## APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice Cornish.*

KANJEE AND MOOLJEE BROTHERS (DEFENDANTS), APPELLANTS,

1932, April 28.

*v.*

T. SHANMUGAM PILLAI (PLAINTIFF), RESPONDENT.*

*Transfer of Property Act (IV of 1882), sec. 53-A—If retrospective—Transfer of Property (Amendment) Act (XX of 1929)—Indian Registration Act (XVI of 1908), sec. 49 as amended by sec. 10 (3) of the Transfer of Property (Amendment) Supplementary Act (XXI of 1929)—Right to remove sand from land—If, an interest in immovable property—Covenant in an unregistered agreement in respect of a matter collateral to the agreement—Admissibility to prove covenant.*

A written agreement, dated 4th August 1927 and entered into between S and K who were respectively styled lessor and lessee in the said document, provided, *inter alia*, as follows:—(1) that the lessor has received from the lessee a certain amount as compensation, (2) that the lessee shall be at liberty to remove sand or earth from the plots above-mentioned (to a specific depth) and level the plots after removal, (3) that the land should be vacated on or before 1st October 1928 after the removal of sand. The agreement was not registered. A suit was filed by S against K for damages for breach of the covenant to level the land after removing sand or earth therefrom as provided in the agreement.

*Held* that, (i) the agreement was for transfer of an interest in immovable property, (ii) section 53-A of the Transfer of Property Act which was introduced by the Transfer of Property (Amendment) Act (XX of 1929) and section 49 of the Indian Registration Act as amended by section 10 (3) of the Transfer of Property (Amendment) Supplementary Act (XXI of 1929)

* Original Side Appeal No. 11 of 1932.

KANJEE AND MOOLJEE BROS. v. SHANMUGAM PILLAI.

are not retrospective, (iii) inasmuch as damages are claimed in respect of breach of a covenant which was an arrangement collateral to the agreement and which did not affect the land within the meaning of section 49 of the Indian Registration Act, the agreement was admissible in evidence for the said purpose.

APPEAL from the judgment of STONE J. dated 19th January 1932 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 39 of 1931.

*Vere Mockett* and *G. Rajagopalan* for appellants.

*T. M. Krishnaswami Ayyar* and *S. G. Satagopa Mudaliar* for respondent.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by

CORNISH J. CORNISH J.—The defendants are the appellants. They were sued for damages for breach of a covenant to level plaintiff's land after removing earth and sand therefrom. The plaint alleged an agreement dated 25th June 1927. The defendants in their written statement denied this agreement. But they alleged an unregistered agreement in writing dated 4th August 1927 under which, and in consideration of a rent of Rs. 500, they took on lease the suit lands subject to the covenants contained in the agreement; and they further pleaded that "all conditions and covenants binding on the part of the defendants were duly performed and that the lands were properly levelled".

The learned trial Judge has found that the written agreement dated 4th August contained the contract between the parties. Having so found, the learned Judge, rightly in our judgment, held that the agreement was for the transfer of an interest in immovable property. The terms of the agreement were that in payment of compensation (in point of fact a sum of Rs. 500) the defendants were given liberty to remove

sand and earth from the plaintiff's plots of land to depths varying from 2 feet to 8 feet, and were to level the plots after removal. There was also the stipulation that the land was to be vacated on or before 1st October 1928. Although the parties are described in the document as lessor and lessee, the agreement was not, in our view, one of lease. Further, the agreement gave more than a mere licence, and it was not an agreement for the sale of earth and sand as chattels. In our view it was an agreement for the sale of an interest in immovable property. A number of cases, which are not all easily reconcilable, have been cited to us on the question as to what constitutes an agreement for the transfer of an interest in land. In *Marshall* v. *Green*(1) a sale of growing timber, to be taken away as soon as possible, was held not to be a contract for the sale of an interest in land. BRETT J. in that case laid down the following test:

"If they (the things sold) are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section (i.e. section 4 of the Statute of Frauds). But if the thing, not being *fructus industriales*, is to be delivered immediately, . . . then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself. Here the trees were timber-trees, and the purchaser was to take them immediately; therefore, applying the test last mentioned, the contract was not within the 4th section."

It was obviously with this authority before him that COLLINS C.J., in the Full Bench case of this Court, *Seeni Chettiar* v. *Santhanathan Chettiar*(2), stated that it

(1) (1875) L.R. 1 C.P.D. 35, 42. (2) (1896) I.L.R. 20 Mad. 58 (F.B.).

KANJEE AND MOOLJEE BROS. v. SHANMUGAM PILLAI. — CORNISH J.

had long been settled that an agreement for the sale of growing timber, not made with a view to immediate severance from the soil and delivery as chattels, was a contract for the sale of an interest in land. *Marshall* v. *Green*(1) was discussed and criticised by CHITTY J. in *Lavery* v. *Pursell*(2) and the learned Judge points out that the decision turned on this,—that the Court considered that, as the timber was to be cut down as soon as possible and was immediately cut down, the thing sold was a chattel. In *Lavery* v. *Pursell*(2) the contract was for the sale of a house as building materials, and it was held to be a sale of an interest in land; and CHITTY J. finds his conclusion thus:

"I think that the contract does purport to confer on the purchaser the right to be there for the purpose of taking down and removing the materials, and does give him either a complete or a qualified possession; but still a possession of the soil itself—of the land, tenements and hereditaments; certainly of the whole of the house. That being so, if the question was free from authority, I should have thought that this case fell within the statute."

The learned Judge then proceeds to show that *Marshall* v. *Green*(1) was not an authority to the contrary. That reasoning and the conclusion appear to us to be exactly applicable to the agreement with which we are here concerned. Furthermore, the present case is really indistinguishable from *Morgan* v. *Russell & Sons*(3) where it was held that an agreement to sell all the slag and cinders forming part of the soil on certain premises was a contract to grant an interest in land.

The agreement then, purporting to create an interest in immovable property, and being unregistered, the question is whether section 49 of the Indian Registration Act does not prevent the plaintiff from proving the

(1) (1875) L.R. 1 C.P.D. 35, 42. (2) (1888) 39 Ch.D. 508, 515.
(3) [1909] 1 K.B. 357.

terms of the agreement. The learned trial Judge has held that the equity of part-performance established by section 53-A of the Transfer of Property Act enables the plaintiff to enforce his rights under the agreement, notwithstanding that it has not been registered as required by law. It is unnecessary to consider the argument which has been addressed to us on the subject, whether the learned Judge put a right construction on the section, because, in our judgment, the section has no application to an agreement to transfer immovable property which, as in the present case, was made prior to 1st April 1930, the date on which section 53-A is expressed as coming into force. The Transfer of Property (Amendment) Act (XX of 1929), which introduced section 53-A into the Transfer of Property Act, says that the Act, viz., the amending Act, shall come into force on 1st April 1930, and the language of section 53-A itself does not indicate an intention that it should come into force on any other date. But it has been contended, in view of the provisions in section 63 of the Act, that certain specified sections (which do not include section 53-A) shall not affect the terms and incidents of transfers of property made prior to 1st April 1930, and that the inference is that section 53-A was intended to have retrospective effect on transfers of property. Their Lordships of the Judicial Committee, in *Young* v. *Adams*(1), have stated that retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language. Judged by that test, the Transfer of Property (Amendment) Act (XX of 1929), in our opinion, fails to disclose an intention that section 53-A was to have a restrospective effect. In support of the contention reference has been made to Act XXI of 1929, which is entitled " An Act to supplement the Transfer

(1) [1898] A.C. 469.

KANJEE AND MOOLJEE BROS. v. SHANMUGAM PILLAI. — CORNISH J.

of Property (Amendment) Act (XX of 1929)." This Act is likewise expressed to come into force on 1st April 1930. It does not amend the Transfer of Property (Amendment) Act (XX of 1929) but it amends section 49 of the Registration Act by enabling an unregistered document to be received as evidence of part-performance of a contract for the purposes of section 53-A of the Transfer of Property Act. The Act to supplement the Transfer of Property (Amendment) Act XX of 1929 (Act XXI of 1929) is supplementary of the Transfer of Property (Amendment) Act (XX of 1929) and its provisions must be construed accordingly. And if, as we think, section 53-A is applicable only to transfers of immovable property made after 1st April 1930, it must follow that the operation of the amendment made by Act XXI to section 49 of the Registration Act should be similarly restricted.

Now, if the plaintiff cannot rely on section 53-A, the equity of part-performance cannot help him. Although in *Mahomed Musa* v. *Aghore Kumar Ganguli*(1) their Lordships of the Judicial Committee laid down that the equitable doctrine of part-performance was applicable in India, their Lordships in the later case of *Ariff* v. *Jadunath Majumdar*(2) held that the equity could not override the provisions of a statutory enactment. It is clear, therefore, upon this authority that the agreement of the 4th August, being a document which required registration, is prevented by section 49 of the Indian Registration Act (the amendment of this section by Act XXI of 1929 not being effective for the purpose of this case) from being received as evidence of any transaction affecting the property, and that no equitable doctrine can nullify the operation of the section. The words "transaction affecting such property" in section 49 have been held to mean transaction

(1) (1914) I.L.R. 42 Calc. 801 (P.C.). (2) (1930) I.L.R. 58 Calc. 1235 (P.C.).

purporting or operating to create, declare, assign, limit or extinguish a right, title or interest in immovable property; *Saraswatamma* v. *Paddayya*(1). To that extent, therefore, the unregistered document would not be receivable as evidence of its terms. The question is whether the covenant that defendants would level plaintiff's land after removing the sand to the same level as adjacent plots operates to create or declare a right, title or interest in or to immovable property. The covenant certainly operates to create a right in the plaintiff to have something done to his land, and an obligation on the defendants to do it. But we think that the right and obligation so imposed cannot be described in the ordinary sense of the words as "a right, title or interest to immovable property". If this be the correct view, then the document is admissible to prove the terms of the covenant. The learned Counsel for the defendants has, however, contended, upon the authority of *Sambayya* v. *Gangayya*(2), that the covenant is inseparable from the agreement and must stand or fall with it. But in that case the covenant was by the lessee to purchase the premises at the end of the term; it was clearly an agreement to create an interest in land. On the other hand, it is well settled that an unregistered document is admissible as evidence of a personal covenant or of a collateral transaction which does not require registration. It is to be observed that the covenant in question is not a repairing covenant. It did not require the defendants to restore the land after excavating the sand; but they were required to level the land to the level of adjoining lands so as to make it similarly cultivable. In our judgment the covenant was an arrangement collateral to the agreement, and one which did not affect the land within the meaning of section 49.

(1) (1922) I.L.R. 46 Mad. 349. (2) (1890) I.L.R. 13 Mad. 303.

KANJEE AND MOOLJEE BROS. v. SHANMUGAM PILLAI. — CORNISH J.

There remains to be briefly noticed the contention that the defendants had admitted the terms of the covenant in their written statement. They admitted that the August agreement contained covenants, and they averred that they had fulfilled the covenants. But nowhere do they admit the terms of the covenant; they were not discoverable anywhere in the pleadings, and, curiously enough, the plaint makes no mention of the August agreement.

The result of our judgment is that, although our reasons are different, our conclusion is the same as that reached by the learned trial Judge. Accordingly, the appeal fails and must be dismissed with costs. The learned Judge has assessed the plaintiff's damages at Rs. 3,000 for defendants' breach of their covenant to level his land. The plaintiff claimed Rs. 6,000. The only evidence given in the case on this subject was the plaintiff's who said that he thought the cost of levelling the land would be Rs. 5,000. The learned Judge made a personal inspection of the land, but it was under water at the time so that the occasion was not favourable for testing the plaintiff's estimate of damage. Mr. Mockett has told us that defendants had witnesses to give evidence upon the question of damages, but that they were not called because the arguments were confined to the questions of law. In the circumstances, we think that defendants should have the opportunity of calling these witnesses and that the case should go back to the learned Judge for this purpose.

The question of costs at the trial will abide the result of the further enquiry by the trial Court into the question of what damages (if any) are payable by the defendants. There will be no refund of the court-fee paid on the memorandum of appeal herein.

G.R.

Attorney for appellants: *N. T. Shamanna.*