

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the appeal of
Babu Bindeshri Parshad v. Mahant Jairam
Gir from the High Court of Judicature for the
North-Western Provinces, Allahabad ; delivered
June 17th, 1887.*

Present :

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD BAGGALLAY.

SIR RICHARD COUCH.

THE Appellant in this case, and the Respondent, on the 3rd of October 1882, entered into an agreement for the sale of an estate which is described in the agreement at Ilaka Dabha. The agreement is very short, and is in these words:—" Out of Rs. 10,075 (ten thousand and " seventy-five) at which it has been settled by " Mahant Jairamgir to convey Ilaka Dabha " to Babu Bindeshri Parshad, Rs. 200 (two " hundred) have been received as earnest money, " through Lala Chhedi Lal and Mata Parshad " Malwai. The balance, viz., Rs. 9,875 (nine " thousand eight hundred and seventy-five), exclu- " sive of costs, will be received in cash within " 15 days, and then I will execute the sale deed " and get it registered. The purchaser will " bear the costs on account of the stamp paper " and the registration and mutation fees. I will " have nothing to do with them. I will take " the entire amount in cash. If the balance is " not paid within 15 days the earnest money " will be forfeited, and the vendor will be at " liberty to sell the Ilaka or not."

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On the 16th October the following letter was written to the Appellant: "My dear Mahant Jairaimgir," —after compliments— "I beg to say that you contracted with me to sell the zamindari of Taluqa Dabha, Pargana Kiwai, Zilla, Allahabad, for Rs. 10,075, and accepted Rs. 200 as earnest money. The draft of the sale deed is also ready. However, you make excuses in executing the sale deed. It is 13 days since you were paid the earnest money. You have also sent to me the stamp, but nobody appears on your behalf to write and complete the sale deed. I have over and over again sent my man to you, but you have put the matter off from day to day. As I have some misgivings in the matter, and I am ready to pay the money and have the sale deed executed by this writing, I request you to duly execute the said sale deed in accordance with the corrected draft, and accept the money from me as soon after the receipt of this as possible." It is stated in the statement of the pleader who was examined by the subordinate Judge before the settlement of the issues that this notice was served on the 18th October, "and about three or four days after this, the aforesaid draft of the sale deed was sent to Madho Chanbay, Defendant's gumashta at Mizapur. The draft was not sent to the Defendant's gumashta within the term of 15 days." It is stated afterwards that there was some mistake as to that date, and it would seem that the draft of the sale deed was sent three or four days before the 18th, probably on the 14th October. As sent to the Defendant, it contained this clause:—

"Should a stranger now or hereafter acquire any other title in the property sold, or any kind of flaw arise, I, the vendor, my heirs and assigns, shall in every way be responsible therefor. The vendee shall, at all events, be

“ at liberty, if any such contingencies arise, to
 “ seek his relief in the Civil Court and realise
 “ his losses and damages from me, the vendor,
 “ from my person and property, and that of
 “ my heirs and assigns, together with interest
 “ and costs incurred in the court; and to this I
 will have no objection whatever.” thus requiring
 the Defendant to give an absolute warranty of
 title to the property which was sold. The
 Defendant objected to this, and struck out this
 clause, and it would seem that he substituted for
 it a clause to the following effect:—“ Should any
 “ kind of dispute arise, whether now or hereafter
 “ on my part, or that of my heirs or assigns, in
 “ the property sold, I, the vendor, and my heirs
 “ will be responsible therefor,” and the draft
 thus altered was returned to the Plaintiff. The
 Defendant appears to have thought that the
 Plaintiff was entitled to this, but their Lordships
 are not prepared to hold that such a contract of
 sale as this gave the purchaser a right to insist
 on any formal covenants such as the practice of
 English lawyers has attached to an English con-
 tract of sale if that is what was in the minds of
 the parties.

The Plaintiff, the purchaser, was not satisfied
 with this. After the 18th October there appears
 to have been some correspondence or negotiation
 between the parties with respect to the receipt
 of some outstanding rents, and it is said that a
 letter was written on the 30th October, but that
 letter does not appear in the proceedings. The
 Plaintiff insisted upon having in the sale deed
 the agreement or covenant which had been in-
 serted being an absolute warranty of title; and
 on the 4th December he brought his suit in the
 court of the subordinate Judge of Allahabad,
 in which, after stating the contract and the
 payment of the earnest money, he alleged that
 “ the Defendant did not perform the aforesaid

“ contract, and when the Plaintiff saw that the
“ Defendant delayed in the complete execution
“ of the deed in question, he requested the
“ Defendant to have the deed completely executed
“ and registered by means of a written and
“ registered notice on the 16th October 1882,”
and that he sent the draft on the 18th October
1882, which, as has been stated, was admitted to
be a mistake. Then he said: “the Plaintiff has
“ all along showed readiness to have the contract
“ completely performed as far as he himself was
“ concerned;” and prayed that a judgement
might be passed ordering the Defendant to
execute and get registered a sale deed in favour
of the Plaintiff in respect of the property
claimed, by entering a guarantee of good valid
title.

Now there he distinctly claimed to have the
contract performed by having this warranty of
title; and when he says that he was ready to
have the contract completely performed, as far
as he himself was concerned, it must be taken
that he was ready to have it performed in that
way.

The case went for trial before the subordinate
Judge of Allahabad, and he, in his judgement,
came to the conclusion that the time fixed for the
payment of the balance of the purchase money
was material, and that the Plaintiff had not paid
the purchase money at the time fixed, and no
valid excuse had been shown for his not doing so,
and consequently he was not entitled to have a
decree, and he dismissed the suit. It then went
by way of appeal to the High Court, and it is
important to see what the Plaintiff insisted upon
when he made his appeal to the High Court.
In his memorandum of appeal, he said that
he appealed because the Appellant had done
“ all that lay in his power within the stipu-
“ lated period to secure the due execution and

“ completion of the sale contract which had
“ been previously accepted in unqualified terms
“ by the Defendant, the Respondent; because
“ there is ample evidence to prove that the
“ Appellant could not deposit with the Respon-
“ dent the balance of the consideration money
“ in consequence of the refusal of the latter to
“ execute a proper conveyance with a warranty
“ of good title,” distinctly insisting then on his
right to have a warranty of good title; and,
“ because upon the facts admitted by the Respon-
“ dent himself, the (Plaintiff) Appellant is entitled
“ to an equitable decree for his claim,” namely,
the claim for a deed with a warranty of good
title. It has been suggested that the Plaintiff
was willing to take a decree upon the terms
which it was said the Defendant admitted he was
liable to perform, namely, to have a sale deed
with a qualified covenant; but there is no evi-
dence that at any time before this stage of the
case the Plaintiff had in any way submitted or
shown his willingness to take any other sale deed
than one with a warranty of title. The pleader
was examined and there is no trace of any
willingness to do this.

When the case came before the High Court,
it went into a consideration of some evidence,
which, in its opinion, showed that the agreement
between the parties was different from that
which was stated in the writing; that all that
the Defendant undertook to sell, and the Plaintiff
contracted to buy, were the rights and interests
of the Defendant whatever they might be;
that it was known to them that the subject-
matter of the agreement was the right and
interest of certain persons, and that the vendor
could not be expected to give any absolute
warranty of title. Their Lordships have not
gone into this evidence, and therefore express no
opinion as to the ground upon which the High

Court rested their judgement. They came to the conclusion, upon the oral evidence, that it was not a proper case for a decree for specific performance.

The question which has now to be considered, is, whether the decree of the subordinate Judge dismissing the suit ought to stand ; and the position of the parties appears to be this: that the Plaintiff has all along, until he saw that the judgement of the High Court was likely to be given against him, been insisting upon having the sale deed with the warranty of title; and it is admitted by his learned counsel at the bar, that he had no right to any such covenant. It has not been attempted to be shown that he had. Thus he was insisting upon having that which he had no right to have, and he delayed performing his part of the agreement for the payment of the purchase money on that account. Under such circumstances as these, it certainly is not a case in which it would be right for this Committee to advise Her Majesty to make any decree for specific performance.

The cases to which their Lordships have been referred are very different from this. They are cases where apparently the Plaintiff has been willing to submit to have the agreement which was actually proved performed. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed, and the decree of the High Court affirmed, and the Appellant will pay the costs of this appeal.