APPELLATE CIVIL.

Before Mr. Justice Subramanya Ayyar and Mr. Justice Best.

1892. Feb. 8, 15.

THANDAVAN AND ANOTHER (PLAINTIFFS NOS. 2 AND 4), APPELLANTS,

v.

VALLIAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 13, 43—"Res judicata"—*Registration Act—Act III of* 1877, *ss.* 17, 49—*Instrument affecting movable and immovable property.*

The widow, daughter and divided brother of a deceased Hindu, executed an instrument which provided for the distribution of his property, both movable and immovable as to which they had disputed. The document was not registered. The widow set up a will made by the deceased in her favour: the brother sued the widow for a declaration that the will was a forgery, but the Court held that it was genuine. He now sued the widow and daughter on the above instrument to recover his agreed share of the movable property of the deceased. The widow set up the will, which the plaintiff averred was invalid according to the custom governing the family:

Held, (1) that the plaintiff was not precluded by the decree in the former suit from impugning the validity of the will;

(2) that the unregistered instrument was admissible as evidence in support of the plaintiff's claim for the movable property.

APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in original suit No. 40 of 1888.

Suit for possession of a one-third share in the movable property of Paramasiva Chetti deceased, the brother of the plaintiff. The plaintiff alleged in the plaint that he was by custom entitled to the whole property; but the present claim was founded on an instrument, dated 28th December 1887, and made between the plaintiff and defendants Nos. 1 and 2, the widow and daughter, respectively, of the deceased, embodying the result of a compromise of disputes which had arisen between the parties as to their rights to the property. This instrument was not registered. Its terms (omitting formal parts) were as follows:—

"The following is the arrangement made by us three consenting to the decision given by our relatives and friends who have attested this, and who, having been chosen arbitrators, heard the representations made by us three regarding our disputes on

* Appeal No. 99 of 1891.

"the morning of this 28th day of the current December month after the death, which took place at 10 P.M., on the 27th idem, of Paramasivan Chettiar, who was the younger brother of the said Appavu Chettiar, husband of Valliamma Ammal and father of Mangaiyarkarasi *alias* Tangathammal. We three shall divide into three shares, each of us taking a share, the balance remaining out of the movables and outstanding debts, &c., after paying in common thereout, at the time of our division, the following items, namely, in accordance with what the said Paramasivan Chettiar expressed before his death, Rs. 700 in cash, and gold ornaments worth Rs. 300 to the said Mangayarkarasi *alias* Tangathammal, who is the daughter of the said Paramasivan Chettiar; Rs. 300 to Pichammal, who is the daughter of Appavu Chettiar and wife of Orayur Sivanthilingam Chettiar; Rs. 190 to Gengadhara Mudaliar on behalf of the charity to Sree Matharbhutta Iswara Swami, the same being the balance remaining payable after deducting what was paid by the said Paramasivan Chettiar for that charity; and Rs. 150 to Veerabadra Chettiar's son Marudai Chettiar and cloth merchant Lakshmana Pillai, that amount being the total of Rs. 100 on account of Kailasanatha Swami Kovil, which stands in the Periyakadai street of the said fort and of Rs. 50 on account of Pillayar Kovil, which stands in the said street. The share taken by each of us shall be at his or her disposal with power of alienation, &c., at pleasure; and the others shall have no right or claim thereto, or interest therein, whatever. The immovable properties consisting of two strong terraced houses, which bear Municipal Nos. 11 and 12 and are situate in the southern portion of Periya Chetti street of the fort, and of nunjah lands lying in Kaluthaimalaipatti, shall be enjoyed by the said Valliamma Ammal during her life-time; and, after her death, the said Appavu Chettiar and his heirs shall perform her obsequies, &c., and the said Appavu Chettiar and others shall enjoy the said two houses and the said nunja land with all rights thereto. The said Appavu Chettiar himself shall enjoy, with all rights thereto, the thatched house which fell to the share of the said Paramasivan Chetti. To this effect this karar-agreement was entered into among us three. This agreement shall be in the possession of Nagalingam Chettiar, son of Velayudan Chettiar of Orayur; and the key of the said house shall be with the cloth merchant

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"Lakshmana Pillai. The said Lakshmana Pillai shall put a lock "and seal on the said house."

The plaintiff died during the pendency of the suit which was proceeded with by his sons.

The District Judge held that this instrument was bad for want of consideration and also by reason of its being unregistered. Defendant No. 1, among other defences, pleaded that she was entitled to the property under the will of her husband. In a previous suit brought by the plaintiff against this defendant for a declaration that the will in question was a forgery, a decree was passed for the defendant on a finding that it was a genuine will. The District Judge held that the plaintiff was now estopped from bringing into question the validity of the will.

On the abovementioned rulings, the District Judge dismissed the suit.

The plaintiffs preferred this appeal.

Mr. *Subramanyam* for appellants.

Bhashyam Ayyangar and *Pattabhirama Ayyar* for respondent, No. 1.

Panchapagesa Sastri for respondent, No. 2.

SUBRAMANYA AYYAR, J.—One Paramasivan Chetti died on the 27th December 1887 leaving him surviving, his divided brother, the first plaintiff, his widow, the first defendant, and his daughter, the second defendant. The plaintiffs, Nos. 2 and 4, are the sons of the first plaintiff, who died after the institution of the suit.

The case for the plaintiffs is that the late first plaintiff was entitled, according to the custom of the caste, to succeed, to the exclusion of the first defendant, to the properties left by Paramasivan Chetti, that, on his death, disputes arose between the late first plaintiff, and the first defendant respecting his properties; that, through the mediation of certain persons, the disputes were settled and the terms of the settlement were embodied in an agreement executed between the first plaintiff and the first and second defendants on the 28th December 1887; that, according to the said agreement, the first plaintiff became entitled to one-third of the movable properties and certain immovable properties left by Paramasivan. This suit is to recover the plaintiffs' one-third share of the movable properties.

It was contended by the first defendant that the agreement sued on was obtained from her by coercion; that there was no

consideration for it; and that it was not receivable in evidence. The custom alleged by the plaintiff was also denied and the first defendant claimed the whole estate of Paramasivan as his widow and also under his will.

In original suit No. 12 of 1887, the late plaintiff sued the first defendant for a declaration that the will set up by her was a forgery. It was held by the Court of First Instance, as well as by the High Court, on appeal, that the document impeached was genuine.

This decision, the District Judge held, in the present case, estopped the plaintiffs from questioning the validity of the will. He further held that the instrument of compromise was void for want of registration and was without consideration. He dismissed the suit and the plaintiffs appeal.

I shall first deal with the objection that, as the document sued on was not registered, it was void. It was urged that the transaction evidenced by the document was indivisible, and, therefore, the plaintiffs could not be permitted to rely on the document or use it in evidence in respect of any part of the transaction in question. I think this contention is unsustainable. Section 49 of the Registration Act lays down that no document required to be registered by section 17 shall, unless duly registered, "affect any *immovable* property comprised therein," or "be received as evidence of any transaction affecting *such* property." The object of the law is obviously to prevent documents which ought to be, but are not, registered from affecting immovable property and immovable property only. There does not seem to be any warrant for supposing that, if a document relating to both immovable and movable property is not registered as required by law, then the document becomes wholly inoperative, not taking effect even as regards the movable property comprised therein. The words of the section are the very reverse of what one would expect the Legislature to use if it was intended to render an unregistered document falling within the provisions of section 49 inadmissible as evidence for any purpose whatever. On the other hand, the terms of the section clearly imply that it was not so intended.

The decision in *Lakshmamma* v. *Kameswara*(1) relied on for the respondent, when taken with the facts of the case, is, I think,

(1) I.L.R., 13 Mad., 281.

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not in conflict with my view. The document A in that case was in reality a deed of gift of movable and immovable properties executed in 1886. There was, no doubt, also an arrangement for a partition—not a partition on the footing of a pre-existing right—but a partition to carry out the gift made under the document itself. The Court in that case said "there can be no such thing as a partition apart from this document" and in effect held that the document could not be looked at for any purpose whatever, and that the transaction was void for want of registration.

In *Mattongeney Dossee* v. *Ramnarain Sadkhan*(1) the argument of indivisibility was urged and accepted in respect of a hypothecation bond for money lent; but the contrary view was taken in *Krishto Lall Ghose* v. *Bonomalee Roy*(2). In the order referring the question for the decision of the Full Bench in *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan*(3), Wilson, J., drew attention to the divergence between the views expressed in the two cases *Mattongeney Dossee* v. *Ramnarain Sadkhan*(1), *Krishto Lall Ghose* v. *Bonomalee Roy*(2) just referred to. He explained that, according to the decision in *Mattongeney Dossee* v. *Ramnarain Sadkhan*(1), the word "transaction" in section 49 meant "the whole bargain;" whereas, according to the opinion of the Judges who decided the case in *Krishto Lall Ghose* v. *Bonomalee Roy*(2), it meant "not the bargain but that term of the bargain which affects land." The Judges who formed the Full Bench decided that the true construction was that no document should be received in evidence of any transaction *so far as it affected land*, and that the view they took of the section rendered it unnecessary to consider whether the document of the kind then in question embodied one single transaction or might properly be said to contain more. The same view has been taken by this Court after the Registration Act of 1871 came into force—see *Stri Seshathri Ayyengar* v. *Sankara Ayen*(4), *Jagappa* v. *Latchappa*(5). *Achoo Bayamah* v. *Dhany Ram*(6) cannot be relied on, as that decision proceeded on the clause "no instrument required by section 17 to be registered shall be received in evidence in any civil proceeding in any Court unless registered," which existed in section 49 of Act XX of 1866; but nothing corresponding to this is to be found in the present section

(1) I.L.R., 4 Cal., 83. (2) I.L.R., 5 Cal., 611. (3) I.L.R., 9 Cal., 520.
(4) 7 M.H.C.R., 296. (5) I.L.R., 5 Mad., 119. (6) 4 M.H.C.R., 378.

49. Now, in dealing with the question of indivisibility of contracts, the rule laid down in the *Bishop of Chester* v. *John Freland*(1) must be borne in mind. There Hutton, J., said that "when a good "thing and a void thing are put together in the same grant, "the law makes such construction that the grant shall be good "for that which is good and void for that which is void." For guidance in the practical application of this principle, (adapting the language of a writer of authority,) perhaps no better rule can be given than that if the part which is void be in its own nature separable and divisible, and there be no express stipulation or necessary implication which makes that which is void and that which is good absolutely one thing, and that which is void may be regarded not as a condition going to the essence of the contract, in such a case that which is good may be taken as distinct from that which is void. (Parsons on Contracts, 7th Edition, Vol. I, p. 494.) Construing the document in question with reference to these principles, I am of opinion that it is admissible in evidence in support of the plaintiffs' claim to the share of the movable properties comprised therein.

The next question argued was whether the plaintiffs were entitled to question the validity of the will left by Paramasivan Chetti. The District Judge seems to me to be in error in considering that the plaintiffs were estopped by the decision in original suit No. 12 of 1887 from raising such a contention. The infringement of right complained of in that suit was that the first defendant put forward a fabricated document as the genuine will of her husband; whilst the infraction complained of in connection with the matter under consideration at present, is that Paramasivan himself purported to dispose by his will of property which, according to the alleged custom of the caste, he could not alienate. This latter case was not, in my opinion, matter which ought to have been made a ground of attack in the former suit; *Allunni* v. *Kunjusha*(2), *Konerrav* v. *Gurrav*(3). Therefore no question of estoppel arises.

In consequence of the view taken by the District Judge, he excluded the evidence which the parties were prepared to produce upon the main issues in the case. I would therefore set aside

(1) Ley., 79. (2) I.L.R., 7 Mad., 264. (3) I.L.R., 5 Bom., 594.

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the decree of the Lower Court and remand the suit for disposal according to law.

BEST, J.—I concur in finding that the suit is not barred by the previous suit (original suit No. 12 of 1887), and also that the agreement sued on is not inadmissible in consequence of its non-registration as evidence in support of the claim for the movables, which alone are sought to be recovered in this suit.

Section 49 of the present Registration Act renders an unregistered document inadmissible as evidence of any transaction affecting immovable property, which is the kind of property expressly mentioned in the preceding clause and referred to as "such property" in the clause in which its non-admissibility as evidence is declared—see *Stri Seshathri Ayyengar* v. *Sankara Ayen*(1) and *Guduri Jagannadham* v. *Rapaka Ramanna*(2), in the latter of which cases the decision of the majority of the Full Bench in *Achoo Bayamah* v. *Dhany Ram*(3) is referred to, but not followed because (as is remarked) "the new law has explicitly adopted the doctrine "which the late Chief Justice of this Court believed to be derivable "from the old, namely, that the object of section 49 was solely to "prevent instruments from being of legal force for any of the pur-"poses which make registration compulsory under section 17." This last decision was also followed in *Jagappa* v. *Latchappa*(4). None of these cases are noticed in the judgment in *Lakshmamma* v. *Kameswara*(5), which proceeds, moreover, mainly on the ground that the transaction evidenced by the document then in question was "one and indivisible." Such, however, is not the case here. The partition of movables, now sought to be enforced, can be effected quite independently of the immovable properties which are also included in the agreement.

The decision of a Full Bench of the Calcutta High Court in *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan*(6) is also in accordance with the decisions in *Stri Seshathri Ayyenyar* v. *Sankara Ayen*(1), *Achoo Bayamah* v. *Dhany Ram*(3) and *Jagappa* v. *Latchappa*(4).

I agree therefore in finding that want of registration is no bar to the admissibility of the agreement sued on as evidence for the purposes of this suit.

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(1) 7 M.H.C.R., 296. (2) 7 M.H.C.R., 348. (3) 4 M.H.C.R., 378.
(4) I.L.R., 5 Mad., 119. (5) I.L.R., 13 Mad., 281. (6) I.L.R., 9 Cal., 520.

As to the question whether the suit is *res judicata* by the decision in original suit No. 12 of 1887, it is to be observed that the object of that suit was merely to get a declaration that the will was not genuine. The property was not then sued for and it cannot be said that plaintiff ought in that suit to have questioned the validity of the will in case of its being found to be genuine.

I concur, therefore, in setting aside the Lower Court's decree and remanding the suit for disposal according to law.

The costs hitherto incurred will be provided for in the decree to be passed by the Lower Court.

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Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SULTAN MOIDEEN (DEFENDANT No. 2), APPELLANT,

v.

SAVALAYAMMAL AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

1891. April 16. 1892. February 17.

Civil Procedure Code, ss. 231, 258—Joint decree—Execution, application for—Uncertified payment to one decree-holder.

One of two holders of a joint decree applied for execution of the decree to the full amount. It appeared that the other decree-holder had received a certain sum from the judgment-debtor on account of the decree out of Court, but this payment had not been certified:

Held, that the payment was valid only to the extent of the share to which the payee was entitled, and that this share having been ascertained and credit given for it, the decree should be executed in favour of the present applicant for the balance.

APPEAL against the decree of T. Weir, District Judge of Salem, on execution petition No. 444 of 1890, in which Savalayammal, one of two joint decree-holders, prayed for the execution of the decree in original suit No. 13 of 1883 on the file of the District Court of Salem.

The decree, which was passed in the terms of a compromise, was to the effect that the defendant should pay to the plaintiffs (viz., the present petitioner and one Appaji Chetti) jointly Rs.

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* Appeal against Order No. 33 of 1890.