APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

1911. July 26, and August 2.

RAGHUNATHA CHARIAR (PLAINTIFF), APPELLANT,

v.

SADAGOPA CHARIAR (DEFENDENT), RESPONDENT.*

Right of suit—Transfer of property in consideration of transferee paying sums to third parties—Failure of transferee to pay in reasonable time—Right of transferor to sue for sums irrespective of damage.

A transfers his property to *B* in consideration of *B* agreeing to pay certain sums to third persons.

A is himself entitled to sue *B* for the recovery of those sums as if they are due to him in case of *B*'s failure to pay the third persons within a reasonable time; and *A* is not in such a case bound to show that he was in any way damnified by *B*'s failure.

Dorasinga Tevar v. *Arunachalam Chetti*, [(1900) I.L.R., 23 Mad., 441], *Runganadham Pantulu* v. *Appala Naidu* [C.M.A. No. 119 of 1908 (unreported)], and *Gopala Aiayar* v. *Ramaswami Sastrigal* [S.A. No. 133 of 1907 (unreported)], followed.

Siva Subramania Mudaliar v. *Gnanasambanda Pandara Sannadhi* [(1911) 21 M.L.J., 359], *Chenchuramayya* v. *Subbaramayya* [(1911) 9 M.L.T., 79], *Doraisami Tevar* v. *Lakshmanan Chetty* [(1904) 14 M.L.J., 285], *Thangammai Nachiar* v. *Subbammal* [(1906) 16 M.L.J., 20], *Putti Narayanamurthy Ayyar* v. *Marimuthu Pillai* [(1903) I.L.R., 26 Mad., 322], *Kumar Nath Bhuttacharjee* v. *Nobo Kumar Bhuttacharjee* [(1899) I.L.R., 26 Calc., 241] and *Musammat Izzat-un-Nissa Begam* v. *Kunwar Pertab Singh* [(1909) L.R., 36 I.A., 203], distinguished.

Subba Naidu v. *Bathula Bee Bee Sahiba* [(1910) 8 M.L.T., 188], referred to.

SECOND APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tanjore, in Appeal No. 760 of 1908, presented against the decree of K. S. LAKSHMI NARASAIYAR, the District Munsif of Valangiman, in Original Suit No. 212 of 1907.

The facts of this case are fully set out in the judgment.

The Hon. Mr. *P. S. Sivaswami Ayyar*, Advocate-General, and *T. Ranga Ramanujachariar* for the appellant.

S. Srinivasa Ayyangar and *N. R. K. Thathachariar* for the respondent.

ABDUR RAHIM AND SUNDARA AYYAR, JJ.

JUDGMENT.—In this case the plaintiff instituted a suit for the recovery from the defendant of a sum of money which the latter had agreed to pay to two persons Alamelu Ammall and Srinivasa

* Second Appeal No. 238 of 1910.

Gopalachariar as consideration for the transfer to him by the plaintiff of two decrees in Original Suits Nos. 61 and 62 of 1902 in the District Munsif's Court of Valangiman. The plaintiff alleged that the defendant failed to pay the amounts due to the two persons named above and that he himself had to pay them. The contract of assignment was dated 28th January 1904, and this suit was instituted on the 16th July 1907. The amount due to the said two persons was in fact paid by the plaintiff's brother and not by the plaintiff himself. The plaint alleged that the plaintiff had made good the amount to his brother by some adjustment with him. Both the Lower Courts have disbelieved the adjustment and dismissed the suit holding that the plaintiff has no cause of action to recover the amount as he has not yet sustained any damage by the defendant's breach of his contract. The defendant also raised the contention that the assignment of the decrees in Original Suits Nos. 61 and 62 of 1902 was brought about by fraud on the part of the plaintiff and that the consideration of the assignment subsequently failed. But these questions have now been set at rest and have not been argued before us.

The main contention in this appeal by the plaintiff is that the nature of the plaintiff's right against the defendant has been misunderstood and that the Lower Courts have wrongly proceeded on the footing that the defendant's obligation under the contract (Exhibit A) was to indemnify the plaintiff against any claims by the two persons to whom he himself owed the debt, which the defendant had agreed to discharge under the contract. Mr. S. Srinivasa Ayyangar who argued the case at great length for the respondent (defendant) argued that the defendant's obligation was to pay the consideration for the assignment to certain other persons than the plaintiff and that the plaintiff had no right to claim the amount himself in variance of the contract, and as he had not proved that he sustained any actual damage by the defendant's failure to perform the contract in the manner stipulated no decree could be passed in the plaintiff's favour. If we understood him aright, he also maintained that the plaintiff's right was only to be indemnified against his creditors' claims. We are by no means sure that the two contentions are not the same in substance though expressed in different forms. It is perfectly clear to us that the amount mentioned in the contract was agreed upon as consideration for

RAGHUNATHA v. SADAGOPA.

ABDUR RAHIM AND SUNDARA AYYAR, JJ.

the assignment of the decrees in the defendant's favour and the plaintiff is entitled to insist that the defendant should pay it in some form or other. It is no doubt conceivable and possible that an assignment of property may be made in consideration merely of the assignee agreeing to indemnify the assignor against some claim by a third party. But this is not the natural interpretation to be placed where the value of the property assigned is ascertained between the parties and the assignee is directed to pay that value to a third party. Such a direction is *primâ facie* intended for the benefit of the assignor. We think it would have been perfectly open to the plaintiff in this case to pay off his two creditors himself and to claim the payment of the consideration for the assignment direct to himself. Where the assignee is himself interested in the payment being made to a third party, there might be reason to hold that the assignor could not alter the mode of payment prescribed by the assignment deed. It may also be conceded that when on the faith of the original direction the assignee has entered into direct relations with the third party and rendered himself liable to make the payment to him the assignor could no longer require the assignee to pay the consideration to himself. See *Siva Subramania Mudaliar* v. *Gnanasambanda Pandara Sannadhi*(1) to which one of us was a party and *Chenchuramayya* v. *Subbaramayya*(2). But these instances do not affect the general nature of the right possessed by a person who for a certain sum of money executes a conveyance in favour of another and agrees that the money should be paid to the third persons. In the decision in *Dorasinga Tevar* v. *Arunachalam Chetti*(3), with which we agree, SUBRAMANIA AYYAR and MOORE, JJ., held that where a person executes a lease to another and the lessee agrees in consideration thereof to discharge the debt due by the lessor to a third person but fails to do so within a reasonable time, the lessor is entitled to recover the amount although he has not paid the debt himself.

The same view was adopted in *Ranganadham Pantulu* v. *Appala Naidu*(4), to which one of us was a party and in *Daswant Singh* v. *Syed Shah Ramjan Ali*(5). It is also in accordance with the rule in England where a vendee of property makes a promise in

(1) (1911) 21 M.L.J., 359. (2) (1911) 9 M.L.T., 79.
(3) (1900) I.L.R., 23 Mad., 441. (4) C.M.A. No. 119 of 1908 (unreported).
(5) (1907) 6 C.L.J., 398.

consideration of the sale to discharge certain encumbrances on the property sold. The judgment of BODDAM and BASHYAM AYYANGAR, JJ., in *Doraisami Tevar* v. *Lakshmanan Chetty*(1), does not support the respondent's contention. The suit there was not to recover the amount which the vendee had promised to pay to the vendor's creditor, but to recover as damages the amount for which the vendor had executed to his creditor a promissory-note on account of interest due to him for a period of one year in consequence of the vendee not having paid the amount immediately. There can be no doubt that the vendor was entitled only to recover the consideration for the sale which the vendee failed to pay to the former's creditor. He could not claim any further damages which he had not actually sustained. *Thangammal Nachiar* v. *Subbammal*(2), decided by MOORE and SANKARAN NAIR, JJ., was a similar case; on the other hand in *Gopala Aiyar* v. *Ramaswami Sastrigal*(3) to which SANKARAN NAIR, J., was a party, *Dorasinga Tevar* v. *Arunachalam Chetti*(4) was followed. *Putti Narayanamurthi Ayyar* v. *Marimuthu Pillai*(5) and *Kumar Nath Bhuttacharjee* v. *Nobo Kumar Bhuttacharjee*(6), were suits for contribution and the plaintiff's right in such cases is undoubtedly only to recover the defendant's portion of the money actually paid by the plaintiff.

The case on which the learned vakil for the respondent mainly relied was *Musammat Izzatt-un-Nissa Begam* v. *Kunwar Pertab Singh*(7). But, in our opinion, it affords him no help whatever. There a mortgagee in execution of a decree on his mortgage purchased the mortgagor's equity of redemption subject to two prior mortgages stated to be for certain sums. It afterwards turned out that those mortgages were valueless. The mortgagor sued to recover from the mortgagee-purchaser the amount stated in the sale certificate as the value of those mortgages. The Judicial Committee held that the claim was unsustainable. According to Their Lordships' view what was sold was the equity of redemption of the mortgagor. The fact that it turned out to be more valuable than it was supposed to be at the time of the auction sale could give no right of action to the mortgagor.

(1) (1904) 14 M.L.J., 285.
(2) (1906) 16 M.L.J., 20.
(3) S.A. No. 133 of 1907 (unreported).
(4) (1900) I.L.R., 23 Mad., 441.
(5) (1903) I.L.R., 26 Mad., 322.
(6) (1899) I.L.R., 26 Calc., 241.
(7) (1909) L.R., 36 I.A., 203 at p. 208.

RAGHUNATHA v. SADAGOPA. — ABDUR RAHIM AND SUNDARA AYYAR, JJ.

They observed: "On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the incumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the incumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property."

It is perfectly clear that the Judicial Committee was dealing with a case where a vendee pays a certain price for the equity of redemption and agrees to indemnify the vendor against the claims of the incumbrances, and not one where he agrees to pay a certain sum of money for the land sold to him and undertakes to pay a portion thereof to incumbrancers. Their Lordships observe that in such a case an express promise to discharge incumbrances against which the purchaser covenants to indemnify the vendor, does not change the nature of the vendor's right which is only to be indemnified against certain claims, and not to have certain sums of money belonging to him paid to another.

For these reasons we are of opinion that the plaintiff is entitled to recover the amount which the defendant agreed to pay to third parties. Mr. Srinivasa Ayyangar invites us to refer the question for decision to a Full Bench, contending that the cases of *Doraisami Tevar* v. *Lakshmanany Chett*(1) and of *Thangammal Nachiar* v. *Subbammal*(2), are in conflict with *Dorasinga Tevar* v. *Arunachalam Chetti*(3), and draws attention to the observation of MILLER, J., in *Subba Naidu* v. *Bathula Bee Bee Sahiba*(4), that there is such conflict. But we do not think for the reasons already mentioned by us that there is any real conflict of authority and we must decline to accede to his request.

It is next contended that as the debts due to the plaintiff's creditors have been actually paid by the plaintiff's brother and

(1) (1904) 14 M.L.J., 285.
(2) (1906) 16 M.L.J., 20.
(3) (1900) I.L.R., 23 Mad., 441.
(4) (1910) 8 M.L.T., 188.

as there is nothing to show that the brother could or would proceed against him, the plaintiff ought not to be given a decree. It is not clear to us that the plaintiff's brother would not be entitled to proceed against him. Assuming, however, that he could not that does not effect the plaintiff's right in the view we have expressed above.

We must finally refer to another contention of Mr. Srinivasa Ayyangar, that the defendant had difficulties in executing the decrees which were assigned to him and that he could not be held to be guilty of default in the payment of the money which he agreed to pay. There is in our opinion no substance in this argument. The defendant's contract was to pay the consideration for the assignment to the two persons referred to above and he was bound to do so within a reasonable time. Moreover it was he himself who tried to repudiate the assignment on grounds which were found to be unsustainable.

The plaintiff is entitled to a decree for the sum of Rs. 1,375 with interest at six per cent. from the date of plaint to this date and further interest at the same rate. The defendant must pay the plaintiff's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

T. VENKATACHALA REDDI (PLAINTIFF), APPELLANT,

v.

T. RANGIAH REDDI AND THREE OTHERS (DEFENDANTS NOS. 1 TO 4), RESPONDENTS.*

1911. July 21, 26 and 27 and August 3.

Civil Procedure Code (Act V of 1908), sch. II, para. 17—Agreement to refer to arbitration a pending litigation, privately, not coming under—Order filing agreement—Appeal, maintainability of—Civil Procedure Code (Act V of 1908), Order 23, rule 3—Mere agreement is not an adjustment under.

An order of a court filing an agreement to arbitrate presented by the parties to a suit is a decree and is appealable as such even under the old Civil Procedure Code (Act XIV of 1882), as well as under section 104 (*d*) of the new Code.

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* Civil Miscellaneous Appeal No. 22 of 1910.