod C. J. held that whether the defendants' right to sue for specific performance still subsisted or not was immaterial. The headnote says :-

The plaintiff agreed to sell certain property to the defendants which was already in their possession. The defendants paid up the full purchase money to the plaintiff, but omitted to take from him a registered sale deed. After their right to obtain specific performance of the agreement to sell had become time-barred the plaintiff sued to recover possession of the property :-Held, dismissing the suit, that the defendants were entitled to remain in possession against the plaintiff.

Macleod, C.J. there held that the decision in *Bapu Apaji v. Kashinath Sadoba* which, he considered, was based on the fiduciary aspect of the vendor's position and the impropriety of permitting him to succeed against his vendee in a suit for possession, and that that argument must also apply where the vendee in possession has allowed the time for filing a suit for specific performance to expire. But it has been pointed out to us by Mr. Thakor that, although in 1929 the doctrine of part-performance received statutory recognition in Section 53A of the Transfer of Property Act, the judgments of the Judicial Committee of the Privy Council do not support the doctrine in *Venkatesh Damodar v. Mallappa Bhimappa*. Mr. Thakor relied on the leading case of *Ariff v. Jadunath Majumdar* in which it was held by the Privy Council in a judgment delivered by Lord Russell of Killowen-

that there being no lease made by a registered document as required by Section 107 of the Transfer of Property Act, 1882, the appellant was entitled to eject the respondent, with liberty to him to apply to remove the structures; had the respondent's right to sue for specific performance not been barred he could have claimed the execution of an instrument, which he could have registered, the appellant's suit being stayed in the meantime.

This finding seems to be opposed to the doctrine in *Venkatesh Damodar v. Mallappa Bhimappa*, though Mr. Dave has endeavoured to distinguish it, in that it deals with a lease and not with a sale.

6. The next case relied on is *Currimbhoy & Co. v. Greet* . The ruling in that case is-

Defendants in a suit for ejectment in a Court in which a counterclaim is incompetent cannot obtain protection on the ground that they are in possession under an agreement for a lease without bringing a separate suit for specific performance before their right to do so has become barred under Article 113 of the Indian Limitation Act; it is not sufficient that the right was not so barred at the institution of the suit for ejectment.'

The next case relied on was *Webb v. Macpherson* , an older one which I need not discuss, and also *Chhatra Kumari Devi v. Mohan Bikram Shah* . These were quoted on the point that there can be only one legal owner of the property at the same time.

7. It seems to us that the latest case decided by His Majesty's Privy Council concludes the matter, as far as this Court is concerned. This is *Mian Pir Bux v. Mahomed Tahar* : (1934)36BOMLR1195 , P.C. which was an appeal from the Court of the Judicial Commissioner of Sind. It concerned a plot of land in New Sukkur, which had been granted by the Collector of Sukkur half and half to the parties to the suit. One of these was a political exile, and had hopes of being allowed to return to Quetta, his native place. He accordingly executed an agreement to sell the plot which was allotted to him by the Collector, to the appellant before the Privy Council, Khan Bahadur Mian Pir Bux, in the event of his being allowed to return to his native place by the political authorities, by the end of May 1919. The District Judge dismissed the suit. In appeal the Judicial Commissioner's Court reversed the District Judge's decree, and allowed plaintiff one for possession of the plot in question, disallowing the application of the doctrine of part-performance. Their Lordships referred to the case of *Ariff v. Fadunath Majumdar*, and although that case concerned a lease they held that it applied to one of sale also. They remarked (p. 1200) :-

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, XX 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.

8. The facts in this case are that originally there was an agreement to sell to the husband of defendant No. 7 executed in 1919. This admittedly has never been put into effect, and we must assume that it was set aside by the consent of the parties, as it was replaced by what is called a deed of assignment, executed on September 4, 1923, by defendant No. 3 in favour of defendant No. 7, the wife of the vendee in the agreement of 1919. This deed of assignment was made over to the vendee, who did not get it registered. Consequently, it is not admissible in evidence and cannot be referred to for any purpose whatever ; neither under Section 91 of the Indian Evidence Act is any evidence admissible to prove its contents.

9. Mr. Dave for the respondents has relied especially on *Bapu Apaji v. Kashinath Sadoba and Venkatesh Damodar v. Mallappa Bhimappa* and to Sir Dinshah Mulla's work on the Transfer of Property Act, where there is a distinction made in the notes to Section 53A on the equities, the learned author stating that there are three kinds of equities, one similar to the equity in *Maddison v. Alderson* (1883) 8 App, Cas. 467, that is the equity of part-performance, one like the equity in *Walsh v. Lonsdale* (1882) 21 Ch. D. 9, and the fiduciary capacity of the vendor. The argument has been based on the cases of *Bapu Apaji v. Kashinath Sadoba and Venkatesh Damodar v. Mallappa Bhimappa*. The notes at page 247 of Sir Dinshah Mulla's book show that it is an open question whether the above decisions are still good law if they go beyond Section 53A. This work was published before the latest decision I have quoted above, and it seems to us that in fact that decision has set aside the doctrine of part-performance as explained in these rulings. We think, therefore, that in this case the defendant is not entitled to rely on the bare agreement and possession.

10. On the facts also it does not seem to us that defendant No. 7 has a case. The failure to register the document in question is shared equally between her and

defendant No. 3 at the best, and defendant No. 7 is not in possession of the property, as far as we can see, in her own right, but as administratrix of the two estates for which she has obtained letters of administration. We, consequently, think that the learned Judge's finding on this issue is wrong, and that It should have been in the terms of the original finding of Mr. P. C. Desai. This is to this effect :-

The result is that I hold the alleged assignment of defendant No. 3's share to defendant No. 7 not proved. The above finding leads to a modification of the decretal order of this Court dated March 17, 1924, to the following effect, namely :That defendant No. 3's share is declared to be 17/144ths of (b) and (c) properties referred to in the said decretal order, which she shall be at liberty to recover on payment of the appropriate amount of Court-fees.

11. The last point, which was actually suggested by myself, arises out of the fact that the property alleged to be assigned to defendant No. 7 was in part immovable property and in part shares in industrial undertakings. Such shares can be transferred apart from a registered instrument. The question is whether the assignment would hold good as regards those shares or not. The document which is inadmissible for want of registration, however, does not distinguish between defendant No. 3's share in the industrial company's shares, or her interest in the immovable property, and it is not possible in the circumstances to separate the two. Moreover, there has not been any actual transfer of the shares, for these are held, by defendant No. 7 as administratrix of the estate.

12. We think that for these reasons Mr. Desai's finding on the issue must be confirmed. Since the claim as to the non-existence of any transfer was made late, and has thus been the cause of the whole trouble, we think that each party should bear her own costs.