PRIVY COUNCIL.

*P.C.**
1921

Jan. 28.

MA SHWE MYA (DEFENDANT) APPELLANT;

v.

MAUNG MO HNAUNG (PLAINTIFF) RESPONDENT.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF UPPER BURMA.]

Procedure—Amendment of plaint—New case—Civil Procedure Code (Act V. of 1908), s. 153, Order VI, r. 17—Limitation—Breach of contract—Contract to sell three out of twelve sites to be granted—Time for performance—Limitation Act (IX of 1908), Sch. I., Art. 115.

The appellant contracted in 1903 to sell to the respondent three out of twelve sites for oil wells which she expected to be allotted to her by Government for that year. In 1904, four sites were allotted for 1903, but the appellant did not obtain the whole twelve till 1912. The respondent in 1904 or 1905 after the four sites were allotted asked the appellant to transfer three to him but she refused; no sites were transferred to him. In 1913 the appellant sued the respondent for specific performance of a verbal agreement which he alleged that the appellant had made in 1912 in reference to the 1903 contract to transfer to him three sites allotted in 1912, but not being among those allotted for 1903. Both Courts found against the alleged verbal agreement, but the Appellate Court allowed the respondent to amend his plaint by claiming damages for the failure to deliver sites under the agreement of 1903 :—

Held, that it was not open to the Court under the Code of Civil Procedure, s. 153, and Order VI, r. 17, to allow the amendment, as it altered the real matter in controversy between the parties.

Held, further, that the claim as amended was barred by limitation, since the appellant became liable to perform the contract of 1903 as soon as three sites had been allotted to her for 1903 and there was a refusal by her to transfer in 1904 or 1905.

Judgment of the Court of the Judicial Commissioner reversed.

APPEAL and cross-appeal from a judgment and decree of the Court of the Judicial Commissioner

* *Present*: LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW, SIR JOHN EDGE and MR. AMEER ALI.

(August 28, 1918), reversing a decree of the District Judge, Magwe.

The suit was instituted by the respondent in 1913, claiming specific performance of a verbal agreement alleged to have been made by the appellant in 1912 to transfer to the respondent three specified sites for oil wells in Upper Burma. The agreement was alleged in relation to an agreement in writing made in 1903 by which the appellant agreed to sell to the respondent three out of twelve sites allotted to her for that year.

The facts and the case and the effect of the decisions of the Courts in Burma appear from the judgment of the Judicial Committee. The respondent cross-appealed (by special leave) from the Appellate Court's refusal to grant specific performance of the agreement of 1903.

De Gruyther, K.C., Parikh and *J. K. Roy*, for the appellant.

Sir Erle Richards, K.C., and *E. B. Raikes*, for the respondent

The judgment of their Lordships was delivered by

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LORD BUCKMASTER. The appellant in this case was the defendant in a suit that was instituted by the respondent on February 22, 1913, seeking specific performance of an agreement to sell certain oil wells in Burma, as she is what is known as a twinzayo, *i.e.*, one of the twenty-four people to whom the Government is in the habit of annually making grants of oil wells in British Burma. On December 18, 1903, as the settlement of a dispute that was then outstanding between herself and the respondent, the appellant entered into an agreement, through her husband as her attorney, with the respondent for the sale to him

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of two sets of oil wells. The first were six out of the twelve sites that she would obtain for 1902, and the second were three out of the twelve sites that she would obtain for 1903. It appears that so far as the twelve sites for 1902 were concerned the contract was duly satisfied, but with regard to the 1903 sites difficulties arose. On September 21, 1904, four of those sites were allotted by the Government, and on January 12, 1905, a further six were allotted, making ten in all. Eight of these were resumed by the Government on July 1, 1907, on the ground that there had been no working, and one was resumed on March 20, 1908. All the nine sites so resumed were regranted before February 3, 1912, and, at a later date, probably about March of 1912, a further twenty-three sites were granted to the appellant, who thus became possessed of all the sites which she would have received had they been annually allotted to her according to the usual practice in groups of twelve at a time. None of these sites were conveyed to the respondent, and accordingly he instituted in 1913 against the appellant the proceedings which have given rise to this appeal.

The pleadings which were then filed are very instructive upon the nature of his claim. He sets out the contract of December 18, 1903; he refers to the fact that the sites allotted in 1902 had been duly transferred and alleges that ten out of the twelve sites had been received in 1903, and he concludes in this way: "Out of these"—that is out of the ten for 1903—"the plaintiff asked the defendant to deliver three sites which still remained due to the plaintiff, but she refused to do so." He then refers to the allotments in 1912 and states that in 1912 he again "asked her to deliver three sites and she promised to give three sites out of those which she obtained in 1912. But

afterwards she did not give them." He then states that the suit is not barred by limitation and prays "for a decree with costs, for recovery of three sites out of twenty-three granted in 1912," and he sets out the numbers of the sites. It is important to observe that no one of those numbers relates to any of the sites that were originally allotted in respect of 1903, and that the whole action is deliberately founded on the alleged agreement of 1912.

On the matter coming for trial before the District Judge, he found that the verbal agreement, upon which this pleading was based, was not established by the evidence, and the Judicial Commissioner, to whom an appeal was taken from that judgment, affirmed that view, but the Judicial Commissioner, instead of affirming the decree by which the suit had been dismissed, made an order directing that there should be liberty to amend and a reference established upon that amendment enabling compensation to be assessed for the alleged breach of the contract to convey entered into in the year 1903.

The first question that arises is whether or no that leave to amend was properly given in accordance with the rules by which that leave must necessarily be regulated. All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suits.

The provisions as to amendment are those that are to be found in the Code of Civil Procedure of 1908.

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Section 153 of that Code enacts that "The Court may at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding," and by Order VI, r. 17, "The Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties." The real question in controversy between the parties in these proceedings was the existence and the character of an agreement alleged to have been made in 1912 for the delivery of certain sites of oil wells specified and identified by the numbers stated in the plaint, which could only have been delivered in respect of that subsequent bargain. When once that contract has been negatived, to permit the plaintiff to set up and establish another and an independent contract altogether would, in their Lordships' opinion, be to go outside the provisions established by the Code of Civil Procedure, to which reference has been made. It would be a regrettable thing if, when in fact the whole of a controversy between two parties was properly open, rigid rules prevent its determination, but in this case their Lordships think that the rules do have that operation and that it was not open to the Court to permit a new case to be made.

They desire, however, to add that, having given the fullest consideration to the new case which could be set up, they are of opinion that it must fail, and they think that it is only right to the parties to state the reasons that lead them to that conclusion.

If the contract is now put forward as the contract that was made on December 18, 1903, that is a contract which, so far as it is unperformed, relates to the delivery of three sites out of twelve sites for 1903. It has been urged on behalf of the respondent that that contract could not proceed to operate until twelve sites had in fact been allocated. That is not the view that their Lordships take of the contract. Their view is that when the power of selection rested with the defendant, and so soon as she was able to allocate three sites she was in a position to satisfy the bargain and that she could have then been compelled to obey it. There is nothing to show that the allocation of the total of the twelve sites is a condition precedent to the grant of the three. If that be right it follows that she could have satisfied the contract in 1904, and it was shortly afterwards, in 1905, that the plaintiff himself alleged that the refusal had taken place. The defendant was herself called by the plaintiff as a witness, though for reasons, of which there is no explanation, the plaintiff does not appear to have entered the witness-box, and, on being called, she says that the "plaintiff came and asked me for the three remaining well sites in 1904 or 1905, but I refused to give them to him." It is quite true that there is other evidence to suggest that what took place on that occasion was more in the nature of an evasion than of a direct refusal; but, if the plaintiff is going to assert that in fact the reason for the omission to satisfy the contract was not due to a refusal on the defendant's part, he certainly was bound to have gone into the box to have answered a statement so specific and so direct by the other party to the contract called as his own witness.

Their Lordships think that there was at that date a refusal and that consequently, in any circumstances,

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the Limitation Act would have prevented this suit from being instituted on February 22, 1913. That this was the view that was held by the plaintiff himself when the proceedings were first instituted is, in their Lordships' minds, apparent from the form of the plaint by which the proceedings were begun.

So far, therefore, as the appeal is concerned their Lordships think that it should be allowed.

So far as the cross-appeal is concerned, it is an action for specific performance of this contract of December 18, 1903. It certainly is rather startling to be told that nine years after a contract has been made which could have been satisfied within twelve months of its execution, a party to the contract is at liberty to take proceedings for specific performance. The rights of equity which prevail in British Burma are rights which are given to people who are vigilant and not to those who sleep, and, unless there can be clearly established some reason which threw upon the defendant the entire blame for the delay that had occurred, or unless, indeed, it can be shown that the real right of action had only accrued a short time before the proceedings were instituted, such a lapse of time would be fatal to any action for specific performance of a contract. As their Lordships have already expressed their view that the Limitation Act defeats the suit, it is therefore unnecessary to add anything further on the cross-appeal.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed and that the cross-appeal should be dismissed, with costs to the defendant here and in the Courts below.

A. M. T.

Solicitor for the appellant: *E. Dalgado.*

Solicitors for the respondent: *T. L. Wilson & Co.*