

**Ram Chunder Dutt Vs. Dwarkanath Bysack and ors.**

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**Court :** Kolkata

**Decided On :** Jan-14-1889

**Reported in :** (1889)ILR16Cal330

**Judge :** Norris, J.

**Appellant :** Ram Chunder Dutt

**Respondent :** Dwarkanath Bysack and ors.

**Judgement :**

**Norris, J.**

1. This was a suit to recover damages for breach of covenants for title and for quiet enjoyment. The case is one of some importance, and it is desirable to set out the facts in detail (His Lordship then proceeded to state the facts as set out above and continued):

2. For the plaintiff it was contended that all the defendants were liable on the covenants alluded to-Amrita Lal, Surendra Lal, and Rajluckhee-as-having themselves executed the conveyance; Dwarkanath and Girendra Lal, as being bound by the execution thereof by the Registrar in their respective names.

3. Mr. Bonnerjee admitted that the Registrar's authority must rest upon statute, or upon practice or procedure having the force of statute.

4. The statutory authority relied on was Section 261 of the Code of Civil Procedure; the practice or procedure having the force of statute that was contained in Rules 341 and 436 of Belchambers' Rules and Orders.

5. It was further contended for the plaintiff that the 'conveyance' referred to in Section 261 of the Code of Civil Procedure, and in Rule 436, meant a deed of transfer containing a warranty, such warranty being expressed by such covenants as were necessary to secure to the grantee the estate granted; that the covenant sued on was such a covenant; and that, therefore, the Registrar had authority so to covenant on behalf of Dwarkanath and Girendra Lal.

6. Mr. Pugh, on the other hand, contended that the Registrar had no authority, either under Section 261 of the Code of Civil Procedure or under the Rules, to execute the conveyance on his client's behalf.

7. As regards Section 261, he contended that it applied only to cases where a decree had been made for specific performance; he denied that in this case there had been any decree for the execution of a conveyance; he denied that his client was a 'judgment-debtor' within the meaning of the section, or that the plaintiff was a 'decree-holder:' he further contended that if Section 261 was applicable, and if the plaintiff was a 'decree-holder' and the defendant a 'judgment-debtor' within the meaning of the section, yet the Registrar had no authority to act under the provisions of the section, because the procedure laid down by the section had not been followed.

8. As regards Rule 436, Mr. Pugh contended that it had no statutory authority, and that even if it had, and was applicable to the case, yet, as the procedure there laid down had not been complied with, the Registrar had no authority to execute the conveyance on his client's behalf.

9. Mr. Pugh further argued that even if, under the provisions of Section 261 and Rule 436, or either of them, the Registrar had authority to execute the conveyance on Dwarkanath's behalf, he had only authority to execute such a conveyance as might be necessary to pass Dwarkanath's estate, and could not possibly have any authority to enter into covenants on his behalf.

10. And, lastly, Mr. Pugh contended that general covenants for title and quiet enjoyment did not embrace the case of a defect of title known to the purchaser before or at the date of his purchase.

11. I think I have correctly stated the views expressed by the respective learned Counsel.

12. Mr. Pugh's arguments upon Section 261 and Rule 436 are applicable to the case as against Girendra Lal as well as to that against his own client; his argument upon the question of a known defect at the date of the purchase is applicable to all of the defendants. I propose to deal in the first place with the argument common to all the defendants.

13. In support of it, Mr. Pugh referred to Coke on Littleton, 384 A, the last page in the note; Platt on Covenants, 387; Sugden's Vendors and Purchasers, 14th Ed., 368; and Gas Light and Coke Company v. Towse L.R. 35 Ch. Div. 519.

14. The passage from Platt runs as follows: 'Where the title is known to be defective, the party will sometimes complete his purchase, relying on the vendor's covenants for indemnity. It must, of course, under these circumstances, be. matter of express agreement, whether the vendee will take the conveyance containing covenants, with the usual qualification, or whether the covenants shall be made to extend generally to the acts of all the world. Should the seller agree to covenant against this defect specially and particularly, prudence suggests, with a view to keep the fact of unsoundness of title from the face of the purchase deed, that the indemnity should be contained in a separate instrument. Even-in cases where there has been a covenant against incumbrances, it has been sometimes doubted whether that covenant would extend to protect a purchaser against incumbrances of which he had express notice.'

15. This is, I think, a meagre authority for Mr. Pugh's contention, The case of the Gas Light and Coke Company v. Towse L.R. 35 Ch. Div. 519 does not in my opinion assist him.

16. On the other hand, in the last edition of Dart's Vendors and Purchasers, at page 886, it is said: 'Although the fact of the purchaser having notice of a defect cannot prevent the covenants for title from extending to it, since extrinsic evidence of intention is inadmissible for the purpose of construing a deed; yet, in an action to rectify the covenant, that\_ fact may be used as the basis of an inference, that it could not have been the intention of the parties that the covenant should include a defect of which both were equally aware. It has accordingly been suggested that, if the purchaser consents to take a defective title, in reliance on the covenant for title, so that the covenant is intended to cover a known defect, this intention should be clearly expressed in the covenant itself.' And in the foot-note it is said: 'It may be observed that none of the authorities warrant the proposition that it is doubtful whether the covenant would extend to a known defect.'

17. This is, I think, a correct view of the law, and I must, therefore, hold that the covenant extends to the defect in title in consequence of which the plaintiff, though well aware of it, was dispossessed of a moiety of the premises he had purchased.

18. I now proceed to deal with the case as against Girendra Lal. He is a minor, and no guardian ad litem has been appointed, and upon this ground alone I think the suit against him should be dismissed.

19. But there is also another ground. For reasons which I shall presently explain, I am of opinion that the Registrar had authority to execute the conveyance on Girendra Lal's behalf; but I am clearly of opinion that he had no authority to covenant on his behalf. If authority is wanted for this proposition, it will be found in the case of Waghela Rajsanji v. Shekh Masludin L.R. 14 I.A. 89, for a reference to which I am indebted to Mr. Pugh, In that case a guardian covenanted on behalf of her infant ward to indemnify the purchaser of the ward's estate against any claim by the Government for revenue; the Judicial Committee held that it was beyond the power of the guardian to impose a personal liability on the ward.

20. The Registrar, in a case such as this, cannot be in a higher position than the guardian of an infant ward.

21. It is but right to say that the learned Counsel for the plaintiff, after argument, acquiesced in this view.

22. I have had considerable doubt as to whether there should not be a decree against Rajluckhee; but, upon consideration, I am of opinion that the suit as against her should be dismissed.

23. Rajluckhee is a purda-nashin lady. The only legal advice she had before she executed the conveyance was from Baboo Preo Nath Bose, the attorney of the plaintiff (who, as I have already said, is her uncle, and was for many years her manager). The evidence as to the explanation of the deed to Rajluckhee is that of her son Surendra Lal, who said: 'Preo Nath Bose explained the deed to my mother.'

24. I do not think this is sufficient. Before I can hold a purda-nashin lady liable upon a covenant of such unusual stringency as the covenant now sued on, I must be satisfied that she had 'good independent advice in the matter,' and that she clearly understood the nature of the contract she was entering into, and the liabilities she was taking upon herself.

25. I now come to the case against Dwarkanath. It appears that rule 436 is based upon Statutory Enactment.

26. Act XXV of 1841 - 'An Act for amending the law concerning imprisonment for contempts of decrees or orders made by Courts of Equity' -an Act containing provisions similar to those to be found in 11 Geo. IV and 1 Wm. IV, c. 36, provided that when any person should have been directed by any decree or order in Equity of Her Majesty's Supreme Courts to execute any deed, and should have refused or neglected so to do, and had been detained in prison for two months for contempt, the Court might appoint the Master or Registrar to execute the deed.

27. Act V of 1855: 'An Act to assimilate the process of execution on all sides of Her Majesty's Supreme Courts, and to extend and amend the provisions of Act XXV of 1841': provided that 'whenever any person has been directed by any judgment, decree, sentence, or order of any of the said Courts to execute any conveyance,

and such person has refused or neglected to obey such direction, or has evaded compliance therewith either by absenting himself in order to avoid service of the judgment, decree, sentence or order wherein such direction is contained, or by any other means, it shall be lawful for the Court by which such direction has been given, whether the person disobeying or evading compliance with such direction is in custody or not, upon application made to the said Court for that purpose, and upon proof to its satisfaction of such default or evasion as aforesaid, to order or appoint the Registrar, Master, or other officer of the said Court to execute such conveyance.' Act XXV of 1841, in so far as it had not been repealed, and Act V of 1855, except as to the Straits Settlement, were repealed by Act VIII of 1868; but the repealing Act contained the following saving clause: 'Nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised, or derived by, in, or from any enactment hereby repealed.'

28. Act VIII of 1868 was repealed by Act XIV of 1870; Act XIV of 1870 by Act XII of 1873; Act XII of 1873 by Act XVI of 1874; and Act XVI of 1874 by Act XII of 1876; but all these Acts contain the same saving clause as is contained in Act VIII of 1868. The procedure laid down by Act V of 1855 is, therefore, still in force, and is defined in Rule 436 of Belchambers' Rules and Orders.

29. I am, therefore, of opinion that the order of the 8th of September 1885 was properly made, save as hereinafter mentioned, and that the Registrar had authority to execute the conveyance on behalf of Dwarkanath.

30. This leads me to the consideration of Mr. Pugh's objection that the form of procedure laid down in Rule 436 was not followed.

31. Rule 436 runs as follows: 'If any person, certified by the Registrar to be a necessary party to a conveyance, be a minor, or otherwise under disability, or, being sui juris, shall neglect or refuse to execute the conveyance, an order may be obtained in the case of a person under disability, directing the Registrar to execute the conveyance for him and in his name, and in other cases, directing the person

to execute the conveyance within a time to be fixed by the order, and, in default thereof, directing the Registrar to execute the same for him and in his name. The application shall be, on summons, and shall be supported by an affidavit or affirmation of the facts, and it shall be shown that the person required to execute the conveyance was certified by the Registrar to be a necessary party, and that the conveyance has been approved of by such party or by the Registrar. Unless otherwise ordered, the costs of such application, in the case of a person under disability, shall be part of the costs of the sale, and, in other cases, shall be borne and paid by the defaulting party.'

32. The order of the 8th of September 1885 was not 'an order directing' Dwarkanath 'to execute the conveyance within a time to be fixed by the order, and, in default thereof, directing the Registrar to execute the same for him and in his name;' it was an order directing 'the Registrar of the Court to approve of, and execute for, and in the name of the said defendant Dwarkanath Bysack, as one of the executors of the estate of Sreemutty Anundmoye Dassee, deceased, and also as one of her heirs and legal representatives, the conveyance of the said house and premises No. 22, Machooa Bazaar Street;' nor is there any evidence of the service of the order on Dwarkanath. Mr. Pugh argued that the making of the order in the words of the rule, its service upon the defendant, or his default to obey it, were conditions precedent to the authority of the Registrar to execute the conveyance.

33. On the other side it was contended that, if these were conditions precedent, which was not admitted, the defendant had waived their performance by his attorney's letter of the 29th August 1885.

34. I think that the plaintiff's contention must prevail.

35. I am, therefore, of opinion that the Registrar had authority to execute the conveyance on behalf of Dwarkanath. The next point to be considered is- Had the Registrar authority to covenant on behalf of Dwarkanath

36. I am of opinion that he had no such authority. Mr. Sale puts his client's case thus-' The defendant was bound to give a conveyance with the usual covenants.

The covenant sued upon is a usual one; and the effect of the order upon the Registrar was to direct him to do what the defendant was bound to do.'

37. No doubt where there is a contract for the sale of immoveable property, an agreement to make a good title is implied.

38. The Legislature of this country has distinctly recognised this principle in the Transfer of Property Act.

39. But in this case there was no agreement for sale, and I am unable to construe 'conveyance' in Rule 436 as meaning 'conveyance executed by virtue of an agreement for sale.'

40. I think 'conveyance' in Rule 436 means such an instrument as may be necessary to transfer A's estate, if he has any, to B.

41. In the result then, I am of opinion that the suit must be dismissed as against Dwarkanath with costs.

42. There must be a decree against Amrita Lal and Surendra Lal for Rs. 4,900. I arrive at this sum in this way: the plaintiff gave Rs. 7,000 for the premises, he sold the portion of which he was not dispossessed for Rs. 3,785, the difference between these two sums is Rs. 3,215; I add to this Rs. 1,188 paid to Baboo Preo Nath Bose for costs in the suit brought by the Mulicks, Rs. 70 paid to Baboo Gonesh Chunder, and Rs. 437 interest on Rs. 3,215 at 6 per cent, from the 24th of September 1886, the date of dispossession, to this date. The Rs. 4,900 plus the costs on scale No. 1 will carry interest at 6 per cent, from date of decree until realization.

1 Decree for execution of conveyances, or endorsement of negotiable instruments.

'[Section 261: If the decree be for the execution of a conveyance, or for the endorsement of a negotiable instrument, and the judgment-debtor neglects or refuses to comply with the decree, the decree-holder may prepare the draft of a conveyance or endorsement in accordance with the terms of the decree, and deliver the same to the Court.

The Court shall thereupon cause the draft to be served on the judgment-debtor in manner hereinbefore provided for serving a summons, together with a notice in writing stating that his objections, if any, thereto shall be made within such time (mentioning it) as the Court fixes in this behalf.

The decree-holder may also tender a duplicate of the draft to the Court for execution, upon the proper stamp paper if a stamp is required by law.

On proof of such service, the Court, or such officer as it appoints in this behalf, shall execute the duplicate so tendered, or may, if necessary, alter the same, so as to bring it into accordance with the terms of the decree and execute the duplicate so altered:

Provided that, if any party object to the draft so served as aforesaid, his objections shall, within the time so fixed, be stated in writing and argued before the Court, and the Court shall thereupon pass such order as it thinks fit, and execute, or alter and execute, the duplicate in accordance therewith.]

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