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Code of Civil Procedure, and that the High Court do thereupon finally determine the case.

That each party do bear his own costs of this appeal, and that all the costs of the parties in the Lower Courts do abide the event of the final decision of the suit.

Appellants' Agents: Messrs. *Burton, Yeates* and *Hart.*

Respondents' Agents: Messrs. *Gregory, Rowcliffes* and *Co.*

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Forbes.

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GOODRICH (PRESIDENT OF THE MUNICIPALITY OF VIZIANAGRAM) APPELLANT, *v.* VENKANNA, RESPONDENT.*

Madras Act III of 1871—*Tolls, farming of—Execution—Agreement.*

An Agreement was entered into between the Commissioners of the town of V. and the defendant, farming the tolls of the town of V. to the defendant for one year. The agreement was duly signed by the defendant but was not executed under seal by the Commissioners as required by Madras Act III of 1871. In a suit by the President on behalf of the Commissioners, brought after the expiry of the year, for a portion of the sum due to them by the defendant

Held, that inasmuch as the plaintiff had fully performed all things to be performed on his part, and both parties had acted under the agreement though it was not formally executed by the Commissioners, and as the defendant had had the full benefit of the contract, it would be contrary to equity and good conscience to allow him to set up as ground of defence that there was no contract in point of law.

Arunachella Sástry for the appellant.

C. Ramachendra Rau Saib for the respondent.

The facts of this case are sufficiently stated by the Court (KERNAN, J., and FORBES, J.) who delivered the following

JUDGMENT.—The plaintiff, the President of the Commissioners of the Town of Vizianagram under the Towns' Improvement Act III of 1871, appeals against a decree of the District Judge of Vizagapatam, made in Original Suit 252 of 1873 on the 17th of December 1877, whereby he dismissed the suit with costs.

The suit was brought to recover from the defendant Rupees 1,497-8-0, balance due on a written agreement A, dated the 27th

* Second Appeal No. 422 of 1878, against the decree of E. C. G. Thomas, District Judge of Vizagapatam, dated 17th December 1877, reversing the revised decree of the Court of the District Munsif of Vizianagram, dated 10th March 1876.

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of March 1872, which was duly signed by the defendant. The agreement purports to be made by the defendant with several persons named therein, Municipal Commissioners of Vizianagram, and after reciting that defendant bid Rupees 8,110 for lease of the tolls leviable on carriages, &c., entering into Vizianagram from March 1872 to March 1873, and that his offer was accepted, the defendant thereby binds himself to pay that sum by monthly equal instalments, the last instalment to be paid on the 15th of March 1873.

The agreement then recited a mortgage of lands by the defendant to the Commissioners to secure the Rupees 8,110, and provided that whenever delay should arise in paying instalments, the lease (of the tolls) might be again put up to auction and also the land sold to pay the loss and arrears, and that if the proceeds were insufficient defendant should make up the amount by his other property.

It provided that defendant should pay the instalments in silver coins.

In his written statement the defendant claimed a remission of about the amount sued for, principally on the ground that carts were prevented, by order of a Magistrate, from entering the town on account of cholera. By a further written statement the defendant set up other defences, not necessary to refer to.

The Munsif made a decree on the 10th March 1876 for the plaintiff for the full sum claimed.

Against that decree the defendant appealed to the District Court on the ground amongst others that the plaint document dated 27th March 1872, A, was not duly executed under Section 11 of Act III of 1871, and also on the ground that plaintiff's cause of action, if any, could not arise until plaintiff sold the mortgaged security lands and until a deficiency was found after applying the proceeds to pay the arrears.

The District Judge held that the suit was not maintainable, first, on the ground that the contract was not sealed or attested by the Commissioners and President or Vice-President, as required by the Act; and secondly, "supposing that difficulty waived (by the admission of the defendant), the terms of the document had not been acted on by the plaintiff."

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As to the second ground the District Judge considered that it was not optional to the plaintiff to sue the defendant before selling the land, and that plaintiff was bound to sell the land in the first instance.

We do not agree with the District Judge on this second point. The document A contained a positive contract by the defendant to pay the instalments, and to pay in silver coins. Then after reciting that the mortgage was given, it was provided that plaintiff might sell the land, and that any loss should be paid out of the other property of the defendant. These provisions did not contain any restraint on the plaintiff from suing the defendant on his contract or oblige plaintiff to resort to the property before suing the defendant. They merely provided security for the performance by defendant of his contract and a guarantee to plaintiff against loss.

As to the first ground, viz., that the document A was not sealed and attested as required by Section 11 (1). No doubt the document A is not sealed or attested as required by the Act. Whether Section 11 is mandatory or merely directory is not, in the view we take of the case, necessary to consider. Nor is it necessary to consider whether, if this action was brought in a Court of Common Law, the absence of the seal and attestation should afford a defence, inasmuch as the plaintiff, in our view of the facts, has fully performed all things to be performed on his part, and both parties have acted under the agreement, though it was not formally executed by the Commissioners as required by the Act. *See* the cases referred to by Byles, J., in *South of Ireland Colliery Company* v. *Waddle* (2).

Such performance on the part of the Commissioner is clearly proved.

The defendant, after signing the agreement, was put into immediate possession and receipt of the tolls leased. He received the tolls during the year he contracted for, and has had the full benefit of the contract.

The objection that the agreement was not formally executed on the part of the Commissioners never was made by him, though it was patent, until after he had got the full benefit of the agree-

(1) Act III of 1871. (2) L.R., 3 C.P., 473.

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ment, and the year had terminated, and the action was brought. Under these circumstances it would be contrary to "equity and good conscience" to allow the defendant to set up as ground of defence that there was no contract in point of law in an action for the unpaid balance of the amount agreed to be paid.

In the case of *Cook* v. *Corporation of Sulford* (1) it appeared that there was a resolution of the corporation, 5th January 1860, not under seal, to grant certain lands to the plaintiff for 300 years on certain terms, and that plaintiff got possession and paid rent under it, and the corporation performed certain portions of the agreement. The plaintiff to the knowledge of the corporation laid out money in building a wall and other improvements. In 1864 the corporation served notice to quit, and the plaintiff filed his bill for specific performance. To this bill the corporation set up the defence, amongst others, that the resolution was not under seal. The defence was disallowed, and the Vice-Chancellor in giving judgment said it was quite untenable. The case was heard in appeal (2), and the Lord Chancellor, referring to the objections of the corporation, says, "one of which was that the agreement was not under seal. But the corporation has agents to see what is going on, and if the corporation allow a wall to be built and money expended on the faith of a resolution regularly entered in their books, they must be answerable."

The objection in that case was by the corporation, who were the parties to be relieved by reason of the absence of seal. Here the objection is made not by the corporation, who have already fulfilled the contract, but by the defendant, who signed and is clearly bound, if the corporation are bound. It is quite clear that the corporation are bound, having given possession of the tolls and received payments under the contract.

We shall, therefore, reverse the decree of the Lower Appellate Court and remand the case to be tried on appeal from the decree of the Munsif.

The defendant is to pay the costs of this hearing in this Court.

The costs of the appeal in the Lower Court to be provided for in the trial hereby directed.

Suit remanded.

(1) L.R., 10 Eq., 678. (2) L.R., 6 Ch. Ap., 551.