APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

APPASÁMI AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

and

MÁNIKAM (REPRESENTATIVE OF RAMANÁDHAN, PLAINTIFF), RESPONDENT.*

1885. July 13. Sept. 28.

Civil Procedure Code, s. 375—Agreement to compromise appeal—Petition to Court by both parties—Consent withdrawn before decree by one party—Remedy—Transfer of Property Act, s. 59—Charge on immovable property—Oral agreement as to terms of compromise of suit—Terms of compromise in dispute—Proof by affidavit and further evidence.

The parties to an appeal, in which an issue had been remitted for trial to the Lower Court, having presented a petition to the Lower Court stating that the suit had been compromised and the terms of the compromise, requested the Lower Court to move the Appellate Court to pass a decree in accordance with such terms. Before a decree was passed, one of the parties objected to the compromise being accepted:

Held, that it was open to the Court, such objection notwithstanding, to pass a decree in accordance with the agreement—*Ruttonsey Lálji* v. *Pooribái* (I.L.R., 7 Bom., 304) and *Karuppan* v. *Rámasámi* (I.L.R., 8 Mad., 482) followed; *Hara Sundari Debi* v. *Kumar Dukhinessur Malia* (I.L.R., 11 Cal., 250) observed upon.

An oral agreement by the parties to a suit that a decree be passed creating a charge on immovable property above, Rs. 100 in value, is not rendered inoperative by s. 59 of the Transfer of Property Act.

The parties to an appeal applied to the Court to pass a decree in accordance with the terms of a compromise, and, before decree was passed, one of the parties objected to such decree being passed on the ground that certain conditions precedent to be performed by the other party had not been performed. The Court (this being denied by the other party) called for affidavits in proof of the terms of the agreement of compromise, and, these being found not to be sufficiently conclusive, directed the Lower Court to take evidence on the point.

APPEAL from the decree of C. Purushotam Ayyar, Acting Subordinate Judge of Madura (West) in suit 8 of 1883.

The facts and arguments in this case, so far as they are material for the purpose of this report, appear from the judgment of the Court (Muttusámi Ayyar and Hutchins, JJ.).

Bháshyam Ayyangár and *Kaliánaráma Ayyar* for appellants.

Hon. *Subramanya Ayyar* and *Rangáchárya*r for respondent.

* Appeal 43 of 1884.

APPASÁMI v. MÁNIKAM.

JUDGMENT.—The respondent (Ramanádhan Chetti) sought to recover from the appellants (Appasámi Náyak, zamíndár of Kannivádi and three others) Rs. 16,000 with interest due upon a hypothecation bond which the appellants executed in his favour on the 6th June 1882. He alleged that, out of Rs. 16,000, Rs. 1,000 was a debt acknowledged to be due upon a settlement of accounts in respect of monies advanced by him from time to time, and Rs. 15,000 the purchase money due under a deed of sale executed by him at the request of the appellants in the names of first appellant's wives. At the trial it was elicited that one Naráyana Ayyar, from whom title to the land sold was derived, had a minor son, and that on his behalf a guardian objected to the sale. The Court of First Instance however decreed the claim, but on appeal this Court considered that the hypothecation was valid to the extent of Rs. 1,000, but in regard to the claim for Rs. 15,000 referred for trial the issue—Whether with reference to the minor's interest, if any, in the property agreed to be sold, the respondent could make out such a title as a purchaser would be bound to accept.

During the trial of this issue in the Subordinate Court, on the 23rd February 1885, the appellants and the respondent presented a petition of compromise reporting that the respondent's claim was amicably adjusted. The petition stated the terms on which the parties had agreed to compromise the suit and requested the Subordinate Court to move this Court to pass a decree in accordance with those terms.

In pursuance of this request the petition was forwarded to this Court, but when the appeal came on for disposal, the appellants presented Civil Miscellaneous Petition No. 226 of 1885, objecting to the compromise being accepted. It was alleged that the compromise was entered into subject to certain conditions, that it was agreed that those conditions should be fulfilled prior to the acceptance of the compromise by this Court, that they were not inserted in the razináma because they were not connected with the subject-matter of the suit, and that the respondent failed to fulfil those conditions.

The conditions were :—

(*a*) The plaintiff should satisfy the claims of the minor son of the said Naráyana Ayyar and convey the property in

dispute to defendants free of any defects in the plaintiff's title to the said property and that he should execute a registered sale-deed.

(*b*) The plaintiff should be responsible for any expenses to be incurred in getting the possession of the property transferred to petitioners.

(*c*) That plaintiff should lend Rs. 60,000 to petitioners and get a bond executed by them for the said sum, payable in six years with interest at 12 per cent. per annum and with a bonus of Rs. 7½ per 100.

On the other hand the respondent contended that the petition of compromise contained the whole agreement, that it was absolute and unconditional, and that as a special consideration for entering into the compromise, a sum of Rs. 4,500 was paid to the zamíndár.

The agreement set out in the petition of compromise is that Rs. 19,000 was to be paid with interest at 12 per cent. per annum in certain instalments in full satisfaction of the respondent's claim, that on default being made in respect of any instalment, the instalment overdue together with interest was to be recovered by taking out execution on the twenty-five villages mentioned in the compromise and their income, and that no execution was to be taken out against any other property or against the body of either of the judgment-debtors.

Before deciding whether the razináma should be accepted, it was considered desirable to call for affidavits. Affidavits having been filed on both sides, the appeal comes on again for disposal. It is urged by the learned pleader for the appellants (1) that we are not at liberty to accept the compromise unless the parties thereto continue to consent to it until we pass a decree in its terms; (2) that the agreement is not valid nor enforceable by suit; and (3) that the affidavits filed for the appellants show that the agreement made in adjustment of the suit was conditional.

As to the first contention, our decision must depend on the construction which we ought to place on s. 375 of Act XIV of 1882. It is in these terms: "If a suit be adjusted wholly or in part by *any lawful agreement*, or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final,

APPASÁMI v. MÁNIKAM.

so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction." The appeal before us was adjusted by an agreement, and the only questions open to us under s. 375 are whether there was an agreement in adjustment of the appeal, and whether that agreement was lawful. If we are satisfied on both these points, the section seems to us to leave no alternative but that of recording the agreement and passing a decree in accordance with it so far as it relates to the suit. Apart from this section, the parties to a suit are at liberty to ask for a decree by consent, and if the contention for the appellants, viz., that the parties should continue in agreement up to the date of moving for the decree, were to prevail, there was no necessity for inserting in the Code s. 375. We, accordingly, held *Karuppan* v. *Rámasámi* (1) that, when it was shown that a suit had been adjusted by a lawful agreement, a decree must be passed in accordance with it and concurred in the decision of the Bombay High Court in *Ruttonsey Lálji* v. *Pooribái*.(2)

Our attention is now drawn to the decision of the Calcutta High Court in *Hara Sundari Debi* v. *Kumara Dukhinessur Malia*.(3) In that case the plaintiff claimed relief as against defendant No. 1, who was in possession of the property in dispute. Both those parties receded from the compromise and prayed that the suit might be dealt with on its merits, but defendant No. 2, who was not in possession, insisted on the agreement being enforced. It appears further that the agreement provided for partitioning the property in suit among the members of the family, whilst defendant No. 1 had no beneficial interest in it but held it as a trustee for certain idol. Thus, there were other grounds on which the decree made under s. 375 was set aside and the observation made as to the construction of s. 375 could only be regarded as an *obiter dictum*. It was no doubt observed that s. 375 is but an amendment and modification of the corresponding section of Act VIII of 1859 and that it did not apply to a case in which the parties concerned, or some of them, declined to carry out the agreement before judgment was recorded, and in support of this view, it was pointed out that s. 375 allowed no appeal while, if a suit were brought for the specific performance of the agreement

(1) I.L.R., 8 Mad., 482. (2) I.L.R., 7 Bom., 304.
(3) I.L.R., 11 Cal., 250.

and a decree obtained, an appeal would lie. In answer to this remark it may be observed that under s. 523 an order may be made specifically enforcing an agreement to refer a matter in dispute to arbitration and there too no appeal is allowed. The question whether or not a compromise had been agreed to, may have been considered so simple that the decision upon it might well be made conclusive, especially as the parties entering into such an agreement *pendente lite* would have distinct notice that there would be no appeal.

We are still inclined to agree with the Bombay High Court that s. 375 was intended to meet cases in which the parties having once agreed subsequently fall out and that it was framed to provide an alternative and a more expeditious remedy than a suit for specific performance. It will be observed that the section puts an adjustment by agreement upon the same footing as a satisfaction in whole or in part by payment. It does not seem open to question that a payment after suit brought would entitle the defendant to a decree *pro tanto*, and if he can rely on a payment he is equally entitled to rely on an agreement or compromise.

As to the English cases referred to on the subject—*Pryer* v. *Gribble*,(1) *Scully* v. *Lord Dundonald*,(2) *Holt* v. *Jesse* (3)—their result, as stated by the Bombay High Court, is that a simple agreement for the compromise of a suit may be enforced by an interlocutory application in the pending suit, but when the agreement goes beyond the subject-matter of the suit, the remedy is a bill for specific performance. This rule is extended by s. 375 and the agreement is rendered enforceable even when it goes beyond the subject-matter of the suit in so far as it relates to it. This is only in accordance with the observation made in some of the English decisions. The intention of the Legislature, therefore, appears to us to have been to carry out, as far as possible, the policy of avoiding a multiplicity of suits and of determining all matters in controversy in a pending suit in that suit—(See also the Judicature Act, s. 24, cl. 7). For these reasons we still adhere to the opinion we expressed in *Karuppan* v. *Rámasámi*.(4)

It has however been urged by the appellants' pleader that the agreement recited in the petition of compromise was oral and that

(1) L.R., 10 Ch. App., 534.
(2) L.R., 8 Ch. D., 658.
(3) L.R., 3 Ch. D., 177.
(4) I.L.R., 8 Mad., 482.

APPASÁMI v. MÁNIKAM.

it is invalid and ineffectual to create a charge on the villages under s. 59 of Act IV of 1882. The intention of the parties to the agreement was, not that it should of itself create a charge on immovable property but only that it should create a right to obtain a decree by way of specific performance. It is in the nature of a preliminary contract intended to be perfected by another document, and we do not consider that it is inoperative under Act IV of 1882.

As to the third contention, the case made out by the affidavits for the respondent is that, on the 7th February, he arranged with the persons acting for the minor that Rs. 4,500 should be paid for his benefit, that the minor's claim should be renounced, that until the renunciation was communicated to the Court, the money should be deposited with one Sitaráma Ayyar, and that after it was so communicated, it should be paid by Sitaráma Ayyar to those who acted for the minor; that on the 12th February the zamíndár invited the respondent to arrange the whole matter with him, and offered to settle with the minor about his claim, and to put in a razináma admitting the whole of the respondent's claim in the suit and making the zamíndárí security for it if the respondent paid him Rs. 4,500 and agreed to receive the decree amount in five instalments, and further undertook not to proceed in execution against his body or that of his son; that the respondent accepted the offer, that the razináma was then drawn up and signed by the zamíndár and his son, that on the 23rd February it was brought to Madura by Appasámi Náyak, that it was then presented to the Subordinate Court by the pleaders of both parties and acknowledged by them, and that thereupon Rs. 4,500 was paid to Appasámi Náyak for the zamíndár. Manikam Chetti, the respondent, has filed an affidavit to that effect, and it is supported by the affidavits of Balagurunatha Pillai, Alagappa Chetti and Perya Karuppan Chetti. It is supported further by the affidavit of Annámalai Chetti in regard to the remittance of Rs. 4,500 from Madras to Madura, and by the letters which then passed between Annámalai Chetti and the respondent.

On the other hand, the appellants' case, as sought to be established by four affidavits, is that the terms of the compromise were settled with the zamíndár's manager, that the respondent agreed to fulfil the conditions referred to before the razináma was accepted by the High Court, that on the 25th February the respondent

took a list of immovable property to be attached to the razináma and asked the zamíndár to sign it, that the zamíndár refused to do so until the conditions were fulfilled, and that the respondent since promised to get Rs. 60,000 from Rayapuram within one week when called upon to lend that sum according to his agreement. Appasámi Náyak, to whom the respondent states that he paid Rs. 4,500, produces a letter, dated 26th February, purporting to be signed by the respondent. It states that Rs. 64,500 will be paid through the Village Magistrate of Rayapuram and that Rs. 322½ are sent for the stamp. This letter is denied by the respondent. As to the affidavits filed for the appellants, it must be observed that some of them speak of a proposal that the zamíndár and his son should execute a bond for Rs. 19,000. This is inconsistent with the terms of the razináma. Again, Appasámi Náyak does not distinctly deny that he received Rs. 4,500 for the zamíndár as a consideration for entering into the compromise. Nor is the statement that a list of immovable property to be attached to the razináma was taken to the zamíndár for his signature on the 25th February at all likely, for, the razináma was presented to the Subordinate Court on the 23rd February, and the twenty-five villages seem to comprise the whole zamíndárí. Further, it is in the highest degree improbable that if the appellants' contention is *bonâ fide*, the petition of compromise would have been presented for transmission to this Court with the prayer that a decree should be passed in accordance with it. The story that the alleged conditions were not inserted in the razináma because they were not connected with the subject-matter of the suit is also unlikely, for the present contention is that the razináma was intended to have no legal force at all until these conditions were fulfilled.

Judging from the affidavits the appellants' contention does not appear to be free from suspicion, but the affidavits are not sufficiently conclusive. As our decision under s. 375 will be final, we consider it proper to direct the Subordinate Judge to take evidence and forward it to this Court with his opinion. He will also ascertain on which villages the debt was agreed to be a charge. We, accordingly, order the Subordinate Judge to try upon such evidence as the parties to this appeal may adduce, what was the real agreement made between the parties to this appeal in view to its adjustment.

APPASÁMI v. MÁNIKAM.

And the Subordinate Judge is directed to submit his finding and the evidence thereon on the foregoing issue.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

1885. Oct. 30, 31.

LOGAN (PRESIDENT OF THE MUNICIPAL COMMISSION, TELLICHERRY), PLAINTIFF,

and

KUNJI (DEFENDANT).*

Small Cause Court Act XI of 1865—Jurisdiction—Suit to recover municipal tax.

A suit to recover a municipal tax is not cognizable by a Small Cause Court constituted under Act XI of 1865.

THIS was a case referred to the High Court under s. 617 of the Code of Civil Procedure by the Acting District Judge of Tellicherry (L. Moore) at the request of the District Múnsif of Tellicherry.

The case was stated by the District Múnsif as follows :—

"The Municipal Commissioners of Tellicherry, through their President, the Collector of Malabar, sued the defendant for the recovery of Rs. 14-1-4, being the municipal tax due by the defendant for the years 1882, 1883 and 1884. The amount was due by the defendant as the tax on houses and lands owned by the defendant within the municipality.

"The defendant admits the legality of the assessment and his liability to pay the rate, but only pleads payment of the same. The defendant further pleads that the suit by the municipality is not one cognizable by the Court of Small Causes.

"The Municipal Commissioners brought two other suits in the Subordinate Court of Tellicherry on its small cause side—suits 361 of 1885 and 357 of 1885. The Subordinate Judge, Mr. Kunjan Menon, held that the suits were not in the nature of those cognizable by Courts of Small Causes, and ordered the plaints to be returned. The plaint in 361 of 1885 was presented in my Court on the regular side on the 22nd June 1885. I was of opinion

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* Referred Case 11 of 1885.