APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Ramesam.

1922, January 19.

EGALA PEDDA PAPA NAIDU AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

P. MUNISAMY AIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Contract—Specific performance—Agreement to sell on payment of a price at a future time at the option of the promisee—Sale by promisor to a third party—Acceptance by promisee, after sale—Offer irrevocable—Offer at an end by the sale—No offer for acceptance—Suit for specific performance by promisee, against promisor and his vendee, whether maintainable.

A, the owner of certain lands, agreed to sell them to *B* on payment of the price before a particular date in any future year at the option of *B*, and *B* exercised his option after the lands had been sold by *A* to a third person and with knowledge of the sale.

On a suit for specific performance of the agreement being instituted by *B* against *A* and his vendee,

Held, that the agreement was not a completed contract but only an offer by the owner to sell to the other, which could become a contract only on acceptance by the latter by payment of the price; and that the offer was at an end on the sale of the property to the third person and that there was no subsisting offer for acceptance and no contract of which specific performance could be enforced against the vendee.

Helby v. *Mathews*, [1895] A.C., 47 ; and *Dickinson* v. *Dodds*, [1876], 2 Ch. D., 463, followed.

SEMBLE.—If the undertaking not to withdraw the offer was not a mere *nudum pactum*, the promisee might maintain an action for damages against the promisor.

SECOND APPEALS against the decrees of R. NARASIMHA AYYANGAR, the Temporary Subordinate Judge of

* Second Appeals Nos. 314 and 315 of 1920.

Chingleput, in Appeal Suits Nos. 5 and 6 of 1919, respectively, preferred against the decrees of T. SUNDARAM AYYAR, the District Munsif of Tiruvallur, in Original Suits Nos. 667 1917 and 558 of 1916, respectively.

This Second Appeal arises out of a suit instituted for specific performance of an agreement to sell the suit lands to the plaintiff. The agreement was contained in Exhibit A, dated 10th October 1913, executed by the second defendant in favour of the plaintiff, the material terms of which appear from the Judgment.

The plaintiffs did not offer to pay the amount of price with a view to get a sale-deed executed by the second defendant, who sold the property to the first defendant by a registered sale-deed, dated 14th March 1916. The plaintiffs brought this suit (Original Suit No. 667 of 1917) against the first and second defendants for specific performance of the agreement alleged to be contained in Exhibit A for the sale of lands to the plaintiffs. There was a previous suit (Original Suit No. 558 of 1916) instituted by the first defendant to recover possession of the suit lands under the sale-deed executed to him. The District Munsif who tried both suits decreed the suit for specific performance in favour of the plaintiff in Original Suit No. 667 of 1917 and dismissed the suit of the first defendant. On Appeal by the first defendant in both the suits, the Subordinate Judge reversed both the decrees and upheld the sale in favour of the first defendant in Original Suit No. 667 of 1917. The plaintiffs in Original Suit No. 667 of 1917 preferred this Second Appeal.

T. R. Ramachandra Ayyar, *T. R. Krishnaswami Ayyar* and *T. D. Srinivasa Achariyar* for appellants.

T. M. Krishnaswami Ayyar and *S. Ranga Achariyar* for respondents.

JUDGMENT.

PAPA NAIDU v. MUNISAMY AIYAR.

This Second Appeal arises out of a suit for the specific performance of a contract, for the sale of the suit land, executed by the second defendant on 10th October 1913 in favour of plaintiffs. The first defendant, to whom the land was sold by the second defendant, on 14th March 1916, is the contesting defendant. The District Munsif decreed the suit; but on Appeal by the first defendant, the Subordinate Judge held that there was no contract and dismissed the suit. The plaintiffs appeal.

The alleged contract is evidenced by Exhibit A, the material portion of which, runs as follows :—

"In respect of the lands which you and others had sold to my mother Ammayammal on the 2nd October 1902, you executed a cultivation muchilika to me on the 10th October 1913 specifying the lands with particulars of numbers. The amount mentioned in the said sale-deed is Rs. 600. And the amount of small loans taken from time to time is Rs. 200. On payment being made of the total amount of Rs. 800 (eight hundred) within the 30th Vygasi of any year whatsoever, I shall execute a sale-deed to you in respect of the lands consisting of acres (10·52) ten and fifty two cents specified in the aforesaid sale-deed. I shall not execute a sale-deed to any other person. Should a sale be so effected to any other person such sale shall not be valid."

It is clear that, under this document, the promisee has the option of paying the price agreed upon, within the 30th Vygasi of any year but that he was not bound to do so. Assuming that there was consideration for Exhibit A and that there is an agreement binding on the promisor, this agreement may, in popular language, be described as an agreement to sell. But what the second defendant really did was that she bound herself to sell to plaintiffs on certain terms, if they chose to

avail themselves of the binding offer and her agreement is, in truth, merely an offer which cannot be withdrawn and certainly does not connote an agreement to buy. It is only in this sense that there can be said to have been an agreement to sell in the present case. (*Helby* v. *Mathews*(1) per Lord HERSCHELL, L.C.). In *Dickinson* v. *Dodds*(2) JAMES, L.J., said :

" Unless both parties had agreed there was no concluded agreement ; "

and MELLISH, L.J., said :

" I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer and until both parties are bound, neither party is bound."

The learned vakil for the appellants, while conceding that the second defendant could not sue the plaintiffs for specific performance before the plaintiffs tendered the price, contended that the plaintiffs must be deemed to have agreed to buy but that only the payment of the price was postponed at their option and that this is a case of successive (as opposed to simultaneous) performance of reciprocal promises (section 54 of the Contract Act). But we find it difficult to follow this argument. So long as the second defendant cannot charge the plaintiffs with a breach of failure to perform though they are to begin, there never was a contract at all. The case in *Charamudi* v. *Raghavulu*(3) was referred to in the course of the arguments. The point now before us was neither argued nor decided in that case. The only point raised in it was whether the contract therein was void as opposed to the rule against perpetuities. It

(1) [1895] A.C., 471 at page 477. (2) [1876] 2 Ch. D., 463.
(3) (1916) I.L.R., 39 Mad., 462.

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may be that, in the case of a personal contract executed so far as one party is concerned, as in *South Eastern Railway* v. *Associated Portland Cement Manufacturers, Ltd.*,(1) it is binding between the parties and no question of the application of the rule against perpetuities arises. But where the agreement is executory on both sides, with an option to one of the parties to do as he likes, there is nothing more than a standing offer, though it may be that, during the life time of the promisor, the distinction between a binding offer and a complete agreement is not of much importance as between the parties. In *Charamudi* v. *Raghavulu*(2) the case arose between the parties and the offer was not revoked by the death of the promisor or otherwise. But when the offer is at an end, e.g., (1) by the death or insanity of the promisor, see Contract Act, section 6 (4), or (2) by the destruction of the subject matter of the offer, *Edwards* v. *West*(3) see section 56 of the Contract Act, or (3) by the promisor selling it to a third party, the sale being known to the promisee before acceptance as in *Dickinson* v. *Dodds*(4) there is nothing to accept. In the last case, if the undertaking not to withdraw the offer was not a mere *nudum pactum* but a binding undertaking, the promisee might maintain an action for damages against the promisor. But in this case the plaintiffs made no such claim against the second defendant either in the Court below or in Second Appeal. So far as the first defendant is concerned, there is no agreement, the specific performance of which can be claimed by the plaintiffs. (See *Dickinson* v. *Dodds*(4).

The result is the Second Appeal fails and is dismissed with costs of the first defendant (first respondent).

K.R.

(1) [1910] 1 Ch., 12.
(2) (1916) I.L.R., 39 Mad., 462.
(3) (1878) 7 Ch.D., 858.
(4) [1876] 2 Ch.D., 463.