

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Shephard.

1897.
July 26, 29.

PONNAMBALA PILLAI (PLAINTIFF), APPELLANT,

v.

SUNDARAPPAYYAR (DEFENDANT), RESPONDENT.*

*Hindu Law—Conditional contract to sell family lands—Birth of vendor's son
before fulfilment of condition.*

A Hindu entered into a contract to sell certain land, being family property of which he was not in possession, as soon as possession should be obtained. Before possession was obtained a son was born to him. A decree for specific performance was passed and executed against him, the son not being brought on to the record. In a suit by the son for partition of the property in question :

Held, that the plaintiff had an existing right in the property which was not bound by the decree and the subsequent proceedings, and that he was entitled to the relief sought.

Semle : That a contract for sale of land made by a Hindu before a son is born to him is not binding on the son born before the transfer of the property takes place.

SECOND APPEAL against the decree of T. M. Horsfall, District Judge of Tanjore, in Appeal Suit No. 255 of 1895, confirming the decree of T. Venkataramayya, District Munsiff of Kumbakonam, in Original Suit No. 422 of 1893.

The plaintiff sued for partition and possession of a moiety of certain land together with mesne profits. The property in question had belonged to the family of the plaintiff. He however was not born until 1874, before which date certain transactions had been entered into between his father and uncle, since deceased and the present defendant. In 1872 the father and uncle agreed to sell to defendant their family lands in a certain village including the property now in question, and later on in the same year they executed a conveyance of so much of the property as was then in their possession, and therein expressed their willingness to execute a sale-deed in respect of the rest of the land, of which they expected to get possession, as soon as that should happen. Possession was obtained in 1877, but the plaintiff's father refused to convey, and a suit for specific performance

* Second Appeal No. 754 of 1896.

was brought against him. In this suit to which the present plaintiff was not a party, a decree was passed as prayed, and in the result the land of which partition is now sought was conveyed to defendant.

PONNAMBALA
PILLAI
v.
SUNDARAP-
PATYAR.

It was not found that the sale was justified by circumstances of family necessity, but both the Lower Courts held that the plaintiff was not entitled to recover. The District Judge expressed the view that the transaction based on the contract of 1877 was inseparable from that of 1872 and was therefore binding on the plaintiff who was not born at the last-mentioned date.

The plaintiff preferred this appeal.

The *Acting Advocate-General* (Hon'ble V. *Bhashyam Ayyangar*) and *Kristnasami Ayyar* for appellants.

Pattabhirama Ayyar for respondent.

JUDGMENT.—The facts of this case lie in a small compass and there was so little dispute about them that no issues of fact were raised in the Court of First Instance. In 1872 before the birth of the plaintiff, his father together with his brother Saminada having certain debts to pay off entered into an oral contract with the defendant to sell to him their family lands in the village of Anakudi and their share of the palace in the same place for the sum of Rs. 29,000. On the 10th May 1872 the vendors wrote to the defendant the letter marked XVIII. In it they say that three velies and odd have not yet been delivered into their possession under the Court decree and they ask the defendant to let the matter stand over and take a sale-deed in respect of the remaining properties for Rs. 25,000, expressing their willingness to execute a sale “in respect of the said maniam punjah, &c., lands for a sum of Rs. 3,500 as soon as we get possession of the same.” To this request the defendant acceded, and accordingly a conveyance in his favour was executed on the 12th May 1872, comprising the other lands included in the contract and expressed to be in consideration of the sum of Rs. 25,500, details of which are given in the document. The proceedings in the partition suit referred to in the letter XVIII are not before us. But it appears from the exhibits put in by the defendant (XIV and XV) that it was in May 1872 uncertain what share of the punjah lands would fall to the vendors, and that, in the result, they did not get the lands which they expected to get. This did not happen till February 1877 before which date the plaintiff had been born and his father's brother

PONNAMBALA
PILLAI
v.
SUNDARAP-
PANYAR.

had died. By that time the plaintiff's father had repented of his bargain and accordingly he refused to convey to the defendant the punjah lands of which he came into possession. The result of this conduct was a suit for specific performance brought by the present defendant. This litigation went on during 1880 and 1881 and ended in a decree against the plaintiff's father. The plaintiff himself was not joined in this suit, and it is quite impossible to hold, as was argued by the respondent's wakil, that the plaintiff was in any way represented in the suit by his father. Now, in this suit instituted soon after the plaintiff came of age, he claims a moiety of the property conveyed to the defendant in pursuance of the decree for specific performance made against his father. The plaintiff's case is that, inasmuch as he was born before the decree was passed or the conveyance executed, and the sale of the property was not necessitated by the exigency of any debt pressing on his father, he being by birth a coparcener with his father is entitled to repudiate the sale so far as his moiety is concerned. The District Judge appears to have based his judgment in the defendant's favour on the ground that the sale was made under the original contract and that as the plaintiff was bound by the sale made on the 12th May 1872, so he must be bound by the further sale made in pursuance of the same contract. It has not been found by either Court that there was any necessity for the sale impeached by the plaintiff. The defendant's case must therefore be rested on the ground that a contract for sale made by a Hindu before a son is born to him is binding on the son notwithstanding that the latter is born before the transfer of the property takes place. No authority was cited for this position, and we do not think it can be maintained. The son of a Hindu on his birth becomes a coparcener with his father in respect of family property. This right of the son may be defeated, or rather is prevented from coming into existence, by an alienation of the property made before the son's birth. We are asked now to hold that a mere contract for sale operates as an alienation, and that in the suit which may be brought on that contract by the purchaser the son has no other defence than the father would have. In support of the argument reference is made to the doctrine of equity according to which the purchaser under a contract for sale is for certain purposes regarded as the owner of the property. If otherwise this doctrine has any application we do not see how it can avail the defendant and alter the

fact that his vendor's interest in the property was liable to be diminished by the birth of a son. It is not as if the son claimed through the father. A purchaser in the position of the defendant before actual transfer of the property is in no worse position than the purchaser from a coparcener of an undefined share. As the latter takes subject to the chance of the vendor's share being diminished before partition takes place, so a purchaser in the defendant's position, contracting with one whose interest is liable to diminution, must take subject to that liability.

PONNAMBALA
PILLAI
v.
SUNDARAP-
PAYAR.

But the whole argument for the defendant rests on the assumption that the contract enforced by the suit of 1880 was the original contract of 1872. We think this is a complete mistake. On the acceptance of the offer made in the letter already mentioned a new contract with new incidents was effected with regard to the lands which the plaintiff's father was not then in a position to deliver. In that new contract there was a condition which was not fulfilled until long after the plaintiff's birth. It is impossible, therefore, to hold that at the date of his birth there was no property in existence to which the plaintiff's right could attach. On the ground that the property of which partition has now been claimed had not passed from the family when the plaintiff was born, we must hold that the plaintiff is entitled to the decree for which he asks. It is suggested that he ought to be put upon terms and that it should be assumed that his share of the purchase money came to his hands. This, however, is a point which ought to have been taken in the Court of First Instance and made the subject of an issue. It cannot be assumed that the plaintiff has become possessed of any part of the purchase money, and there is admittedly no evidence to support the observation made on the point by the District Judge.

The decree must be reversed and a decree passed in favour of the plaintiff; and the respondent must pay the costs in all the Courts.
