APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

ALAGAPPA MUDALIAR (PLAINTIFF), APPELLANT,

v.

SIVARAMASUNDARA MUDALIAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

1894. September 26. 1895. July 9.

Suit for specific performance of agreement for partition—Alienation of the management of a public charity—Illegal—Effect of partial illegality—Civil Procedure Code, s. 28.

In a suit for specific performance of an agreement for partition, it appeared that amongst other property considered liable to partition, was the huk right of a public choultry and certain other lands alleged to belong to the same charity. The said huk right had been sold by auction to that member of the family who bid the highest price and was purchased by the plaintiff. On a suit being brought to enforce the terms of the arrangement:

Held, that the sale by auction of the huk right was illegal, but that as such illegality did not affect the other terms of the arrangement, it might be enforced as to the rest of the property;

Held further, with reference to section 28 of the Civil Procedure Code, that the third defendant a minor was properly included as a party to the suit, though he was not a party to the arrangement.

APPEAL against the decree of S. Gopalachariar, Subordinate Judge of Tinnevelly, in original suit No. 36 of 1889.

The plaintiff and defendants Nos. 1 and 2 are brothers. Defendant No. 3 is the son of defendant No. 1. The suit was brought by the plaintiff against the defendants to enforce, by execution of a partition deed, the terms of an arrangement as to partition come to by the brothers in the presence of mediators in May 1888 and to declare the rights of the parties. The property set forth in the schedules to the plaint included *inter alia* two items, viz., certain lands in Vachakarapatti described in schedule II-B and the chattram of Vachakarapatti and the lands attached thereto described in schedule II-C. With regard to the other items of property set forth in the plaint schedules, the Subordinate Judge found them liable to partition, and there was no appeal against this finding of fact. Part of the arrangement sought to be enforced by the plaintiff was to the effect that the three brothers had agreed that the following plaint properties should be sold by auction and that to that brother who bid the highest amount, the other two brothers should relinquish their right in the property sold,

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that out of the auction purchase money the debts due by the family should be deducted and the balance if any divided into three equal parts amongst the three brothers. The property so auctioned consisted of—

(1) the private right in the property in schedule II-B;

(2) the huk and all other rights in the properties in schedule II-C;

(3) Rs. 81,700 the sum remaining in first defendant's hands out of the said charity funds;

(4) the outstandings due in that village.

The auction took place and plaintiff purchased for Rs. 7,750. There were certain other particulars arranged in the draft partition deed which are immaterial.

The Subordinate Judge found the arrangement established, but held that, inasmuch as it purported to transfer rights in regard to the charity properties in schedule II-C and the right of managing them to the plaintiff, it was illegal, and further held that, as the arrangement could not be upheld with regard to such charity properties, the plaintiff was not entitled to any relief with regard to the other properties included in the arrangement. He therefore dismissed the suit.

Plaintiff preferred this appeal.

Subramania Ayyar and *Krishnasami Ayyar* for appellant.

Ramachandra Rau Saheb, *Bhashyam Ayyangar*, *Ramakrishna Ayyar*, *Tiruvenkatachariar*, and *Seshachariar* for respondents.

The Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.) made the following order:—

ORDER.—This is an appeal from the decree of the Subordinate Judge dismissing the suit without costs. The judgment of the Subordinate Judge which, on the substantial issues of fact (the first, second, third and sixth), is in the plaintiff's favour, proceeds upon certain grounds of law upon which also the arguments in the hearing of the appeal turned. The Judge's findings on the facts were not questioned. It is found as a fact that by agreement between the three brothers a sale of certain properties by auction was effected and the plaintiff became the purchaser. The terms of the whole arrangement are set out in exhibit E. This sale included among other things the *huk* right of Vachakarapatti choultry, the lands attached to the choultry and certain other lands, the *kudivaram* of which is vested in the family. As to these latter, it is asserted on

the defendants' behalf that they also are part of the charity property. There has been no finding on the point.

The Vachakarapatti choultry is one of several charities managed by the family to which the parties belong. It is admittedly a public charity. There is no direct evidence as to the conditions fixed by the founder for the management of the choultry and its property or for the devolution of the right of management. In the inam statement made by the plaintiff's father Thitharappa, Chidambaranatha, who is described as the latter's great grandfather and manager of the charity, appears under the heading 'name of the original holder.' In another column it is said "the inam was granted to my ancestors by the Carnatic Rajahs for the purpose of conducting charity in the choultry, &c." Thitharappa, it appears, was one of three brothers, who, having previously divided among themselves their family property, in 1871 proceeded to divide the family charities. It is recited in the deed of 26th May 1871 that it was at first settled to manage in common the charities attached to the family, but that they had since come to another arrangement with regard to the same. Under that arrangement the choultry now in question fell to the share of the plaintiff's father. He died in July 1877 leaving two sons Alagappa and Sivaramasundra, the plaintiff and defendant No. 1, and a third, then a minor, now defendant No. 2. In the same year it was agreed between the two adult brothers that, although the hukdarship was common to the three, it should be registered in the name of the eldest, the defendant No. 1. This is all the evidence adduced with regard to the management of the choultry, and it is not likely that more would be forthcoming, inasmuch as it appears from the pedigree that the grandfather and the great grandfather of Thitharappa each left only one son. Judging from the scanty materials available, we think it must be taken to have been the intention of the founder of the choultry that the office of management should be held in common by the family of the original holder. No other rule of succession can well be suggested. The fact that in 1871 a division of the charities then belonging to the family took place is by itself no ground for holding that any other rule than that above stated holds good with regard to this choultry. It was argued by the plaintiff's vakil that, although the office of superintending religious or charitable institutions cannot be alienated like ordinary property, it is competent to any one member of the family

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interested to renounce or waive his right in the matter (*Hancharam* v. *Pranshankar*(1)). Our attention was also called to the cases in which it has been held that one person may, by force of the law of limitation, lose his right to such an office and another may in the same manner acquire it. It is true that there is an apparent inconsistency in holding that by operation of law an alienation may be effected which cannot be effected by an act of the party. It may be suggested that the explanation lies in the fact that the law of limitation is a law of a general and positive character and that no exemption from it is allowed in the case of charitable or religious offices. It is well settled that such offices cannot be alienated by the act of parties. The question then is whether the arrangement made in the present case amounts to an alienation. If it was a mere arrangement for the more convenient management of the choultry, reserving to the plaintiff's brothers their right of control, and, if necessary, of resumption of actual management, then it might be said that there would be no interference with the supposed will of the founder and that the arrangement would be lawful. To that extent it seems clear that any coparcener jointly entitled to management may waive his rights. But the transaction now before us is of a very different character. It is clearly intended that the brothers other than the plaintiff shall divest themselves altogether of all right of control over the choultry. For the future it was intended that the right of management should devolve in the line of the plaintiff and his heirs to the exclusion of his brothers. In our opinion it makes no difference that the alienee is a member of the same family (see *Kuppa* v. *Dorasami*(2) and *Narayana* v. *Ranga*(3)). We think the Subordinate Judge was right in holding the alienation to be invalid.

The next question is whether the Judge was right, in consequence of this ruling and for the other reasons given by him, in dismissing the suit altogether. His main reason for dismissing it was that in his view the stipulation that a formal document should be drawn up and registered showed that neither party intended to be bound until that was done. The Judge refers to *Ridgway* v. *Wharton*(4). In our judgment the Subordinate Judge has misunderstood the law and the observations made in the case cited.

(1) I.L.R., 6 Bom., 298.
(2) I.L.R., 6 Mad., 76.
(3) I.L.R., 15 Mad., 183.
(4) 6 H.L.C., 238.

The plain question is whether in fact the terms of the agreement have been definitively settled, or whether the matter rests in the stage of negotiation. Here there is no doubt that the terms of the arrangement had been finally determined. There was a full and complete agreement between the parties, and they must, as observed by Lord Cranworth, be bound by it, notwithstanding that they intended to have a formal agreement drawn up.

Then it is said that, as part of the agreement is void and therefore cannot be enforced, the plaintiff ought not to have a decree for specific performance as to the remainder. But for the offer made before us by the plaintiff's vakil there would certainly be a difficulty in decreeing specific performance in part. The plaintiff is by the contract under an obligation to pay Rs. 7,500 as the price of two properties. It is not clear whether he has paid the money or not. However he is willing to pay it as the price of the one property only in respect of which the agreement is lawful. That being so, no question arises as to the apportionment of the money between the legal and the illegal parts of the transaction. The plaintiff being content to pay the whole consideration, we see no reason why the defendants should not be compelled to perform that part of the contract which is lawful. The defendants' vakil could not suggest that there would be anything inequitable in such a decree ; he only objected that the plaintiff's offer was not made in the Court below. This is a matter with which we can deal in our order as to costs.

On behalf of the defendant No. 3, the minor son of defendant No. 1, a further objection is taken to the frame of the suit. It is said that he was improperly made a party to a suit for specific performance, because he was not a party to the contract and no other cause of action could properly be joined in this suit. It is clear that against him there can be no decree for specific performance, and indeed the plaintiff does not ask for such relief against him. But the plaintiff is interested in having him before the Court in order to obtain an adjudication against him as well with regard to the existence of the contract as with regard to the question whether the contract is of such a nature as to be binding on him. The objection that such a decree as is required against the defendant No. 3 is one which cannot be combined with a decree for specific performance against the other defendants appears to us to be met by section 28 of the Code of Civil Procedure. According to that

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section all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter. The reasons for giving this latitude are explained in *Honduras Railway Company* v. *Tucker*(1), where also specific performance was part of the relief claimed. We observe that this authority is not mentioned in *Luckumsey Ookerda* v. *Fazulla Cassumbhoy*(2), a case somewhat resembling the present. It appears to us that there is here one and the same matter, namely, the contract between the plaintiff and his adult brothers, in respect of which he has a right to relief against them and also against the minor defendant. It is immaterial that the relief is not the same in both cases (see *Janokinath Mookerjee* v. *Ramrunjun Chuckerbutty*(3) and *Rajdhur Chowdhry* v. *Kali Kristna Bhuttacharjya*(4)). Certainly the present case is within the reason of the rule, for it would be most inconvenient to leave to be decided in another suit against the minor defendant the questions above mentioned. Of these questions, the latter has been left undetermined, although in the written statement of the minor defendant there is an allegation that the arrangement between the three brothers is prejudicial to his interests. If the plaintiff desires to have any decree against the minor defendant, there must be a finding on the issue whether the said arrangement was made in fraud of the interests of the minor defendant. There must also be findings on the eighth, ninth, tenth and eleventh issues.

As to the memoranda of objections, we see no reason to interfere in the matter of costs, in which the Subordinate Judge has exercised his discretion.

The following were the issues sent back for a finding :—

Is item B in second schedule the property of the family or of the chattram ?

Are the debts mentioned in plaint schedule true ?

Have plaintiff and second defendant misappropriated properties mentioned in the schedule to the first defendant's written statement ?

Has plaintiff paid first defendant Rs. 1,529–5–4 and second defendant Rs. 1,598–13–6 ?

(1) L.R., 2 Ex. D., 301.
(2) I.L.R., 5 Bom., 177.
(3) I.L.R., 4 Calc., 949.
(4) I.L.R., 8 Calc., 963.

The Subordinate Judge found that the kudi right belonged to the family and not to the choultry, that the debts in plaint schedule are true, that the misappropriation was not proved and gave no finding as to the eleventh issue. With regard to the new issue he said "the first defendant must be deemed to have acted as the "manager in respect of his branch, and in such capacity it was "competent to him to enter into an arrangement for division with "his brothers, and such arrangement is binding on third defendant "in the absence of fraud or detriment, neither of which is proved."

On receipt of the above finding the case came on for final hearing before SHEPHARD and BEST, JJ.

Krishnasami Ayyar for appellant.

Ramachandra Rau Saheb, Bhashyam Ayyangar, Ramakrishna Ayyar, Tiruvenkatachariar and *Seshachariar* for respondents.

JUDGMENT.—The eighth issue raises the question whether the family of the parties possesses any interest in the lands comprised in schedule II-B. The plaintiff's contention is that, while the *melvaram* is admittedly part of the charity estate, the *kudivaram* in those lands belongs to the family. According to the memorandum made on the 26th May 1888, the property declared to have been purchased by the plaintiff for Rs. 7,750 was the choultry at Vachakarapatti. It is more particularly described in exhibit D as "the *huk* right of Vachakarapatti choultry, the lands the registry of which stands in the names of Alagappa Mudaliar and Shanmugasundara Mudaliar in No. 6, the decree razinamah, and all other deeds in respect of the said choultry, Rs. 747 being in possession of Sivaramasundara Mudaliar, and Rs. 70 from the *tirvah* of Sekanapuram and all the lands pertaining to Vachakarapatti choultry together with all the rights and privileges thereof."

The property now claimed as family property consists of the lands registered in the names of Alagappa Mudaliar and Shunmugasundara Mudaliar. The circumstance that they are specifically mentioned in exhibit D is regarded by the Subordinate Judge as indicating that they were not chattram lands. In our opinion the language is equivocal, and, taking exhibit D with exhibit E, we do not think that any inference in the plaintiff's favour can be drawn from it; rather the contrary. Similarly with regard to the security bond (exhibit R), the language of it is consistent with either view. Seeing that the writer styled himself *hukdar*, we think he might, with perfect honesty, describe the charity lands as

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his lands. The fact that he so designates them in such a document is no ground for the inference that he treated the lands as his own to the exclusion of the right of the charity. The fact is that the family treated the charity and its property as their own.

There is no documentary evidence distinctly showing that the family claimed the *kudivaram* of these lands. No patta or village accounts are produced. The Subordinate Judge refers to the evidence of certain witnesses. The third witness is the only witness who has no direct interest in these lands. His evidence is not specific as to the lands in question; the plaintiff's vakil was unable to show what the receipts mentioned by him proved. The other two witnesses are the parties themselves.

The defendant No. 1 says that the lands were previously entered in the name of the chattram and that he was no party to the transfer to the names of the plaintiff and defendant No. 2. The plaintiff on the other hand is unable to say in whose name the lands stood in his father's time, and he has no voucher to show that they stood in his father's name. He professes not to know how they came to be transferred to himself and the second defendant. It cannot therefore be according to him that the transfer was made by common consent as the plaintiff's vakil contends.

We cannot agree with the Subordinate Judge in thinking that the evidence as to enjoyment proves the alleged possession of the *kudivaram* by the family.

The result is that we must hold that so much of the agreement as relates to the auction sale in consideration of the Rs. 7,750 cannot be enforced.

As, however, this arrangement is clearly separate from the rest of the agreement, we see no reason why the plaintiff should not have partial relief. There is no dispute as to the findings on issues 1, 2, 3 and 6. It is unnecessary to decide the issues numbered 9, 10 and 11. The finding on the new issue is not challenged.

The decree of the Lower Court must be reversed and the plaintiff must have a decree as prayed except so far as regards the property included in schedules II-B and II-C attached to the plaint, as to which property the plaintiff must be declared to be jointly entitled to management with the defendants Nos. 1 and 2.

Under the circumstances we think each party should pay his own costs.