APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Cornish.

1931, January 8.

R. N. SAMUVIER AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

R. N. RAMASUBBIER (DEFENDANT), RESPONDENT.*

Indian Registration Act (XVI of 1908), ss. 17 and 49—Partnership—Dissolution of—Partnership assets including immovable property—Agreement adjusting rights between partners involving modification of title to immovable property—Necessity of registration—Agreement designed as an indivisible whole—Clause relating to payment of money—Enforcement of—Admissibility of agreement for purpose of.

Where an unregistered instrument of dissolution of partnership affecting or involving modification of title to immovable property is not merely a record of an already completed division of properties but is regarded by the parties as the only repository of their agreement, no other evidence of its terms can be given except the instrument itself, and, that being so, the instrument being unregistered is not receivable as evidence of any transaction affecting immovable property under section 49 of the Indian Registration Act; and where such an instrument, comprising a number of counterbalancing terms, some affecting immovable property and some not, is designed as an indivisible whole to effect a fair distribution of the assets, it is inadmissible in evidence even for the purpose of proving the terms not affecting immovable property.

APPEAL against the decree of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 28 of 1925.

S. Varadachari and *P. R. Srinivasan* for appellants.

T. M. Krishnaswami Ayyar, *T. M. Ramaswami Ayyar* and *K. Venkateswaran* for respondent.

Cur. adv. vult.

* Appeal No. 21 of 1929.

JUDGMENT.

CURGENVEN J.—The plaintiff, who appeals, brought this suit against his brother for a sum of Rs. 18,800-3-1. The learned Subordinate Judge has narrated in full the circumstances leading up to the claim. To understand how it arose, it is only necessary to explain that there were two firms in which both parties were partners. One of these firms worked under the vilasam V.S.R.S., and in it one Sankaranarayana Ayyar had a half-share while the two brothers had the other half-share. It was a money-lending business, and it also ran a chit fund. The other firm was known as the R.S. firm, it was also engaged in money-lending, and the plaintiff and defendant were the partners. The two firms had dealings each with the other. In 1923 disagreements arose between the brothers, and they decided to dissever their interests. By an agreement, Exhibit K, dated the 4th June of that year, the plaintiff purported to take over all the defendant's interests in the V.S.R.S. firm while those of the plaintiff in the R.S. firm were assigned to the defendants. The latter at the same time accepted liability for a sum of Rs. 13,000 odd due by the R.S. to the V.S.R.S. firm. Later, in February 1925, Sankaranarayana Ayyar and the plaintiff dissolved their partnership in the V.S.R.S. firm and it was arranged that the debt due from the R.S. firm, which by that time amounted to Rs. 18,340-6-1, should be taken over by the plaintiff. It is this sum that formed the subject-matter of the suit.

The defendants raised a number of legal objections to the claim, and it is with these that we are concerned. The first part of the argument is based upon the circumstance that the agreement, Exhibit K, between the parties was not registered. It purported, as we have seen, to dissolve two partnerships, and since each

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partnership involved immovable property, title to which necessarily, it is contended, underwent modification, the whole document is subject to the disqualifications imposed by section 49 of the Registration Act, it can neither affect the property nor be received as evidence of any transaction affecting it. Several replies have been attempted to this objection. In the first place the actual transaction is assigned to an anterior date, when the document would be no more than a record of an earlier oral agreement, and not itself the embodiment and sole repository of the contract. But, supposing this contention to fail, it is urged that the objection with regard to registration does not apply where a partnership involving immovable property is dissolved; or if, again, this position is not maintainable, some parts of the transaction, and in particular that part which gives rise to the present claim, are not affected. A further line of defence resorted to by the defendant is that the plaintiff has not acquired the right to sue by a valid assignment of the actionable claim.

There can be no doubt, in my view, that the agreement of 4th June 1923 was, and was intended by the parties to be, the instrument of dissolution. It was not the less so merely because the operations thereby involved could not all be executed upon the day upon which the document was signed, but some came into force earlier and some were left to be done later. Thus it may be, as the plaint recites, that from some day in May the parties began to open separate accounts, but the document itself recognizes the necessity for registered conveyances, and provides that they should be subsequently executed. The document is formal in design, and opens with the words "agreement entered into on 4th June 1923". The plaint (paragraph 4) gives its date as the date up to which the parties carried on their transactions as

joint partners. In paragraph 11 it is referred to as having been "confirmed and brought into force", and other similar expressions occur elsewhere. Allusion to earlier dates on which certain changes involved in the two dissolutions were introduced does not, in my view, go far to show that what was clearly drafted as a written agreement should be discarded in favour of a prior oral one. There are indications in the evidence that it was not until trouble was apprehended from this source that such a theory took shape. Thus the plaintiff, when examined on 11th February 1928, said that when division was effected on 24th May 1923, "it was decided that an agreement should be drawn up and executed in duplicate and each should keep one as a voucher to evidence the arrangements come to". On the 16th February he made the incompatible assertion that "at the time of the division of the assets there was no intention to reduce to writing the arrangements come to", and went on to say that Exhibit K was drawn up merely as a record of an already completed division. Another contradiction of this construction is to be found in his lawyer's notice to the defendant, Exhibit VI. I have no doubt that the written agreement was, in the words of COUCH C.J., quoted by their Lordships of the Privy Council in *Subramonian* v. *Lutchman*(1), "what the parties considered to be the only repository and appropriate evidence of their agreement", and, under section 91 of the Evidence Act, can alone be looked at for the terms of it.

The next point is whether the document could effect its purpose without registration. As has been said, it sets out to dissolve two partnerships, making various dispositions, which need not be given here in

(1) (1922) I.L.R. 50 Calc. 338 (P.C.).

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detail, with regard to the movable and immovable property until then held by each firm. I would here record my view, in reply to an argument addressed to us, that the terms of this deed can only be construed as actually assigning rights in the immovable property, and not, as is provided for by section 17 (2) (v) of the Registration Act, "merely creating a right to obtain another document which will, when executed, create," etc., rights in the property; so that, as has been laid down by the Privy Council in *James Skinner* v. *R. H. Skinner*(1), it cannot escape the provisions of the Act merely because paragraphs 15 and 16 of it may contemplate the execution and registration of other documents. In *Venkataratnam* v. *Subba Rao*(2) PHILLIPS and MADHAVAN NAIR JJ. have held that a document of the nature of Exhibit K does not require registration, but with all respect I am unable to adopt the reasoning upon which that decision is based. The theory underlying it is that both before and after a partner releases his rights the property is and still remains the property of "the partnership," meaning by that phrase, I think the learned Judges would have conceded, a legal entity which does not itself undergo change. But this is surely to lose sight of the fact that "if from any cause whatsoever any member of a partnership ceases to be so, the partnership is dissolved as between all the other members" [Indian Contract Act, section 253 (7)]. Accordingly where, to take the case of the V.S.R.S. firm as an example, there is a partnership of three persons, and one goes out, the whole partnership is dissolved. If the remaining two persons resume business as partners, it can only be by the formation, tacit or express, of a partnership. If the original partnership of three held

(1) (1929) I.L.R. 51 All. 771 (P.C.). (2) (1926) I.L.R. 49 Mad. 738.

immovable property, and it afterwards vests in the new partnership of two, it can surely only be by a transfer of interest from the one to the other. The analogy drawn between partners in a firm and shareholders in a joint stock company does not seem to be a true one, because, whereas a company is a juridical person, and its identity is unaffected by the transfer of its shares, a partnership is, legally speaking, only an aggregate of individuals and changes with every change of *personnel*. Some discussion of this point by the Court of Appeal will be found in *Ashworth* v. *Munn*(1), one of the *Mortmain* cases referred to in the next stage of the argument. It is worth remark that section 17 of the Registration Act excludes from its provisions any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property, which may perhaps justify the inference that, in similar circumstances, the exclusion of instruments relating to partnership was not contemplated by the framers of the Act, and certainly shows an intention to distinguish between such companies and ordinary partnerships.

Assuming then that a partner in a firm possessing immovable property holds an interest in that property, it would seem to follow that upon a dissolution a transfer of that interest takes place. The question whether he does hold such an interest has been elaborately discussed by JARDINE and TELANG JJ. in *Joharmal* v. *Tejram Jagrup*(2), where the English case law dealing with the subject has been considered at length. The former learned Judge admitted that the tendency of decisions in England had been to bring partnership agreements conveying interests in land among other

(1) (1880) 15 Ch.D. 363.

(2) (1892) I.L.R. 17 Bom. 235.

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assets within section 4 of the Statute of Frauds, as had been done under the Statute of Mortmain, and, although he seems to have inclined towards the general proposition that in India a document transferring a share in the assets, including immovable property, of a firm does not require registration, I do not find that he expressly committed himself to that view. TELANG J. gave reasons for adopting the contrary position, in which I would respectfully express my concurrence. To go no further than to the provisions of the Contract Act, under section 253 all partners, in the absence of a contract to the contrary, are joint-owners of the partnership property; and although certain restrictions are imposed upon them, *quâ* partners, in dealing with their shares in that property, that does not make them the less joint-owners, and, if joint-owners they be, it is difficult to see how they can be said not to possess an interest in the property. The same considerations apply of course even more plainly where, as here with the R.S. firm, a partnership of two undergoes dissolution. Each ex-partner acquires certain sole interests in immovable property by the conversion of rights previously held jointly. I conclude then that the agreement Exhibit K cannot operate to affect the immovable property of which it treats, and, in so far at least as it evidences a transaction affecting immovable property, it is inadmissible in evidence.

The appellant next contends that we may take the terms of the agreement piecemeal, and enforce any not directly affecting immovable property, among these latter being the suit claim. The question first arising here is, does it even operate to dissolve the two partnerships? Analogy sought in the severance of joint status among the members of a Hindu family is, I think, likely to be fallacious. We are here dealing not with status

but with contract. In *Gray* v. *Smith*(1) KEKEWICH J. held that an agreement by one of the partners to retire and to assign his share in the partnership assets, including immovable property, is an agreement to assign an interest in land, and falls within the Statute of Frauds, a decision which, although not argued, was approved by the Court of Appeal. But it does not seem necessary here to settle this point, because, I think, that the authorities are clear that, where a contract comprises a number of counterbalancing terms, some affecting immovable property and some not, designed as an indivisible whole to effect a fair distribution of assets, you cannot pick out such of those terms as do not relate to immovable property and enforce them regardless of the consequences of such a course. The decision in *Lakshmamma* v. *Kameswara*(2) has been criticized as giving weight to prior cases decided under the Registration law as it stood before 1877, when the document could not be received in evidence for any purpose. It was a partition case, and the learned judges held that the transaction was one and indivisible, so that the partition of the movable property could not be separated from the partition of the rest. In *Thandavan* v. *Valliamma*(3), a partition of movables effected by an unregistered instrument which dealt also with the immovable property was held to be valid, but it will be found that the one-third share claimed in the movables was quite separable from and independent of the share in the immovable property. The Court has, it is said, to ascertain whether "the part which is void be in its own nature separable and divisible." Another case, dealing with separable movable property and citing the case last referred to with approval, is *Hanmant* v. *Ramabai*(4). So

(1) (1889) 43 Ch.D. 208.
(2) (1882) I.L.R. 13 Mad. 281.
(3) (1892) I.L.R. 15 Mad. 336.
(4) (1919) 21 Bom. L.R. 716.

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too where there is a lien or charge upon property, partly movable and partly immovable, effected by an unregistered document, the charge may be enforced upon the movable property, see *Pasupati Venkatapathiraju Garu* v. *Vatsavaya Venkata Subhadrayyamma*(1). These cases are merely illustrations of contracts with separable terms. In *Vyravan Chetti* v. *Subramanian Chetti*(2), which related to an agreement to divide equally the proceeds of a first and second mortgage, all that their Lordships of the Privy Council decided was that, for the purpose of a claim to half the proceeds, the document, although unregistered, could be given in evidence. No question of the inherent divisibility or indivisibility of a transaction into its component parts really arose. An instance of a document effecting partition of movables and immovables, which was considered not to be enforceable as regards movables only, is afforded by a Full Bench case of this Court, *Pothi Naickan* v. *Naganna Naicker*(3). The principle accepted was that

> "when there is an entire contract and part of it cannot be enforced, the whole goes, whereas it is otherwise when an instrument contains two or more distinct contracts, in which case they are severable."

This case was referred to as the law upon the point in *Perumal Ammal* v. *Perumal Naicker*(4), although the kind of transaction dealt with there, being a gift of movable and immovable property, stands upon a different footing, and no question of upsetting the balance of a bilateral contract arises. Where a party relinquished his claim to property, comprising movables and immovables, in consideration of a sum of Rs. 1,000, it was held in *Bisheshar Lal* v. *Musst. Bhuri*(5) that, as this consideration could not be apportioned

(1) (1918) 47 I.C. 563. (2) (1920) I.L.R. 43 Mad. 660 (P.C.).
(3) (1915) 30 M.L.J. 62 (F.B.). (4) (1920) I.L.R. 44 Mad. 196.
(5) (1920) I.L.R. 1 Lah. 436.

between the real and personal estate, the document could not be admitted for any purpose whatever.

The conclusion to be derived from these cases is that no hard and fast rule can be drawn as to the divisibility, and therefore the enforceability, of some terms in a contract apart from the remainder. If justice can be done between the parties by a partial enforcement, the Court will enforce, and not otherwise. Turning now to the document before us, I think I am right in saying that Mr. Varadachari for the appellants has not attempted to show that, on this principle, the suit amount can be separated from the other property dealt with. In the first place, the plaintiff takes over the defendant's interest in the V.S.R.S. firm, and the defendant the plaintiff's interest in the R.S. firm with an indemnity clause in each case. Then the brothers owned an extent of wet land, of which the plaintiff was to receive 70 acres 60 cents, and the defendant the remainder (area not stated, but said to be considerably less). The plaintiff was to have all the outstandings, and to meet the liabilities of another business, known as the Munnirpallam business, hitherto jointly owned. There were several other assignments of property, some of it immovable, which I need not particularize. It is evident, therefore, that if, on the footing of this agreement, the defendant is held solely liable for the suit item, as a liability of the R.S. firm assumed by him under it, it must be in entire disregard of the consideration which led him to assume that liability. In the case of such a contract as this, the terms of which are inextricably united, the only course, in my view, is to regard it as a single transaction affecting immovable property, within the meaning of section 49 of the Registration Act, and to decline to receive the document as evidence of any of its terms.

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The final ground taken by the appellants upon the question of registration is that there was no occasion to adduce evidence of the terms of the contract, as they had been admitted by the defendant. It is true that the defendant admitted that he had executed Exhibit K, but he set up a further agreement, copy of which he filed as Exhibit XXV, which would have had the effect of very substantially modifying the terms of Exhibit K. It cannot be said, therefore, that the parties were *ad idem* as to the terms of the contract between them.

Since the inadmissibility of Exhibit K is fatal to the plaintiff's claim, the question of the validity of the assignment of the debt to him by the V.S.R.S. firm does not arise. The appeal is dismissed with costs.

CORNISH J. CORNISH J.—I have come to the same conclusion, and will briefly state my reasons.

The plaintiff's evidence is that Exhibit K was intended to embody the agreement between him and the defendant. He says:—"Even when the division was effected on 11th Vykasi 1098 (corresponding to 24th May 1923), it was decided that an agreement should be drawn up and executed in duplicate, and each should keep one as a voucher to evidence the arrangements come to." He adds that a draft of an agreement was prepared a few days later; that two fair copies were prepared from the draft, each being executed by plaintiff and defendant; and that Exhibit K is the agreement executed by both and kept by the plaintiff. Further, Exhibit K is in form an agreement, and does not purport to be a memorandum of an agreement previously made by the parties. It begins,—"Agreement entered into on 4th June 1923 by both of us." In these circumstances, it appears to me that Exhibit K constitutes the contract between the parties; and consequently, under section 91, Evidence Act, no other

evidence of its terms can be given except the document itself; see *Subramonian* v. *Latchman*(1).

It is plain from a perusal of Exhibit K, clauses 2, 5, 15 and 16, that immovable properties exceeding Rs. 100 in value were being assigned; and it will follow by reason of sections 17 and 49, Registration Act, that the document would require registration if that which was being assigned on the dissolution of the partnership was an interest in immovable property. I think it is clear upon the authorities that it was an interest in immovable property. The plaintiff and defendant as partners were joint-owners of the partnership assets, movable and immovable; see section 253, Indian Contract Act. A partner, however, has no right to any specific items of the partnership property as representing his share. But he has, in respect of the amount which falls due to him when an account is taken upon a dissolution of partnership, a charge upon the immovable property of the *quondam* partnership, when the assets comprise such property, and this charge is an interest in land; see *Ashworth* v. *Munn*(2). There it was held that a gift to charity by a testator, a partner in a mercantile firm, of the proceeds of the sale of his share in certain land held as partnership property, was a gift of an interest in land, and therefore void under the Mortmain Act. So, too, in *Gray* v. *Smith*(3) it was held by KEKEWICH J., and the Court of Appeal expressed approval, that an agreement by one of the partners to retire from the partnership and to assign his interest in the partnership assets, which comprised land, was an agreement to assign an interest in land which required a memorandum in writing in pursuance of the Statute of Frauds. The ruling in *Venkataratnam* v. *Subba Rao*(4)

(1) (1922) I.L.R. 50 Calc. 338 (P.C.).
(2) (1880) 15 Ch.D. 363.
(3) (1889) 43 Ch.D. 208.
(4) (1926) I.L.R. 49 Mad. 738.

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is inconsistent with these authorities and I respectfully dissent from it. It appears that the learned Judges, in the case of *Venkataratnam* v. *Subba Rao*(1), treated an ordinary partnership as standing on the same footing as a joint stock company with regard to the transfer of a partner's share; whereas, as is shown by the judgments of the Court of Appeal in *Ashworth* v. *Munn*(2) (supra), there is a great distinction between the two. Thus at page 372 BRETT L.J. observed:

> "There are joint stock companies where by the agreement of the partners, that is to say, by the constitution of the company to which they have agreed, there are to be shares in the company, and there are to be shareholders, and by the agreed constitution of the company those shares may be transferred, and the company still continued. Now, in such a case if the company is the owner of land, in one sense, it may be said that that land does not belong to a corporation but does belong to the shareholder; but by the agreement of the parties that matter is to be dealt with precisely as if there was a corporation, that is to say, the shares are to be allowed to be transferred, so that the new shareholders may come into the partnership without the partnership ceasing at all, . . . But when you come to the case of an ordinary partnership not so constituted, which holds land, one partner cannot dispose of his interest without the consent of the others, and supposing he dies, the partnership is at an end, and it may not be possible to ascertain his interest in the partnership without dealing with the land which is the property of the partnership, in which, therefore, he has an interest."

In view of these authorities, the interest in the partnership assets which the parties to Exhibit K purported to assign was, in my judgment, an interest in immovable property; and that being so, the document being unregistered is not receivable as evidence of any transaction affecting that property; see *James Skinner* v. *E. H. Skinner*(3).

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(1) (1926) I.L.R. 49 Mad. 738. (2) (1880) 15 Ch.D. 363.
(3) (1929) I.L.R. 51 All. 771 (P.C.).

Nor can I discover in Exhibit K an agreement to pay the money claimed by the plaintiff which is severable from the agreement transferring the immovable property. If there were two distinct provisions, the one relating to rights to the immovable property, and the other to the realization and payment of money, proof of the latter provision could be given without the document requiring registration; see *Vyravan Chetti* v. *Subramanian Chetti*(1) and the judgment of WALLIS C.J. in *Pothi Naickan* v. *Naganna Naicker*(2). In my opinion, it is impossible to say that the part of the agreement upon which the plaintiff founds his claim to the Rs. 18,000 is independent of the agreement relating to the transfer of the immovable property. It is part and parcel of the same transaction and indivisible from it.

It has also been contended for the plaintiff that he is entitled to invoke the doctrine of part-performance in aid of his claim. In *Arseculeratne* v. *Perera*(3) it was held that this doctrine had no application to the stringent provisions of a Ceylon Ordinance which rendered "of no force or avail in law" any agreement as to land not duly attested by a notary and two witnesses. It seems to me that the doctrine must be equally unavailing against the not less stringent provision of section 49, Indian Registration Act. Reference, however, has been made to section 53-A of the amended Transfer of Property Act. But the conditions which make that provision applicable have not been fulfilled in this case.

Upon these grounds, I think, the plaintiff's suit fails and his appeal must be dismissed with costs.

G.R.

(1) (1920) I.L.R. 43 Mad. 660 (P.C.). (2) (1915) 30 M.L.J. 62 (F.B.).
(3) [1928] A.C. 173.