Mt. Asa Devi vs Mt. Champa Devi And Ors. on 11 March, 1953

Equivalent citations: AIR1953ALL559, AIR 1953 ALLAHABAD 559

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Mukerji, J.

1. This is an appeal by a plaintiff in a suit for possession of certain zemindari and house properties which were detailed in extenso at the foot of the plaint. The suit which has given rise to this appeal arose under the following circumstances:

2. Rikhi Lal and Raghubans Sahai were two brothers who owned considerable house and zemindari property in the district of Saharanpur; they also owned certain mortgagee rights under two usufructuary mortgage deeds of the value of Rs. 42,000/-. Raghubans Sahai was the first to die; he died some time prior to 1905 leaving behind his son Shambhu Nath as his heir. Rikhi Lal, the other brother, died in 1905 leaving a widow Shrimati Asha Devi who is the plaintiff in this appeal. Rikhi Lal before his death had executed a will in favour of the plaintiff and it was on the basis of this will that she succeeded in getting mutation effected in her name on a moiety share of the family property.

3. Disputes, however, arose between Sm. Asha Devi on the one hand and Shambhu Nath, Raghubans Sahai' 3 son, on the other. These disputes, however, were amicably settled by means of a family arrangement. The settlement which was arrived at was recorded in a document which was registered and which, in effect, forms the basis of the present suit. This document, which we shall refer to hereafter as the family arrangement, was executed by Shambhu Nath and Asha Devi on 17-8-1908. By means of this family arrangement it was settled that Shambhu Nath was to be the owner in possession of the entire properties including the mortgagee rights in respect of the two usufructuary mortgage deed, except a certain house No. 7 and certain other houses mentioned in list (b) of the list appended to the family arrangement. Asha Devi was also to receive from Shambhu Nath a sum of Rs. 16,000/- in cash at the time of the registration of the family arrangement, and she was to receive annually a sum of Rs. 1,300/- as maintenance; this sum of Rs. 1,300/- was payable by Shambhu Nath, in two half-yearly instalments falling due on 15th February and the 15th August every year.

The family arrangement also made provision that in the event of three consecutive defaults in respect of the maintenance payable half-yearly, the family arrangement was to terminate, or, in the

words of the arrangement Asha Devi was given:

> "The right to cancel this deed of compromise and obtain possession over that property which she has left in possession of the 1st party at present and which is mentioned at the foot of this deed of compromise."

(These are the words in which the family arrangement has been translated and these words appear at page 85, line 35 of the paper-book).

According to the family arrangement if Asha Devi did not obtain possession over certain property on account of its being, redeemed, she was to receive a sum of Rs. 5,000/- in cash with interest at the rate of eight annas per cent, per mensem from the date of cancellation after allowing a set-oft to the extent of Rs. 16,000/-which was to be paid to her under the family arrangement at the time of registration. The document also created, a charge in respect of this sum of Rs. 5,000/- on certain items of property enumerated in list A of the family arrangement. Asha Devi was also given the right to recover the arrears of maintenance in the event of this falling into arrears. These were the material conditions provided for by the family arrangement.

4. Shambhu Nath made payments of the maintenance payable to Asha Devi according to the family arrangement up to 15-2-1933, and thereafter there was default. ' There were successive defaults on 15-8-1933, 15-2-1934 and 15-8-1934. Asha Devi consequently taking advantage of the provision in the family arrangement, terminated the arrangement and laid claim to the properties which she had, under the family arrangement, given to Shambhu Nath. In paragraph 7 of her plaint she stated as follows:

> "Out of Rs. 1,300/- payable annually, the plaintiff has received the entire amount due up to the 15th of February, 1933. After this she did not receive the amount which was payable on the 15th of August, 1933, 15th of February, 1934 and the 15th of August 1934. The last instalment fell due on the 15th of August, 1934, and as the amount was not received, the right to cancel the document, dated the 17th of August, 1908, and to demand possession over the property accrued to the plaintiff. She accordingly enforced that right, cancelled, the said document and demanded possession, but no compliance was made."

Compliance not having been made she filed a suit to get back the property on the 11-11-1935, out of which the present appeal has arisen.

5. Certain events happened during the period since 17-8-1908, the date on which the family arrangement had been recorded, and the date on which the right to cancel that arrangement, namely, 15-3-1934, accrued to toe plaintiffs and it is necessary to indicate very briefly some of those events. During this period Shambhu Nath and his successors made certain transfers in respect of properties which had been received by Shambhu Nath under the family arrangement. The other event of importance to notice is the fact that Shambhu Nath died sometime in 1934. One other matter need be noticed at this stage and that matter is that sometime in 1926 Shambhu Nath

mortgaged certain properties to Ram Sarup and others & left the responsibility of making payments of the annuity receivable by Asha Devi on the mortgagees; Asha Devi, however, was not party to this contract.

6. The suit was filed against the heir of Shambhu Nath and the transferees from Shambhu Nath; this had to be so because, as we have indicated earlier, the suit was a suit for possession and after the transfers some of the properties had passed into the hands of the transferees and possession had to be obtained in respect of those properties from the transferees.

7. There were two sets of defendants, therefore; the first set consisting of the heir of Shambhu Nath, and the second set, the trans ferees. The defence taken, by the heir of Shambhu Nath, namely, Sm. Champa Devi his widow, was that Rikhi Lal and Shambhu Nath were members of a joint Hindu family and that on the death of Rikhi Lal the property passed to Shambhu Nath by survivorship and, 'as such, the family arrangement relied upon by the plaintiff was an illegal transaction. The existence of the family arrangement was also denied; it was also said that if there was a family arrangement in existence, then it had been obtained by fraud and was therefore not binding. It was further contended that the term under which the plaintiff claimed to have cancelled the arrangement was penal in its character and was consequently unenforceable at law. There was a further defence which need be noticed and that was that the suit was barred by the provisions of the Encumbered. Estates Act and Section 11, Civil P. C. This defence was raised because of the fact that Sm. Champa Devi, widow of Shambhu Nath, had filed an application under Section 4, Encumbered Estates Act, on 23-9-1935. In this application Champa Devi had shown the properties to which claim was being laid by Asha Devi as her own properties. It may be noticed also that Asha Devi laid a claim to the arrears of maintenance before the Special Judge at a certain stage of the proceedings there.

8. The defence of the transferees followed more or less the same line which was taken by Champa Devi, the widow of Shambhu Nath. The transferees, however, raised two more pleas in defence, that they, that is, defendants 2 to 4, were not liable to pay the sum of Rs. 5,000/- to the plaintiff, inasmuch as the usufructuary mortgage in respect of which this claim of Rs. 5,000/-was made had been redeemed. All the transferees claimed protection under Section 41, T. P. Act, and they also raised the bar of limitation.

9. The trial Court recorded the following findings on the evidence which was adduced before it :

> 1. That for the purposes of the case it was immaterial whether Shambhu Nath was or wa3 not a member of a joint Hindu family at the time of Rikhi Lal's death.
>
> 2. That there was default in the payment of three successive instalments.
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> 3.. That none of the transferees made any reasonable or independent inquiry so as to protect them under Section 41, T. P. Act: The learned trial Judge further found that" in this case the plaintiff did nothing which could have misled the transferees into believing that their transferor had the right to make the transfer. The learned Judge was also of the opinion that Section 41, T. P. Act, was inapplicable, in terms, to the

> facts and circumstances of the present case, inasmuch as the transferor in this case was not the "ostensible owner" of the property but was, at the time when he made the transfer, the real owner under the family arrangement.
>
> 4. That there was no fraud or misrepresentation of any kind in regard to the family settlement and consequently the settlement was binding on the parties.

10. The trial Judge, even though he came to the aforementioned findings in the suit, dismissed the suit on two grounds. First, on the ground that the clause in the family settlement by the enforcement of which the suit for possession was filed was in the nature of a "penalty" and consequently could not be enforced. Secondly, the trial Judge was of the view that the plaintiff came in for possession in regard to that property which Champa Devt had showed as her own in the list of properties appended by her to her application before the Special Judge under Section 4, Encumbered Estates Act, and so in respect of those properties the plaintiff's suit was barred.

11. Before this case came up for final disposal before us, two other matters were decided by this Court and we should like to refer to those two matters at this stage. One such question was whether a civil Court had jurisdiction to determine a question of title to property which had been shown in a list published under the provisions of s. 11, Encumbered Estates Act, and about which the plaintiff either failed to prefer a claim before the Special Judge before filing a suit in the civil Court, or preferred the claim after the institution of a suit in the civil Court for recovery of possession of such property on the basis of title. The aforementioned question was referred by the Bench before which this appeal came up for hearing on 21-9-1949 to a Pull Bench for opinion. On 16-9-1952, the Full Bench decided the question thus:

> "The Civil Court has jurisdiction to determine ' the question of the plaintiff's title in the present case and we answer the last part of the question referred to this Bench accordingly."

As a result of the Pull Bench decision, therefore, the plaintiff's suit for recovery of possession could not be held to be barred under the provisions of Section 11, Encumbered Estates Act.

12. The other matter which has been decided at an earlier stage is whether the entire appeal abated as a result of the death of Kushumbari Dass respondent No. 5 whose heirs were not brought on the record within the time allowed by law. In regard to this matter the point that had been decided was that the death of respondent 5, Kushumbari Dass leads to the abatement in respect of the claim as against that respondent alone but does not mean the abatement of the entire appeal. This decision apparently was based on the principle that the claim as against the deceased respondent was separable from the claim in regard to the other respondents and that there 'would be no real inconsistency in the decrees that may be made by this Court as against the living respondents with the decree that determined the rights as against the deceased respondent.

13. On behalf of the appellants the main question that claimed the attention of the learned counsel in argument?, was the question whether or not the suit could be decided on the ground that the

plaintiff's right to claim possession hinged on a clause in the family arrangement which was in the nature of a "penalty". As we have noticed earlier, the trial Judge was of the opinion that relief could only be granted to the plaintiff by enforcing the clause of the family arrangement which was in the nature of a "penalty". Reliance was placed by the trial Judge on the provisions of Section 74, Contract Act. Section 74, Contract Act, is in these words:

> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

The first explanation to the section may also be quoted:

> "Explanation: A stipulation for increased interest from the date of default may be stipulation by way of penalty."

It i3 not necessary to quote the exception or the other explanation which is incorporated in the section. It will be observed that in Section 74 two types of stipulations are contemplated : First, a stipulati9n to pay a sum of money, and, the second, a stipulation of any other kind that may be in the nature of a "penalty". Where parties to a contract mutually agree that in the event of a breach, the one shall pay to the other a specified sum of money, it not infrequently been comes a question of some difficulty whether such sum is to be considered in the nature of a "penalty" -- that is, as a sum to be paid in the event of any damage, however great or small, which may be incurred by a breach of the contract; or as liquidated damages -- that is, as the sum to be paid in that event, without reference to the extent of the injury actually sustained; and the question as to whether a sum stipulated for in a contract, is a penalty or a liquidated damage, is for the Court to decide.

The fact that the sum is expressly stated in the contract to be a penalty or liquidated, damages, as the case may be, is 'prima facie' evidence that it partakes of that character but is not conclusive. A distinction has been drawn between liquidated damages and a penalty and the kernel of that distinction is to be found in the fact that the essence of a penalty is a payment of money stipulated 'in terrorem' of the offending party, while the essence of liquidated damages is a genuine covenanted pre-estimate of the damage, whether a stated sum or a sum that may be definitely ascertainable on the terms of the contract is or is not a "penalty" can be determined by a Court with comparative ease, inasmuch as there are a good many authorities of high value from which principles for such determination can be easily gleaned; but the position in regard to the "other stipulations by way of penalty" cannot so easily be determined because there are not many decided cases interpreting the scope and the nature of these words. (14) The clause which is said to be in the nature of a penalty in the family arrangement is in these words:

> "If the amount of three harvests becomes due by the 1st party and the 2nd party does not receive it on any account, she shall have the right to cancel this deed of

> compromise and obtain possession over that property which she has left in possession of the 1st party at present and which is mentioned at the foot of this deed of compromise. The name of the 1st party shall be struck off and that of the 2nd party entered in public papers. The 1st party shall have no objection to it. The 2nd party shall have the right to realize the remaining amount of the fixed instalment with interest aforesaid from the property of the 1st party who shall not be liable for the amount in future."

The trial Judge took the view that the right conferred on the plaintiff to recover the arrears of instalments along with interest at six per cent, per annum and also the right given to her to obtain possession over that share of the property which she had handed over to Shambhu Nath at the time of the family arrangement in the event of the default of three consecutive instalments of the maintenance money was in the nature of a "penalty", because this was "a sort of punishment imposed on Shambhu Nath and his successors-in-interest for nonpayment of three consecutive instalments on due dates."

In our opinion, the learned Judge was not right in the view that he took of this clause. In order to make a clause penal, the clause and the contract must, in our judgment, subsist, and that the effect of the "penal" clause should continue to be effective along with the subsistence of the contract. A clause in a contract which terminates the contract and places the parties in the same position in which they were before the contract was entered into could not be said to be a penal clause. There was in this case no "penalty" being imposed which (subsisted along with the contract, but the contract itself was to be abrogated according to the clause on the happening of a contingency. No party was being subjected to any particular hardship because of the default;' the parties were being relegated to the position in which they were when they originally entered into the contract. In order to correctly judge the import of a clause of a family arrangement, one has to look at the family arrangement as a whole, and one has also to look at the intention of the parties which is to be gathered from the circumstances in which the agreement was made.

In this case we find that there was a dispute in relation to the share of Rikhi Lal which was held by his widow Asha Devi, the plaintiff; Shambhu Nath was claiming it on the strength of the right of survivorship, while Asha Devi claimed it on the ground that her husband at the time of his death was a separated member of a Hindu family. This dispute was mutually settled by the family arrangement: Asha Devi giving up her right to possess the properties on condition that she was paid certain specified sum at the time of the execution of the document and a certain specified sum periodically by way of maintenance. Under these circumstances it was natural for Asha Devi to make certain that she did get her maintenance regularly and that in the event of her maintenance falling into arrears, the bargain could be annulled and she could get possession over the property which she had handed over in consideration of receiving regular maintenance. There was, in our judgment, nothing in this anxiety of Asha Devi to safeguard the regular payment of her maintenance which could be termed 'in terrorem'. It was a part of the bargain itself, the very basis of the bargain, and not a term which rendered the bargain any the more difficult of performance on the happening of a certain contingency or something which had the effect of terrorising the other party to the bargain to adhere to the bargain. In our judgment, it was a fair "stipulation which placed the parties on an

equal footing, for if Shambhu Nath found it more profitable to keep the properties in his possession then he had to pay the annual maintenance within the specified time, but if he found it difficult to make the payments within the specified time then he could give up the property and save himself the annual payments.

15. Reliance was placed by the learned Judge on the decision of -- 'Munshi Lal v. Ahmad Mirza', AIR 1933 Oudh 291 (A), for the view that Clause 4 of the family arrangement was in the nature of a "penalty" within the meaning of Section 74, Contract Act. -- 'Munshi Lal's case (A)', in 1933 Oudh lays down that where a contract carries with it an element of punishment, it is in the nature of a penalty. The material condition which fell for interpretation in -- 'Munshi Lal's case (A)', was in these terms:

> "That if for any reason the whole or part of the property sold goes out of the possession of the vendees and their heirs and representatives, then the vendees, their heirs and representatives, shall have 'also' power that by cancellation of the sale deed executed this day by the vendees in favour of the executant No. 4, they get possession of the said property returned and become in possession of the property entered in the said sale deed as a proprietor like the vendee....."

In the view of the learned Judges of the Oudh Chief Court, the use of the word "also" in the aforementioned paragraph indicated that the condition was by way of an additional remedy and, therefore, was in the nature of a penal clause.

This condition was interpreted as a condition of defeasance and, after referring to the provisions of Section 31, T. P. Act, it was noticed that a condition subsequent by way of defeasance on the happening of an uncertain event can be valid; they went on to say that, even if the law allows such a condition being imposed, a Court was not bound in law to, enforce such a condition in any particular case. Reliance was placed on the case of -- 'Alexander Popham v. Eampfeild', (1862) 23 ER 325 (B), and particularly on the observations of the Lord Chancellor in that case at. page 326. The learned Judges of the Oudh Chief Court were of the opinion, relying on the words of the Lord Chancellor, that in the circumstances of that case it was just and equitable to relieve the defendants of the specific enforcement of the condition. They were of the view that the additional remedy of forfeiture given to the plaintiffs in that case was in the nature of a liability imposed on the defendants as a punishment for their committing a breach of the agreement.

In the present case we are of the opinion that the right given to the plaintiff to cancel the contract as a whole was not in the nature of a punishment but was in the nature of a safeguard of the plaintiff's own interests in the property which she had chosen to pass to Shambhu Nath on his discharging certain obligations which he was required to discharge as a consideration for the transfer. We are aware that a penalty may be a vindictive penalty or a reasonable penalty, and that it may be severe or mild, fair or unfair, but in all circumstances a penalty remains a penalty; put to constitute the existence of a penalty what is necessary is that it should appear that there was an element of punishment, however well-deserved and temperate such punishment may be, about it. In this case we have taken the view that there was no element of punishment.

16. Reliance was next placed by the learned trial Judge on the decision of the Privy Council in --'Steedman v. Drinkle', AIR 1915 PC 94 (C). In that case there was an agreement for sale of certain land and on execution of the agreement a portion of the purchase money was paid and for the balance it was provided that it should be paid with interest by annual instalments on a particular date in each year and that on any default, the whole property and interest secured by the agreement should at once become due and be payable, or the contract should' be forfeited and determined at the option of the vendor, and it was also provided that time was to be considered as the essence of the agreement. The first instalment was not paid; the vendor thereupon gave notice cancelling the agreement. The vendee after receipt of the notice tendered the amount, but the vendor declined to receive it. The vendee sued for specific performance and, in the alternative, claimed a relief against the forfeiture clause in the agreement. On these facts it was held by their Lordships of the Judicial Committee that there was no justification for decreeing specific performance and that the stipulation for forfeiture was one for a penalty which the vendee should be relieved against.

Their Lordships further pointed out that under the agreement of that particular case, the Court below was right in holding that the appellant could not insist on forfeiture in accordance with the strict terms of the agreement. It is important to notice that the vendee's claim for specific performance was rejected, with the result that the parties were, by the decision of the Court, restored back practically to the position in which they were before the covenant for sale was executed. It had been hej.d by the Judicial Committee earlier, in the case of --'Kilmer v. British Columbia Orchard Lands Ltd.', (1913) AC 319 (D), that stipulation that payments already made of instalments might, on forfeiture, be retained was really a stipulation for penalty and should be relieved against. There can be no doubt, therefore, that where a party under a contract obtains an unfair advantage on the happening of a breach, then Courts lean against the party trying to secure such an unfair advantage. In the case before us the plaintiff does not, in our judgment, obtain any unfair advantage by the enforcement of the clause which gives her the right to determine the family arrangement in its entirety.

17. Reliance was next placed on a decision of the Nagpur Judicial Commissioner's Court in --'Mt. Bana Bai v. Mt. Chandrabhaga', AIR 1931 Nag 60 (E). In that case the first defendant to the suit executed a deed of maintenance in favour of the plaintiff agreeing to pay her a certain sum of money every year for her maintenance, and if default v/as made to deliver to the plaintiff possession of a certain field for cultivation and appropriation of profits in lieu of maintenance. Defendant 4 to the suit was a purchaser of the property without notice of the plaintiff's right and he, after his purchase, made certain improvements on the property: Default was made and the plaintiff sued for possession on the strength of the agreement. It was held, first, that the document did not transfer any right to the plaintiff in the property, and that the agreement was only an executory agreement which could be enforced if the plaintiff wished to exercise the option given to her. The fourth defendant was willing to pay the maintenance and hence the agreement was not specifically enforced. It was further held that the provision for the surrender on the possession of the field under the circumstances was in the nature of a penalty within the meaning of Section 74, Contract Act, and the Court, as such, was not bound to enforce it.

The learned Judges of the Nagpur Judicial Commissioner's Court pointed out that the object with which that particular stipulation was put into the agreement was to induce the executants to pay up the amount as soon as the demand for possession was made, and naturally, therefore, they were driven to the conclusion that the condition was in the nature of a penalty. It was argued before the learned trial Judge that even if the clause in question was in the nature of a penalty, even then it could not be relieved against inasmuch as it was contained in a family settlement. The learned Judge rightly overruled 1 this contention, because he had the authority of this Court in -- 'Mohiuddin v- Mt. Kashmiro Bibi', AIR 1933 All 252 (FB) (F), to the effect that a compromise, even if embodied in a decree, would not necesarily be enforced by a Court if it contained a penal clause.

18. On behalf of the appellant reliance was placed on the decision of -- 'Sheo Prasad v. Sanaullah', AIR 1929 All 558 (G), where it was held that the term "penalty" cannot be properly applied where all that is agreed between the parties is that they shall revert to the situation existing immediately prior to the new agreement, even though that may involve liability on the part of one of them for a sum greater than if he had carried out the agreement. In that case one of the parties in effect, said this:

> "If you will agree to pay me so much I will accept it; if you do not so pay, I must stand upon my legal rights."

and in regard to this it was held that such a stipulation could not be regarded as a penalty because there was no exacting of anything more than was due.

19. Reliance was next placed on the decision of -- 'Rajagopala Padayachi v. Varadaraja Padayachi', AIR 1925 Mad 84 (H). In that case on a partition among thre6 Hindu brothers, it was agreed that one of them should, instead of being given any land, be entitled to receive from each of the others an annuity and on default of payment of such annuity, should be entitled to resume that portion of his share which had gone to the defaulter. It was held that this clause could not be described as a penalty, nor could it be regarded as a forfeiture clause. It was pointed out that in order to find a penalty clause, it is necessary to first discover whether there were in effect two contracts in one, namely, one a primary contract, and the other in the nature of a subsidiary contract; and when on the failure of the primary contract, the subsidiary contract becomes enforceable, then in such cases Courts are called upon to determine whether or not the subsidiary contract is a contract in the nature of enforcing a penalty, in the case before us, there was really no subsidiary contract enforcing a penalty.

20. On behalf of Champa Devi respondent it was also urged that specific performance should not be granted in this case in view of the provisions of Section 24 (c), Specific Relief Act Section 24 enjoins:

> "Specific performance of a contract cannot be enforced in favour of a person.....
>
> "(c) who has already chosen his remedy and.

obtained satisfaction for the alleged breach of contract;"

> Reliance was based on this provision on the ground that Asha Devi had already approached the Special Judge for the purpose of getting the overdue instalments. We do not consider that the fact that Asha Devi had approached the Special Judge with respect to the arrears of her maintenance was the choice of an alternative remedy made by her, or that the choice of that remedy could have obtained for her satisfaction for the alleged breach of contract. The remedy to receive the overdue instalments was not an alternative remedy to getting back the property on failure of three consecutive Instalments.

21. On behalf of the respondents it was further argued that the present suit was barred by the provisions of Order 2. Rule 2, Civil P. C. because according to the respondent the relief for possession should have been sought before the Special Judge by the plaintiff when she approached that Court with regard to the arrears of maintenance, because the cause of action in respect of both the reliefs was the same. No such bar was raised in the written statement and indeed, there could be no such bar to this suit' inasmuch as the present suit had been filed before the plaintiff approached the Special Judge under the provisions of the Encumbered Estates Act.

22. On behalf of the transferees the main argument was that the suit was barred by the provisions of Section 41, T P. Act. The trial Judge had considered this argument and had come to the conclusion that there was no such bar. It was found that none of the transferees made any inquiries in regard to the title of his transferor. The learned Judge further found that the section should not in terms apply, because Shambhu Nath was not an ostensible owner but was in effect the true owner when he made the transfers, although his ownership was liable to be defeated on the happening of a certain contingency. The learned Judge further found that the plaintiff did no act, either of commission or omission, which could have misled the transferees in any manner. We have examined the evidence and we are satisfied that the learned Judge was right in the conclusions at which he arrived in regard to this matter. Therefore, in our judgment, the transferees could not, under the circumstances of this case, invoke the aid of Section 41, T. P. Act, for their protection.

23. On behalf of the transferees, it was lastly contended that this suit was really a suit for specific performance of a contract and that specific performance should not be decreed, inasmuch as the decree cannot now be enforced by giving possession to the plaintiff in respect of the zemindari properties, those properties having vested in the State by virtue of the Zemindari Abolition Act. We, however, are of the opinion that the present suit was not a suit really for the specific performance of a contract; but it was a suit for possession, pure and simple. In Relief A of her plaint the plaintiff's prayer was set out as follows:

> "(A) The plaintiff may be put in possession over the property specified below on the dispossession of the defendants."

The suit embraced not only zemindari properties, but also house properties. On the view that we have taken, the plaintiff was entitled to possession of the properties in suit, whether she can get actual possession or not by virtue of some statutory provision, is not, in our Judgment, a ground for not giving her a decree for possession. The question whether she can or cannot be put in actual

possession in respect of certain properties will undoubtedly be determined when that question comes before the Court in execution proceedings.

24. In the result, we allow this appeal, set aside the decree of the trial Court and decree the plaintiff's suit; the decree, however, will not be as against respondent 5, namely, Kushumbari Dass in respect of whom there has been an abatement of the appeal by virtue of a previous order of this Court. The appellant will be entitled to get the costs of this litigation from the respondents.