APPELLATE CIVIL.

Before Richardson and Shams-ul-Huda JJ.

BIJOYA KANTA LAHIRI CHOWDHURY 1919

v. Jan. 10

KAILASH CHANDRA BHOUMIK.*

ntract—Specific performance—Agreement to lease certain share in property at fixed rent and premium—No express provision made for payment of kists and interest on arrears or for security—Draft approved of by pleader to be prepared—Receipt of earnest money—Agreement whether completed or not—Intention of parties.

There may be a completed agreement though a document has to be uted embodying its terms. It depends on the question whether the ies intended that there should be no binding contract till the execution a document or whether they intended the document to be merely com' norative of the terms of a bargain already completed, even though its cution is in a manner required by law.

Hyam v. *Gubbay* (1) referred to and distinguished.

Winn v. *Bull* (2) and *Hampshire* v. *Wickens* (3) distinguished.

'here the defendant entered into an oral agreement to grant the plaint- *ltni* lease of his specified share in certain *mouzas* at a fixed annual rent *f* stipulated premium, and a draft *pottah* was to be prepared and appro- of by his pleader, and part of the premium was paid at once and accepted the defendant as earnest money, but no such draft was prepared and roved of, and there was no express provision made by the parties as to payments of *kists*, interest on arrears of rent and as to security for due ment of the rent:—

Held, that the agreement was complete and enforceable in a suit for ific performance, notwithstanding the omission of the approved draft of express provisions as to *kist*, interest, and security, it having been

* Appeal from Appellate Decree, No. 405 of 1917, against the decree P. Bagchi, District Judge of Mymensingh, dated Nov. 29, 1916, ming the decree of Biraja Charan Mitra, Subordinate Judge of Mymen- ig, dated April 26, 1911.

(1) (1915) 20 C. W. N. 66. (2) (1877) 7 Ch. D. 29.
(3) (1878) 7 Ch. D. 555.

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found by the lower Appellate Court that the draft was intended by the parties to be merely commemorative of the terms already agreed upon and not a condition of the completion of the agreement; and, further, that matters relating to the *kists* and interest were presumably intended to be regulated by the Tenancy Law of the country, and that no provision for security was necessary.

ON the 30th December 1909 Bijoya Kanta Lahiri, a fractional co-sharer, entered into an oral agreement with Harish Chandra Bhoumik, Bhagoban Chandra Bhoumik and Mohim Chandra Bhoumik to grant them a *putni* lease of his 3*as.* 15*g.* share in *mouzas* Raniganj, Telipara and Pabai, at an annual rent of Rs. 50 and a *salami* or premium of Rs. 1,300. Part of the premium was payable at once and the remainder within a certain time, and a draft *pottah* was to be prepared and approved of by Bijoya's pleader. On the same day a sum of Rs. 400 was paid by the plaintiffs and accepted by Bijoya as earnest money. The balance was tendered but he refused to execute a lease. It appeared that there was no draft prepared and approved of by the pleader.

Harish Chandra and others thereupon filed a suit for specific performance in the Court of Babu Bipin Charan Mitra, Subordinate Judge of Mymensingh. The defendant admitted an agreement to grant a *putni* lease and also the rent and the premium, but contended that there was no concluded contract which could be specifically enforced. The Court decreed the suit on the 26th November 1911. On appeal by the defendant, the Additional District Judge of Dacca reversed the decision on the ground that there was no concluded agreement because (i) the time of the commencement of the lease was not specified, and (ii) the plaintiffs had failed to prove that they had tendered the balance of the premium within the stipulated period. The plaintiffs appealed to the High Court (Appeal from Appel-

ree No. 1183 of 1912). The Court (Mookerjee and e JJ.) reversed the order of the District Judge, on 13th May 1915, and remanded the case.

On the 29th November 1916, Mr. D. P. Bagchi, strict Judge of Mymensingh, held that all the essen- l ingredients of a valid and enforceable contract re established, and overruled the objections based on srepresentation and mistake as to the actual share the defendant in the *mouzas*, uncertainty as to who uld be *putnidars*: the non-settlement of payments *kists*, cesses, interest on arrears, of security for due ment of rent: and the absence of a draft approved by the pleader. He upheld the decision of the Sub- inate Judge, with some modifications, and directed cific performance. The defendant appealed to the gh Court.

Sir Rashbehary Ghose and *Babu Mahendra Nath y*, for the appellant.

Babu Jogesh Chandra Roy and *Babu Birendra mar De*, for the respondent.

Cur. adv. vult.

RICHARDSON J. This is a second appeal arising of a suit for specific performance of an agreement the grant of a lease. The suit has had a long ory. Specific performance was granted by the ee of the trial Court, dated 26th April 1911. On appeal that decree was reversed by a decree, dated March 1912, the Court holding that the agreement incomplete, inasmuch as it did not fix the date which the lease should commence, and further g that the plaintiffs had failed to prove that they ndered the balance of the premium within the stipulated. The plaintiffs preferred a second to the High Court (*No. 1183 of 1912*) which before Mookerjee and Roe JJ. By a judgment,

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dated 13th May 1915, those learned Judges held it was plain, in view of the provisions of section of the Transfer of Property Act, that the intentio the parties must have been, in the absence of inc tion to the contrary, that the lease should take e from the date of the execution of the instrument. the question of tender, the learned Judges held t no time having been fixed for payment of the bal of the premium, the plaintiffs were at liberty to m and on the facts found had made, their tender wi a reasonable time. The result was that the decr the lower Appellate Court was set aside, and the was remanded to that Court in order that the ap thereto might be re-heard on the other points wh had not been dealt with. The appeal has accordin been re-heard by the Second Additional District Ju of Mymensingh who has made a decree, dated November 1916, confirming, with some modificati the decree of the trial Court for specific performa From that decision the present appeal has been ta by the defendant No. 1.

The appellant is the owner of a fractional shar the property to which the suit relates. The case the plaintiffs is that he contracted orally to give th a *putni* lease of the share. A close approach to agreement to that effect is admitted, but it has b contended in defence that, for various reasons ot than those already dealt with by the High Cour the judgment of May 1915, the agreement was inc plete and incapable of specific performance.

Some of the questions in controversy in the Co below have been finally disposed of in the judgm appealed from, and I shall confine myself to the mat discussed in the arguments before us.

As the suit is based on an oral agreement, no qu tion arises as to the construction of any docum

ıe terms of the agreement and the intention of the rties are questions of fact depending on oral evidence, d unless the Judge in the Court below has mis-plied any principle of law to the facts which he s found, we cannot in second appeal quarrel with s conclusions. Moreover, the Judge is not bound by e language in which he states the terms of the reement, as gathered by him from witnesses speak-g to their recollection of conversations, in the same ıy in which the parties would be bound by the nguage of a written document to which they had bscribed their names. The statement of the terms the Judge can only be regarded as approximating ore or less closely to the words which the parties tually used at the time, and the Judge may look at e evidence as a whole for the purpose of elucidating e intention of the parties on any particular point.

Now, the Court below has found that negotiations ving been going on for some time, on the 15th ns, 1315, an agreement was arrived at between the rties comprising in substance four terms or condi-ns as follows :—

(*i*) that defendant No. 1 would grant to the plaintiffs a *putni* lease of his 3 annas and 15 gandas share in *mouzas* Ranigaon, Telipara and Pabai ;

(*ii*) that the rent payable by the lessees should be Rs. 50 annually ;

(*iii*) that a sum of Rs. 1,300 should be paid as *nazar* or premium : and

(*iv*) that a draft lease was to be prepared accordingly, and approved by the defendant's pleader Babu Shyama Charan Roy.

has further been found that, on the same day, 5th Pous, Rs. 400 was paid by the plaintiffs to the dant by way of earnest money.

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The argument advanced in the Court below that th agreement was incomplete because it made no expre provision in regard to certain particulars said to l essential in a *putni* lease, has been pressed before only in reference to three particulars. It is conten ed that the agreement is deficient in not providi (i) for the *kists* or instalments in which rent shou be paid, (ii) for the rate at which interest should r on arrears of rent, and (iii) whether security shou or should not be given by the lessees for the due pa ment of the rent.

As to *kists* and interest on arrears, I agree wi the Court below that, in the absence of express agre ment, the parties presumably intended that su matters should be regulated by the tenancy law of t country. As to security, there seems no reason w any provision should be made. This contenti fails.

The learned vakil for the defendant, howev directed himself mainly to the fourth of the conc tions above set out. It has been urged upon that inasmuch as the preparation of a formal instr ment of lease was contemplated, there was no co cluded agreement. The effect of a reference to formal document in connection with an agre ment which is being negotiated, was consid ed in the case of *Hyam* v. *Gubbay* (1) by t late Chief Justice and two learned Judges of th Court. The result of the English authorities the cited appears to be that it is a question of the inte tion of the parties whether there is to be no bindi contract till the document is executed or whether t document is merely to commemorate—it may be a manner required by law—the terms of a barg already complete.

(1) (1915) 20 C. W. N. 66.

The conclusion of the Court below in the present
e is that the lease to be drawn up " was only to put
) more formal shape the terms agreed upon between
parties with the insertion of usual legal phraseo-
y and terms necessary in a *putni potta*." It is said
t the mere fact that a formal document was
templated was *prima facie* an indication that
parties did not intend to be bound till it was
cuted. That may be so, but there was other
dence before the Court. There was, for instance,
payment of earnest money. Such payment may
be conclusive to show a binding contract, but it
a fact which the Court was entitled to take into
sideration. It cannot be said that there is no
dence to support the conclusion at which the Court
ived. That being so, the conclusion must be
epted.

Stress is laid on the draft lease having to be
)roved by the defendant's pleader, but what
ference does that make in the circumstances of the
sent case? The parties arranged to put their
eement in writing and the writing was to be
)roved by the defendant's pleader. The two things
together, and the whole question is whether there
a concluded agreement. It is settled, as I have
, that there may be a concluded agreement though
cument is to be executed embodying its terms.
uch a case, the contents of the document have,
)urse, to be approved by both parties before the
ument is executed, but merely from the point of
v whether the document correctly and formally
)s effect to the settled terms of the agreement. If
loes, it represents the ageeement which either
y can be compelled to perform. A reference to
leader in this connection does not necessarily
the position. The function of the pleader may

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be merely to say whether the draft correctly carri out the agreement. The defendant, therefore, is n entitled to assert, as he has attempted to do, th merely because mention was made of a draft lea and his pleader's approval thereof, therefore the never was a binding agreement. It was open to tl Court to find, and the Court has found, a bindi agreement. and all objections on the score of unce tainty and so forth have been rejected. That beir so, the defendant cannot resile from the agreeme nor can he or his pleader refuse assent to a proper drawn instrument. If it be said that he or h pleader might refuse assent to a draft not in acco dance with the agreement, I quite agree. But tl defendant has never met the plaintiffs fairly on th ground. He has contended from the first that the was no agreement. No doubt the draft filed the plaintiffs with the plaint has been found to open to exception as going beyond the agreemen But the plaintiffs, it appears, have throughout bee willing to accept any reasonable modification of the draft. As modified by the directions contained in tl decree of the Court below, the draft will apparentl meet the requirements of the case.

There is no ground for our interference in Secon Appeal and I would dismiss the appeal with costs.

SHAMS-UL-HUDA J. This appeal arises out of a su for specific performance of a contract. The facts, s far as they have any bearing on the questions raise before us, are shortly these. Plaintiffs alleged tha the defendant No. 1 agreed with the plaintiffs 2, 4 an 5 to grant to them and to other plaintiffs a *mourus mukarari* lease of the defendant's share in certa *mouzas* at a fixed annual *jama* of Rs. 50, and for premium of Rs. 1,300, out of which the plaintiffs p

400 at the time of the agreement and promised to
e rest within a month, that the plaintiffs were
lling to pay this amount within the time
the defendant refused to accept the
perform his part of the contract.
ter alia, was that, although there
s for a lease, they had not ripened
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nat no portion of the premium was
ontract, t
he plaintiffs had made a deposit of
lthough t
lefendant's cashier in anticipation of
with the c
all the terms and conditions of the
act; that
en settled, and plaintiffs were not,
ad not be
to a decree for specific performance.
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low have found that there was a
Courts b
ment between the parties, that there
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uncertain
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or as regar
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the plaintiffs' suit.
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here was an understanding between
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the draft of the *potta* would have to
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the defendant's pleader. Plaintiffs'
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prepared such a draft at defendant's
that they
itted it to the defendant's pleader
t and subm
that the draft was so approved after
proval, and
s. This is denied by the defendant
alteration
ar finding on this point.
ere is no el
kil for the appellant has argued, in the
learned va
the agreement is incapable of being
stance, that
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cally enfor
ot been settled. This argument is
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ettled, that as regards those not ex-
been s
as understood that these would be

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in accordance with the provisions of the law in th behalf in the absence of an express agreement to contrary. Accordingly the lower Appella do, tha directed the defendant No. 1 "to execu draft lea in favour of plaintiffs Nos. 2, 4 and her ore the annas and 15 gundas share in mouza reed upon para and Pabai, in terms agreed upo n therefore fa on 15th Pous, 1315, other terms not ag es contempla provided by law". The first contentio be approved

It is next argued that, as the parti e granted of the execution of a formal lease to this contenti them, specific performance cannot b Bull (1), Ham original agreement. In support of y (3) and on reliance has been placed on *Winn* v. ntioned case, *shire* v. *Wickens* (2), *Hyam* v. *Gubba* e clearly disti decisions referred to in the last me seems to me that the cases cited ar ritten agreeme guishable from the present case.

In *Winn* v. *Bull* (1), there was a w n rent "subje whereby the defendant had agreed to rmal contract house for a certain term at a certai r, entered int to the preparation and approval of a f al agreement No such formal contract was, howeve enforced. and it was held that there was no fi hese terms :— which specific performance could l of an estate George Jessel laid down the law in t y 'we will h in the case of a proposed sale or lease the terms bei persons agree to all the terms and sa e is a contra the terms put into form', then all up to a certa put into writing and agreed to, the of the contr If two persons agree in writing tha submitted to point the terms shall be the terms oved of by hi but that the minor terms shall b 7 Ch. certai solicitor, and shall be such as are ap , and for intiffs pe

(1) (1877) 7 Ch. D. 29. (2) (1878)

(3) (1915) 20 C. W. N. 6