APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

1936

Dec. 7.

A.K.A.C.T.A.L. ALAGAPPA CHETTYAR

v.

A.K.R M.M.K. CHETTYAR FIRM.*

Compromise of suit—Submission to arbitration in pending suit without intervention of Court—Award as adjustment of suit—Civil Procedure Code (Act V of 1908), O. 23, r. 3—Terms of award as a subsequent basis of agreement—Signing of award by parties—Subsequent conduct—Agreement in terms of award—Conveyance of land belonging to debtor and acceptable to creditor in settlement of claim—Choice of lands—Lands encumbered—Obligation to convey free from encumbrance—Transfer of Property Act (IV of 1882 and XX of 1929), s. 55 (1) (g).

On the Original Side of the High Court the plaintiff-appellant filed one suit against the respondent firm claiming a mortgage decree, and another suit for a simple money decree. In both the suits there was no substantial defence. During the pendency of the suits the parties went to arbitration, but without observing the provisions of Schedule II of the Civil Procedure Code. An award was made containing the terms of the settlement which the parties subsequently signed. This settlement was to the effect that the respondent firm was to convey to the plaintiff in partial satisfaction of his claims, *inter alia*, a certain number of acres of land acceptable to the plaintiff out of the lands of a much larger area belonging to the respondent firm. The plaintiff exercised his choice and selected lands nearest his own land, but then discovered that they were encumbered. He repudiated the settlement on the ground of fraud (which was subsequently abandoned) and contended that the respondent firm must, if they wished to abide by the settlement, convey to him the lands free from encumbrances.

On the application of the firm to record the terms of the award as a settlement, the trial Judge, feeling himself bound by the decision in *Laljee Jesang* v. *Chander Bhan Shukul* (I.L.R. 9 Ran. 39), held that the award was an adjustment of the suits by way of an agreement within the meaning of Order 23, r. 3 of the Civil Procedure Code, and also that the plaintiff was bound by his choice and must take the lands in their encumbered state, and ordered the decrees to be drawn up in terms of the award. The plaintiff appealed.

Held, that subsequent to the making of the award the acts and admissions of the parties and the correspondence between them showed that they had mutually agreed to adopt and be bound by the terms of the award as

* Civil Misc. Appeal Nos. 34 and 35 of 1936 from the orders of this Court on the Original Side in Civil Regular Suits Nos. 254 and 483 of 1934.

a basis of settlement, and therefore they must be deemed to have concluded a lawful agreement in adjustment of the suits within the meaning of Order 23, r. 3 of the Civil Procedure Code, which can and must be recorded by the Court and decrees passed in terms thereof.

Bhimraj v. *Sethani*, I.L.R. 14 Pat. 799 ; *Hari Parshad* v. *Scogni Devi*, 3 Lah. L.J. 162 ; *K.M.T.T. Chetty* v. *C.T.A. Chetty*, 6 L.B.R. 55 ; *Rohini Kanta Bhatacharjee* v. *Rajani Kanta Bhattacharjee*, 38 C.W.N. 648—*referred to.*

The question as to whether an award made without the intervention of the Court during the pendency of a suit can be the subject of a decree by reason of Order 23, r. 3 of the Code not considered.

Laljee Jesang v. *Chander Bhan Shukul*, I.L.R. 9 Ran. 39 and other cases referred to.

Held also, that the true meaning of the contract between the parties was that the respondent firm was to convey to the appellant the lands which he chose in part satisfaction of his claim, and free from encumbrances, if any. The principle of s. 55 (*1*) (*g*) of the Transfer of Property Act was applicable to the case. If only unencumbered lands were to be chosen by the appellant, the existence of the encumbrances upon other lands which might be more acceptable formed a restraint upon the reality of the appellant's choice.

P. K. Basu, *Hay* (with him *Venkatram*) for the appellant.

Clark (with him *Chakravarti*) for the respondents.

GOODMAN ROBERTS, C.J.—These appeals are brought in respect of two suits one Civil Regular 254 of 1934 upon a mortgage of Rs. 1,08,402-1-0 with interest and costs and the other Civil Regular 483 of 1934 upon a money decree for Rs. 27,166-13-3 with interest and costs. The first was filed in May 1934 and the second in September of the same year and there was no substantial defence to either suit. On November 10, 1934 the managing partner of the defendant firm signed a submission to arbitration and there was issued on November 11 a purported award thereunder. One of the questions which it might have been necessary to decide was whether the reference to arbitration was valid having regard to the provisions of section 19 (2) (*a*) of the Indian Partnership Act whereby in the absence of any usage or custom to the contrary the implied

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authority of a partner does not empower him to submit a dispute relating to the firm to arbitration. The learned trial Judge (Leach J.) took the view that Meyyappa Chettyar the managing partner in question had the right in the particular circumstances of the case to enter on the reference and did so with the full consent of the other partners. He then passed on to consider the question as to whether the award was an adjustment of the suit by way of an agreement or compromise within the meaning of Order 23 rule 3 whereby it is laid down that such agreement or compromise shall be recorded and that a decree shall be passed by the Court in accordance therewith. The learned trial Judge found himself bound by the decision in *Laljee Jesang* v. *Chander Bhan Shukul* (1) where it was held that the words "Save in so far as is otherwise provided by . . . . . any other law for the time being in force" in section 89 of the Code of Civil Procedure (which directs arbitration proceedings to be governed by Schedule II therein) referred to the provisions of Order 23 rule 3 and that accordingly where there is a reference to arbitration in a pending suit without the intervention of the Court and an award is made it can be recorded and confirmed in the terms of the decree.

Now as regards the second suit a dispute arose over the application of the terms of the purported award and a consent order was passed on November 16, 1934 whereby the case was to stand out of the list for a month and if the parties had not then agreed and filed a petition of compromise there should be a decree in favour of the plaintiff. The plaintiff declined to file the petition of compromise, and the defendants accordingly asked that the purported award should be made a decree of the Court. The learned trial Judge

(1) (1930) I.L.R. 9 Ran. 39.

however made a decree in the terms of the consent order of November 16. It was appealed against and the appellate Court held that the subject matter of the suit had been settled in Madras on November 11th, that the agents in Rangoon had no authority to cancel this settlement, and that the consent order was passed under a mutual mistake of fact; the case for the defendants had not been put before Leach J. in this way nor had the facts been completely explained to him and the result of the appeal was that the parties found themselves back in the position in which they were before the consent order was passed. Applications were thereupon made (to Leach J.) seeking decrees in accordance with what was then called the award of the arbitrators. Having held that Meyyappa Chettyar the managing partner of the defendant firm was entitled to enter upon the reference and that the Court was bound by the decision in *Laljee Jesang* v. *Chander Bhan Shukul* (1) he ordered decrees to be drawn up in each suit forthwith. The present appeal to us is from his decision.

Now it has been pointed out to this Court that when the purported award was before the parties Meyyappa Chettyar signed it page by page and as the agent of the defendants entered into a contract upon the basis of its terms. There was correspondence between the parties which shews in my opinion that the defendants chose the terms of the purported award as the basis of settlement between the parties. The question of whether there was a ratification need not be discussed if at some time subsequent to the award there was a new contract between the appellant and respondents. Mr. Basu for the appellant contended that if a question of ratification is involved it is the submission to

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arbitration which must be ratified and not the award, but the true position between the parties does not appear to depend upon ratification but can, as I say, be gleaned from the correspondence.

Meyyappa Chettyar promised to transfer properties to be selected by the appellant in Pyapôn district in the terms of the award, which were as follows :

[His Lordship set out the terms of the award of which paragraph 3 was as follows :]

3. In respect of Rs. 1,39,068-14-3 due and payable to the 1st party by the 2nd party, as shown in paras. 1 and 2, out of the properties already given as security to the 1st party by the 2nd party for the amount of claim shown in para. one, one house No. 836 in Dalhousie Street, Rangoon, one house No. 115 in Oliphant Street (Rangoon), two houses Nos. 59 and 61, in 122nd Street (Rangoon) and one house No. 5 in Obo quarter, Montgomery Street, Pazundaung, in all, 5 houses, and 483·97 acres of land acceptable to the 1st party out of the lands belonging to the 2nd party at Pyapôn, in place of 483·97 acres of land in Eikangyi, being the remaining item of the property in the said security (already given to the 1st party by the 2nd party) shall be conveyed to the 1st party ; the above said 483·97 acres of land in Eikangyi given as security to the 1st party by the 2nd party shall be released from the said security ; the Deeds of the same shall be returned to the 2nd party by the 1st party ; the said five houses in Pazundaung, Rangoon, and 483·97 acres of land directed to be delivered as above shall be valued at Rs. 1,08,420 and conveyed to the 1st party by the 2nd party, and similarly 115 acres of land acceptable to the 1st party out of the lands of the 2nd party at Pyapôn, shall be conveyed to him for Rs. 13,666-13-3, the total sale amount *viz.* Rs. 1,22,068-14-3 shall be credited towards the sum of Rs. 1,39,068-14-3 as shown in this para. ; and the balance of Rs. 17,000 shall be paid thus ; Rs. 7,000 with interest 0-4-0 by the 30th Ani Yuva (14-7-35) and Rs. 10,000 with interest as above by the 30th Ani Dhathu (13-7-36) to the 1st party by the 2nd party, and accounts adjusted.

Accordingly as Mr. Venkatram the advocate engaged on behalf of the appellant wrote to the respondents on January 11, 1935:

"Only on such assurances and believing that the lands which my clients have selected would be available to them my clients' principal agreed to come to terms and sign in the alleged award."

The letter went on to allege that the settlement had been obtained by fraud (a suggestion which there is no evidence to support and which has been subsequently dropped) and that the lands which appellant wanted should be redeemed from encumbrances in which case

"my clients are still prepared to accept these lands in accordance with the settlement."

To that letter Mr. Chakravarti the respondents' advocate replied that

"the allegation on which your clients are trying to recede from the agreement arrived at between our respective clients is without any foundation."

He added that the respondents were filing an application to record the agreement under Order 23 rule 3 that day, but even so I think it would be natural if the appellant were seriously to contend that no agreement was ever arrived at that he should at once place this view upon record; no reply was ever made to that letter.

When the appellant asked for a decree in the terms of the order of November 16th and his objections to the defendants' application were filed on January 12, 1935 he set out his case in the following way.

Paragraph 2.

"The defendant asked the plaintiff to settle the matter outside the Court and negotiations for such settlement were going on for

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a long time. The terms embodied in the alleged award were come to under the following circumstances and the award was obtained by fraud " . . .

then after further narrative it continues

" the plaintiff at the request of the defendant agreed to refer the matter to the arbitration of four persons. Out of four, three only decided the matter "

This is in substance a claim as to the validity of the award.

" When plaintiff signed the document he did so under the impression and understanding that he could select the lands out of the lands belonging to the defendant in the district of Pyapôn close to his lands which the defendant stated before were available. Immediately after his signing he intimated to his agent in Rangoon to select the lands close to his other lands."

After pointing out that the lands chosen by the plaintiff were encumbered (and the plaintiff alleged these encumbrances were effected after the negotiations for settlement had started)

" Plaintiff submits that fraud was committed on him by the defendant for the purpose of getting plaintiff's signature in this settlement. Plaintiff pleads that the adjustment has been obtained by fraud of the defendant and as such is void and should not be recorded."

In suit No. 254 the defendants also referred to an agreement in their petition of January 21, 1935 (Exhibit 5). They say

" on the 11th November 1934 the terms of settlement were recorded and the plaintiff and defendants agreeing to abide by them signed the document containing the agreement. The parties have thus bound themselves to the terms of the said written compromise which wholly adjusts the said suit "

and then continue in paragraph 4

" the plaintiff is now receding from the said agreement which the defendants submit the plaintiff is not entitled to do after the suit has in fact been adjusted wholly by a lawful agreement."

On January 25th the plaintiff files written objections to this petition :

1. The plaintiff submits that the document dated the 11th November 1934 is invalid, unenforceable in law and cannot be admitted in evidence as an award or otherwise.

2. Plaintiff submits that the agreement is not an adjustment within the meaning of Order 23 rule 3 and that the defendant is not entitled to apply to record the agreement.

3. Without waiving the above objections but humbly insisting thereon plaintiff states that the terms agreed upon with reference to the suit claim are as follows :

(he then sets them out in the rest of the paragraph and in paragraph 4).

5. Plaintiff states that his consent to the agreement was obtained by wilful misrepresentation . . . . . .

(and then in paragraph 7)

submits that by reason of defendant's misrepresentation and/or by his refusal to perform the terms of the agreement defendant is precluded from setting up the agreement in answer to the plaintiff's claim.

It is strange to read the correspondence and these documents and then to listen to the contention of the appellant who was plaintiff in the suit that the alleged award never formed the basis of any agreement at all. His whole case was not that there had been no agreement but that he was tricked into signing it. Yet directly the time came for substantiating his charges of fraud he entirely abandoned them ; and he tried to proceed upon the footing that the purported award and submission to arbitration were invalid, and that because the agreement between the parties was one which adopted the terms of the purported award it was itself invalid and could not be sustained.

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In my opinion there is no question of ratification here; nor does the question arise as to whether an award made without the intervention of the Court during the pendency of a suit can be the subject of a decree by reason of Order 23 rule 3. The time may come when the case of *Laljee Jesang* v. *Chander Bhan Shukul* (1) may have to be considered by a Full Bench of this Court; I offer no opinion as to the correctness of that decision. It is at variance with the rule laid down by Rankin J. in *Amar Chand Chamaria* v. *Banwari Lall Rakshit and others* (2) and the question has been before the High Court at Lahore in *Hari Parshad* v. *Soogni* (3) which held that the parties must agree before such an award is recorded as an adjustment under the rule. It has been followed in Calcutta in *Rohini Kanta Bhattacharjee* v. *Rajani Kanta Bhattacharjee and others* (4) and is in conformity with the decisions in *Bhimraj Nanai Lal* v. *Munia Sethani* (5). (In this view the words "any other law in force" in section 89 of the Code of Civil Procedure cannot include the provisions of the rule.) On the other hand a Full Bench in Allahabad (Mukerji J. dissenting) expressed the contrary view in *Gajendra Singh* v. *Durga Kunwar* (6) and was followed by a Full Bench in Madras in *Subbaraju* v. *Venkatramaraju* (7). The High Court of Bombay has reached a similar conclusion. The matter was also considered in *K.M.T.T. Shanmugam Chetty* v. *C.T.A. Annamalay Chetty* (8). It is manifest that the law on this point has received different interpretations in different parts of India but in this appeal there is in my opinion a plain contract to be dealt with which is independent of the validity of

(1) (1930) I.L.R. 9 Ran. 39.
(2) (1922) I.L.R. 49 Cal. 608.
(3) (1921) 3 Lah. L.J. 162.
(4) (1934) 38 C.W.N. 648.
(5) (1935) I.L.R. 14 Pat. 799.
(6) (1925) I.L.R. 47 All. 637.
(7) (1928) I.L.R. 51 Mad 800.
(8) (1912) 6 L.B.R. 55.

the submission to arbitration or its ratification or of the purported award save in so far as the parties to the agreement chose to make it in the precise terms of the purported award. It is beyond question that there is an adjustment which can be recorded within the meaning of Order 23 rule 3 but the only matter to be considered is what the terms of the contract mean and whether the appellant was bound thereunder to select for himself lands of the respondents which were unencumbered at the date of the agreement.

In my opinion he was not so bound. The learned trial Judge in arriving at his conclusion dealt with the purported award and I deal with the same subject matter merely holding that the parties are bound by the agreement they have entered into upon those terms. He says :

"The award provides that the plaintiff shall be at liberty to select whatever lands he prefers and Mr. Venkataram has contended that he should be at liberty to select lands which have been encumbered if he desires—I see no reason why the plaintiff should not select encumbered lands if he wants to but if he does so he will take them subject to encumbrances. But he has over 2,000 acres of unencumbered lands also to choose from."

By the contract the plaintiff was to take lands in Pyapôn district instead of cash or certain lands in Pegu which were at first offered to him in lieu thereof but which he refused to accept. It was submitted that even if section 54 of the Transfer of Property Act 1922 did not apply the rights and liabilities of a buyer and seller respectively devolved upon the parties just as they would in the case of an exchange under section 120 of the same Act. By virtue of section 55 (*1*) (*g*) of the Act in the absence of a contract to the contrary the seller of immovable property is bound to pay all public charges and rent due in respect of the property up to the date of the sale, the interest on all

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incumbrances on such property due on such date and except where the property is sold subject to such incumbrances to discharge all incumbrances on the property then existing.

The true meaning of the contract was that the appellant should take certain lands in part satisfaction of a sum due in cash. I think it unnecessary to decide whether there was either a sale or an exchange of immovable property free from incumbrances in Pyapôn for a charge on lands in Pegu, because the construction to be put upon the contract is such (and Mr. Clark admitted that it was the only reasonable construction) that lands conveyed should not be encumbered at the date of conveyance. Mr. Clark contended that the fact that the lands to be taken were to be lands acceptable to the appellant out of those *belonging to* the respondents at Pyapôn and *should be conveyed* by the respondents, was in his favour and he urges that the respondents could not convey without the consent of the mortgagees. In the evidence of Radhakrishna, clerk to the respondents, it appears that he made a list of unencumbered lands from which the appellants could choose, and the plaintiff writing to his agent told him merely to get first class lands in Pyapôn and said no word about particular lands which he desired and which afterwards turned out to be encumbered lands.

Mr. Hay's reply to this is brief but it appears to me to lead to a sound conclusion. He says in effect that the respondents are no worse off if they pay off the encumbrances on the piece of land which the appellant wants and raise money to do so by creating new encumbrances on lands which the appellant has not selected. If only unencumbered lands are to be chosen, the existence of the encumbrances upon other lands which might be more acceptable forms a restraint upon the

reality of appellant's choice. Were the construction sought after by the respondents correct they could, if the encumbered lands were in fact more desirable, wait until some less desirable properties were selected and then pay off their encumbrances on the more desirable lands. I think the parties must be deemed to have had in contemplation that the appellant could choose any of the respondents' lands he happened to like in Pyapôn to be transferred to him free from encumbrances : obviously (and it is admitted) he was not intending to take lands heavily encumbered in satisfaction of his claim, and equally obviously he was expecting to get and it must have been in contemplation that he should have an unfettered range of choice before him.

For these reasons I am of opinion that effect should be given to the subsisting contract dated November 11 1934 between the parties and decrees must be passed in each suit in accordance with its terms. With regard to Civil Regular 254 of 1934 the lands to be conveyed from the respondents to the appellant must be discharged by the respondents from all incumbrances subsisting on them.

Substantially the appellant has obtained the relief which he sought : his appeal was necessary in order to obtain a conveyance of the lands acceptable to him freed from incumbrances and accordingly I am of opinion that he should have his costs both here and upon the Original Side ; the costs here are assessed at ten gold mohurs for each appeal making twenty in all. Liberty to apply on the Original Side on any matter affecting the construction of the contract, mesne profits and the date of conveyance.

DUNKLEY, J.—I agree that these appeals must be allowed. The operative part of the order of Leach J.,

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dated 11th March, 1936, from which the appeals have been brought, is as follows :

" The award will, therefore, be filed as constituting a compromise of the claims, and a decree will be drawn up in each suit in accordance therewith."

The learned Judge seems to have overlooked that the petitions of the respondent firm in the two suits, dated respectively, 21st December 1934, and 21st January 1935, were not based on the award as such, but were based on the subsequent agreement of the parties to abide by the award. It is open to the parties to a suit to adopt any method they please for the purpose of coming to an agreement in settlement of their disputes. If they choose to adopt the method of asking certain persons to decide what are fair and proper terms of settlement (without informing the Court of their action) and those persons decide on certain terms, and the parties themselves mutually agree to adopt and be bound by those terms as a basis of settlement, then the parties have concluded a lawful agreement in adjustment of the suit, within the meaning of Order 23, Rule 3, of the Code of Civil Procedure, just as much as if they had arrived at those terms after direct negotiation between themselves ; it matters not whether the decision of the persons called in to settle the terms is valid in law as an award. If authority is needed for this self-evident proposition, it is to be found in *K.M.T.T. Shanmugam Chetty* v. *C.T.A. Annamalay Chetty and one* (1), *Hari Parshad* v. *Soogni Devi* (2), *Bhimraj Nanai Lal Firm* v. *Munia Sethani* (3), and *Rohini Kanta Bhattacharjee* v. *Rajani Kanta Bhattacharjee and others* (4). The managing partner of the

(1) (1912) 6 L.B.R. 55.
(2) 3 Lah. L.J. 162.
(3) (1935) I.L.R. 14 Pat. 799.
(4) 38 C.W.N. 648.

respondent firm had implied authority to accept the award of the arbitrators as the basis of an agreement for settlement, and he at once did so, and in fact the respondent firm has always accepted it. It is also plain that the appellant accepted the award after it was made. Learned counsel for the appellant submit that we cannot for this purpose look at the objections filed on behalf of the appellant in reply to the respondent firm's petitions under Order 23, Rule 3, although these objections admittedly contain statements that the appellant consented to an agreement in the terms of the award, and attack the agreement on the ground that the appellant's consent thereto was obtained by misrepresentation and fraud (charges which were subsequently abandoned). It is urged that these objections could and would have been amended if the respondents had not, in subsequent petitions, changed their ground by relying solely on the award as such ; but no amendment could have been permitted which would have had the effect of cancelling these unequivocal admissions. It is, however, unnecessary to consider these objections, for the appellant's own evidence, given on 18th November, 1935, and the letter of his lawyer to the respondents of 11th January, 1935 [Ex. IV (1)], show that he did consent to the terms of the award and signed it in token of such consent. His real complaint is that the respondents have failed to implement the agreement. Moreover, the letter of respondents' lawyer, dated 21st January, 1935 [Ex. IV (2)], stating that application was being filed " to record the agreement between the parties under Order 23, Rule 3 ", elicited no reply. It is clear that both parties consented to be bound by the award, and that there is a subsisting lawful agreement between them to adjust the suits on the terms contained in the award. This agreement can and must be

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recorded by the Court, under the provisions of Order 23, Rule 3, and decrees in accordance with the terms thereof must be passed in both suits.

In appeal No. 34 of 1936, arising out of suit No. 483 of 1934, Mr. Basu has contended before us that the appellant is entitled to a money decree for the amount claimed, without qualification, in this suit, by reason of the order of Leach J., passed by consent of both parties in this suit on 16th November, 1934. To dispose of this point it is sufficient to say that the matter is not open to us as it was finally decided by an appellate Bench of this Court by the judgment, dated 1st May 1935, in first appeal No. 15 of 1935.

The crucial point of these appeals is the construction which the learned Judge has put upon the agreement (or award). With the greatest respect, in my opinion the question of the meaning of the terms of the agreement was not strictly before him. He had to consider one point and one only, namely, whether there had been an adjustment of the suits by a lawful agreement or compromise and if so, to pass decrees in accordance therewith. But the question has been considered and decided, and it forms the main ground of these appeals, and therefore it is incumbent on us to consider it and give our decision in regard to it.

The debt of over one lakh was secured by a mortgage of 484 acres of agricultural land in the Pegu district and a house in Rangoon. The debt in the other suit was unsecured. The settlement of the first suit is to be on the terms that respondent firm shall convey to the appellant certain house property in Rangoon, and 484 acres of land in the Pyapôn district *acceptable* to the appellant out of the lands *belonging* to the respondents. The settlement of the second suit is to be on the terms that the respondent firm shall pay to the appellant a sum of Rs. 17,000 in cash, and shall

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convey a further 115 acres of land in the Pyapôn district *acceplable* to the appellant out of the lands *belonging* to the respondents. Now, it appears that the respondent firm owns over 2,000 acres of land in the Pyapôn district and that some of it was mortgaged in October, 1934. The mortgages were not brought to the notice of the appellant or of the four gentlemen who arranged the terms of settlement. Subsequently, when the agent of the appellant made a choice of 599 acres of the respondent firm's lands in the Pyapôn district, in accordance with the terms of the settlement, he was informed that part of the land chosen was subject to mortgage and therefore could not be conveyed. The standpoint of the appellant is that under the terms of the agreement he is entitled to choose any of the lands belonging to the respondent firm in the Pyapôn district, that he is further entitled to a conveyance free of all incumbrances of the land chosen, and that if any part of the land chosen is encumbered the respondent firm must first discharge the incumbrances. The learned Judge dealt with this matter very briefly in his order, without giving any reasons. His decision was that if the appellant selected encumbered lands he would have to take them subject to the incumbrances. Learned counsel for the respondent firm does not attempt to support this view, and in my opinion, it cannot be supported, for it is plain from the whole tenor of the agreement that transfer of lands free from incumbrances is intended. It directs that the lands, not a mere equity of redemption, shall be *conveyed* by the respondent firm, and speaks of the lands as *belonging* to the respondent firm, and describes the transaction as a sale. The use of the words "belong" and "convey" clearly mean that the absolute title of the lands shall be with the respondent firm and shall be transferred by them to the appellant.

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The argument advanced before us on behalf of th respondents is that, although the words " acceptable to the first party " in the agreement mean that the appellant shall be free to choose 599 acres out of any of the respondent firm's lands in the Pyapôn district, the appellant's choice must not be capricious but must be such as a reasonable, prudent man would make under the circumstances, and that as a reasonable man the appellant ought to make his choice out of the 2,000 acres of land which are unencumbered. I am unable to appreciate this argument. I agree that the appellant's choice must be a reasonable choice, but he may have several good reasons for desiring this land which is encumbered, such as, that it adjoins land which he already owns, and therefore it cannot be said that he has acted unreasonably in choosing this encumbered land as part of the land which is to be conveyed to him. It must be borne in mind that the appellant was unaware of the existence of the incumbrances until he came to make his choice, and by mortgaging their best and most favourably situated lands in this way the respondents could render the appellant's right of choice of no value to him. In my opinion, it is the respondent firm which has acted unreasonably in refusing to discharge these incumbrances and convey the selected lands to the appellant. On their own showing the respondent firm could readily raise the amount required to discharge the incumbrances by mortgaging a sufficient portion of their 2,000 unencumbered acres. The conveyances contemplated are stated in the agreement to be sales, and in my opinion they are, in substance, sales within the meaning of section 54 of the Transfer of Property Act. According to the agreement, the ownership of 484 acres of land in the Pyapôn district and 5 houses in Rangoon is to be transferred for a price of Rs. 1,08,420, and the ownership of

rther 115 acres in Pyapôn is to be transferred for a price of Rs. 13,666-13-3. The fact that the prices which the appellant has to pay will never be handed over by him in cash, but will be set off against the decrees which he is to obtain against the respondent firm in the two suits, does not alter the nature of the transactions. This agreement, in fact, embodies two contracts for the sale of lands which are to be chosen by the appellant out of a larger area. Consequently, there being no contract to the contrary, the provisions of section 55 (*1*) (*g*) of the Transfer of Property Act are applicable, at any rate in principle, and the respondent firm is bound to discharge all incumbrances existing on the lands chosen by the appellant. In my opinion, the correct construction of the agreement by which the suits have been adjusted is that the respondent firm must convey outright free of all incumbrances the particular 599 acres of land belonging to the firm in the Pyapôn district which the appellant may choose, and if any of the lands elected by the appellant are subject to incumbrances the respondent firm must discharge those incumbrances before conveyance.

The appellant has been successful in regard to the main dispute in these appeals, and is therefore entitled to his costs on the Original Side and also of these appeals.

[END OF VOL. XIV, I.L.R. RANGOON.]

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