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estate for such sum. The appellants will pay the costs of the appeals.

They will humbly advise His Majesty to this effect.

A. M. T.,

Solicitor for the appellant: *Edward Dalgado*.

Solicitors for the respondents: *Vallance and Vallance*.

PRIVY COUNCIL.

P.C.*
 1921
 May 9.

CHANDRA KANTA DAS (PLAINTIFF)

v.

PARASULLAH MULLICK (DEFENDANT).

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Contract—Restraint of Trade—Goodwill, sale of—Contract Act (IX of 1872) s. 27.

By a written agreement the respondent purported to buy from the appellant the goodwill of his business of plying ferry-boats between certain places on a river, together with the interest which he had acquired by agreement for the use of landing-places and settlements for the collection of tolls at landing-places; and the appellant agreed that for three years he would not ply boats between the places in question. The appellant sued to recover the consideration agreed:—

Held, that the agreement was for the sale of the goodwill of a business within exception 1 to section 27 of the Indian Contract Act, 1872, and therefore was not void under that section as being in restraint of trade.

Judgment of the High Court reversed.

APPEAL (No. 21 of 1920) by special leave from a judgment and decree of the High Court (January 31, 1917) varying a decree of the Subordinate Judge of Khulna.

* *Present* : VISCOUNT HALDANE, LORD ATKINSON and SIR JOHN EDGE.

The appellant sued the respondent upon a kistibandi bond dated May 27, 1910, and executed by the respondent in the circumstances stated in the judgment of the Judicial Committee.

The Subordinate Judge gave the appellant a decree for the sum claimed less a small deduction for a partial failure of consideration. On appeal, the High Court (Chatterjee and Walmsley JJ.) held that the contract between the parties was void under the Indian Contract, Act, 1872, section 27, as being in restraint of trade, since in their view no goodwill attached to the business so as to bring the agreement within the first exception to that section.

The learned Judges refused a certificate that the case was one fit for appeal to the Privy Council, but the Judicial Committee granted special leave to appeal.

The material terms of the kistibandi bond were as follows: "I buy from you the goodwill of your trade in plying *gahana* boats and every description of interest and ownership which you have acquired in several river-ghats for plying the said *gahana* boats . . . and all the settlements you have obtained for collection of tolls from the panshighata at Khulna and the panshighata at Bagerhat and also for collection of tolls of the firewood mahal and of the thatching *golepata*, etc., at the said ghat at Bagerhat for a consideration of Rs. 5,400 under deed of private sale. I being unable to pay now the said consideration money in cash, you have kindly agreed to receive that money under kistibandi" (*i e.*, instalment) "bond, so I execute this kistibandi bond."

The respondent on the same date executed a *kobala* which provided (*inter alia*): "I sell to you by this *kobala* the right which I have acquired under verbal settlement in the ghats at Khulna and Morrelganj, and the rights acquired by me under settlements by document

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in the following properties and the goodwill I have in the business in plying *gahana* boats from Bagerhat to Khulna, and cease to have any right thereto. You will be able by right of this purchase to enjoy and possess those rights by exercising whatever right I had thereto. I shall not be able to put any obstacle in your enjoying the same. I hereby further promise that I close from this day the business I had in plying *gahana* boats from Bagerhat to Khulna, and I shall not be able to open the said *karbar* in plying *gahana* boats again in the said line and in the line from Bagerhat to Morrelganj and from Bagerhat to Pirojpur, at any time within three years from this day. If I carry on the said *karbar* within the three years I shall return you the whole amount of consideration. But if you do not pay according to the kistibandi bond . . . I shall be at liberty to ply *gahana* boats. In that case you shall not be exempt from paying the kistibandi money.

Sylvain Mayer, K.C., and *H. N. Sen*, for the appellant. The agreement was one for the sale of the goodwill of a business within the first exception to the Indian Contract Act, 1872, section 27, and was therefore not void under that section. There was a "goodwill" according to the authorities: *Trego v. Hunt* (1), *Inland Revenue Commissioners v. Muller* (2). The view that the parties were not *ad idem* cannot be entertained, since the agreement was in writing under their hands.

The respondent did not appear.

May 9.

The judgment of their Lordships was delivered by
 VISCOUNT HALDANE. The question in this appeal arises in a suit by which it was sought to have decided

(1) [1896] A. C. 7.

(2) [1901] A. C. 217.

that the plaintiff, who is the appellant, was entitled to recover a sum of Rs. 5,400, with interest amounting to Rs. 67-8, as due to him under certain agreements. The defence was a charge of fraud in obtaining the agreements, and as a separate defence, that the main agreement was invalid as being in restraint of trade. The learned Additional Subordinate Judge of Khulna in Bengal, who tried the case, decided it in favour of the appellant for the modified amount of Rs. 5,280, the difference being given on the footing that the respondent (being the defendant) was entitled to a small amount for compensation, on the ground of partial failure of consideration. As to this difference, no substantial controversy has been raised, and their Lordships do not think that any question is before them for decision in relation to it.

When the case went on appeal to the High Court at Fort William, the decree of the Subordinate Judge was reversed. Chatterjee J. held that the parties were never *ad idem*, the respondent having been misled by the appellant, and further that there was no real goodwill to assign, such as was the basis of the agreement on the part of the appellant. But he thought that as the respondent had entered into position on the footing of the agreement, although inoperative, he ought to make compensation to the appellant to the extent of Rs. 1,000. Walmsley J., the other member of the Appellate Court, was of opinion that there was nothing fraudulent to render the agreement inoperative on that ground. But he held that it was void as contravening section 27 of the Indian Contract Act, which makes every agreement by which any one is restrained from exercising a lawful profession, trade or business, void. The trial Judge had been of opinion that the case came within the exception to the section which provides that it is not to apply

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where there is a sale of the goodwill, but Walmsley J. held otherwise, on the ground that there was no real good will.

The appeal comes before their Lordships *ex parte*, and they have scanned the case presented for the appellant with some closeness. But, particularly having regard to the fact that the learned Judge who tried the suit found that there was nothing to establish fraud on the part of the appellant in obtaining the agreement, and that this opinion met with the concurrence of Walmsley J., and also because of the character of the evidence itself, they are of opinion that the agreement was, apart from the point of law arising under the Indian Contract Act, a valid agreement.

All that it is necessary to observe is that there was a dispute between the appellant and the respondent. Each of them had passenger ferry-boats on a river. The respondent had entered on this business first. But he had not been prosperous, and the appellant gained an advantage over him by securing better landing-places and negotiating facilities for collecting dues. In 1910 the parties, who had had controversies entered into agreements for putting an end to them. Under one of these, called the kistibandi bond, executed by the respondent in favour of the appellant, the former purported to buy from the latter the goodwill of his trade in plying the ferry-boats, and every description of interest and ownership which the appellant had acquired in several river landing-places for plying the boats, as well as the settlements obtained for the collection of tolls. The price was to be Rs. 5,400, payable by instalments, with interest, and if default was made in payment of any instalment the entirety was to become due at once. No question of title was to be raised by the respondent.

Default in payment was made, and the appellant has instituted the present suit. Much evidence was taken on the question of fraud, but for the reason already given their Lordships do not think it necessary to enter on this question. It has been, in their opinion, satisfactorily disposed of in the Courts below. The question that remains is that raised as to the operation of section 27 of the Indian Contract Act. This section has, under the express exception which it contains, no application if there was here a genuine sale of the goodwill of the business. It ought to be observed that, in addition to the transfer of goodwill and other assets already referred to, there was an agreement or *kobala* executed about the same date by the appellant in favour of the respondent. Under this document the appellant contracted that, in consideration of the Rs. 5,400, he sold his rights in the landing-places and settlements and in the goodwill of the business of plying the ferry-boats, and that he ceased to have any rights thereto. The respondent was to be able to enjoy and possess these rights by exercising whatever right the appellant had in them, and the latter was not to be able to make any obstacle in the respondent's enjoyment of the same. The appellant further undertook to close the business of plying the particular ferry-boats, and that if he ever carried on the business again he would return the whole amount of the consideration.

Their Lordships are of opinion that this transaction amounted to a sale of a real goodwill, and they are unable to agree with the view expressed in the judgment of the High Court. They entertain no doubt that what took place was a sale of the goodwill, within the meaning put on the expression in such cases as *Churton v. Douglas* (1), *Trego v. Hunt* (2), and *Inland*

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Revenue Commissioners v. Muller (1); and as used in the same sense in section 27 of the Indian Contract Act. Accordingly they are of opinion that the decree of the Subordinate Judge must be restored, and that the appellant is entitled to his costs of this appeal and in the High Court. They will humbly advise His Majesty accordingly.

A. M. T.

Solicitors for the appellant : *G. & W. Webb.*

(1) [1901] A. C. 217.

APPELLATE CIVIL.

Before Mookerjee and Buckland JJ.

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Jan. 13.

KULADA PROSAD CHOWDHURY

- v. -

RAMANANDA PATTANAİK.*

Appeal—Preliminary decree—Final decree—Appeal against the preliminary decree after the passing of the final decree—Maintainability—Contract Act (IX of 1872), s. 74—Penalty—Stipulation to take interest at reduced rate if payment punctually made, whether penalty.

Where after the passing of the final decree a party appealed from the preliminary decree but did not also appeal from the final decree :

Held, that the appeal from the preliminary decree was incompetent.

Khiradamoyee Dasi v. Adhar Chandra Ghose (1) distinguished.

The covenant to accept interest at a reduced rate, if it is paid punctually, does not make the original rate of interest a penalty within the meaning of section 74 of the Indian Contract Act.

APPEAL by Kulada Prosad Chowdhury and another, the defendants.

* Appeal from Original Decree, No. 85 of 1920, against the decree of Nagendra Nath Chatterjee, Subordinate Judge of Bankura, dated March 16, 1920.

(1) (1912) 18 C. L. J. 321.