THE INDIAN LAW REPORTS

LAHORE SERIES.

PRIVY COUNCIL.

Before Lord Thankerton, Lord Romer and Sir George Rankin.

RAM SARUP—Appellant,

versus

THE COURT OF WARDS—Respondent.

1939

Nov. 7.

Privy Council Appeal No. 26 of 1939.
On appeal from the High Court at Lahore.

Contract — Champertous agreement — Legality of agreement — Fairness of agreement — Factors to be considered in estimating fairness of agreement — Limitation — Limitation Act (IX of 1908), Art. 113.

A fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, is not *per se* opposed to public policy and is not illegal.

In considering whether the bargain between the parties is a fair one it is essential to have regard, not merely to the value of the property claimed, but to the commercial value of the *claim*. This has to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly it is more reasonable to regard this as confirming their shrewd estimate of the chances, than to condemn the agreement outright as unfair by reason only of the possibility that a great gain to the claimant would have had to be shared with the financier.

Though it is clearly not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging of the fairness of a bargain made at a time when the result of the litigation was problematical.

Held, on the facts, that the agreement in suit was binding and could be specifically enforced.

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Judgment of the High Court, on this point, reversed.

Held, on the question of limitation, that the date of the trial Court's decree, which was the final decree in the suit that was being financed, as it was not appealed against, was not the date fixed for the performance of the agreement to finance the litigation.

Judgment of the High Court, on this point, affirmed *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1), referred to.

Appeal (No.26 of 1939) from a decree of the High Court (March 18, 1937), which reversed a decree of the Subordinate Judge, 1st Class, of Delhi (October, 30, 1935).

The material facts are stated in the judgment of the Judicial Committee.

1939, October 19-20. EDDY, K. C. and PENNELL for the appellant: The agreement may be looked at to see if it is a fair one and not opposed to public policy and not unconscionable. Once the agreement is proved, the onus is, in our submission, on the other side to show it is unfair or opposed to public policy, and, on the evidence they have failed to show this.

The following authorities were cited: *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1), *Kunwar Ram Lal* v. *Nil Kanth* (2), *Lal Achal Ram* v. *Raja Kazim Husain Khan* (3), *Raja Rai Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (4), *Indar Singh* v. *Munshi* (5), *Fateh Jang* v. *Bute Khan* (6).

PENNELL followed.

(1) (1876) L. R. 4 I. A. 23 : I. L. R. 2 Cal. 233 (P. C.).
(2) (1893) L. R. 20 I. A. 112 : I. L. R. 20 Cal. 843 (P. C.).
(3) (1904) L. R. 32 I. A. 113 : I. L. R. 27 All. 271, 279 (P. C.).
(4) (1908) L. R. 35 I. A. 48 : I. L. R. 35 Cal. 420 (P. C.).
(5) (1920) I. L. R. 1 Lah. 124.
(6) (1934) A. I. R. (Lah.) 1017.

WALLACH for the respondent: On the evidence, I submit that the agreement was not a fair one and the High Court was right in holding that it was not, on that account, binding. An agreement which is not a fair one will not be enforced. *Raja Mokham Singh* v. *Raja Rup Singh* (1) and *Chunni Kuar* v. *Rup Singh* (2).

EDDY, K. C. replied.

1939, November 7. The judgment of the Judicial Committee was delivered by—

SIR GEORGE RANKIN.—The appellant Lala Ram Sarup and respondent No.4, Lala Alopi Parshad (hereinin called the plaintiffs), brought the suit out of which this appeal arises in the Court of the District Judge at Delhi on 16th October, 1928. The suit was brought upon an agreement of a champertous nature, dated 2nd October, 1920, and made between the plaintiffs and one Saleem Mahomed Shah. Saleem had since 26th January, 1920, been suing in the Court of the District Judge at Delhi to establish his legitimacy as son to Shahzada Mirza Souriya Jah of the Moghul dynasty, who had died in 1913 possessed of considerable property. Besides Saleem, Souriya had left him surviving two widows and two daughters. The Court of Wards had in 1913 taken over his whole estate as belonging to these female heirs, giving a compassionate allowance to Saleem as a temporary measure. It had been decided by the Chief Commissioner that the Court of Wards should not upon its own responsibility recognise Saleem as entitled to succeed to any portion of the estate, but that he should be invited to obtain the decision of a civil court, and informed that the Court of Wards would give all possible aid to the

(1) (1893) L. R. 20 I. A. 127 : I. L. R. 15 All. 352 (P. C.).
(2) (1888) I. L. R. 11 All. 57, 73.

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civil courts in order to arrive at an early decision with the least possible cost to the litigants. His application for a loan was not unnaturally refused by the Court of Wards; who gave him instead some inexpert advice about bringing a friendly suit for a mere declaratory decree on a court fee of ten rupees and about suing *in forma pauperis*. By June, 1919, he had approached a Muslim lawyer of Delhi by name Abdur Rahman. This gentleman was a Khan Bahadur and has since become a knight and a judge of the High Court of Madras. Having made an arrangement with Saleem to take a fee payable by monthly instalments of Rs.100, he undertook the case and acted for Saleem throughout. On 26th January, 1920, Saleem attempted to proceed *in forma pauperis* by filing an application under Order 33, C. P. C., containing the same particulars as a plaint. He impleaded the Court of Wards, his father's junior widow and daughter and the husband of a deceased daughter. The senior widow had died in 1919. Two schedules (P. 1 and P. 2) were annexed to the application being lists of the moveable and immoveable property left by Souriya according to such information as Saleem had been able to obtain. P. 2 comprised a considerable number of immoveable properties some of which had been held by Souriya as jagirs and were not heritable. The claim was for possession or administration of the whole moveable and immoveable property left by Souriya on the footing that by a family custom over-riding the Mahomedan law Saleem as the only son was the sole heir. He asked for mesne profits, accounts and enquiries and other relief and valued his suit at ten lacs of rupees. The Court of Wards did not, however, fulfil the expectations which it had held out as regards facilitating an early decision in a friendly and inexpensive

suit. Mr. Modad Ali, its manager, opposed the grant of leave to sue *in forma pauperis* on a number of grounds, with the result that the Subordinate Judge on 7th April, 1920, framed four issues and adjourned the case till 3rd August, 1920, for evidence and arguments on the question whether leave should be given. When August came, Saleem, despairing of progress along these lines, had got into touch with respondent No. 4, Alopi Parshad, who at that time (and until 1923) carried on business with the appellant, Ram Sarup, as moneylenders and bankers. Saleem succeeded in arranging that they should find the money to pay the Court fee (Rs.3,000) so that his suit should proceed in the ordinary way and not *in forma pauperis*, and also that they should meet all the expenses of the litigation. Mr. Abdur Rahman on 27th August, 1920, applied to the Court and obtained leave to put in the Court fee by 4th October. The money was paid into the Treasury on 2nd October and on the 8th October the Court made an order treating the application made under Order 33 as a plaint.

The agreement for finance (which is now sued upon) is a registered instrument, dated 2nd October. It recites that Saleem had only an allowance of Rs 100 per month, that he had filed a case *in forma pauperis*, and that it could not be quickly or satisfactorily conducted in that way. A long list of immoveable properties is attached to the agreement: it is said to be in the same terms as the list attached to the application under Order 33. The agreement provides that the financiers, the present plaintiffs, should bear all the expenses of the case and in return therefor should get a three annas share of the immoveable property recovered, provided that this should be increased to four annas should the case be taken on appeal to the Privy

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Council. It was to be in Saleem's option either (*a*) to have the property partitioned and give the plaintiffs their share or (*b*) to have the property valued and pay the plaintiffs in cash.

It is not disputed that the plaintiffs carried out their part of the agreement, providing whatever money was required of them; such monies as had previously been raised by Saleem and paid to Mr. Abdur Rahman being refunded out of the sums provided by the plaintiffs.

The suit was decided by the Subordinate Judge on 10th May, 1925. By his judgment of that date he disposed of a large number of issues which had apparently been argued before him for sixteen days. He found that Saleem was the legitimate son of Souriya; that a document put forward as Souriya's will was not proved and was otherwise invalid; that the alleged family custom of succession excluding females was not proved; and that the succession to the property of Souriya was governed by the rules of Mahomedan law, so that Saleem was entitled to a 14/32nds share and no more. As regards the immoveable property of Souriya he found that there was hardly any dispute, the Court of Wards having filed two lists at Saleem's instance; but the record before their Lordships in the present appeal does not enable them to say what properties were held to have descended to the heirs of Souriya. He found that the claim in respect of moveables was barred by limitation except as regards any moveables which came to the hands of the Court of Wards. He thought it unnecessary to direct accounts or administration as the property was under management by the Court of Wards, and he confined his decree to a direction in Saleem's favour " for possession of 14/32nds

share of the estate of his late father." From this decree neither side, upon consideration, thought fit to bring an appeal.

In consequence of the decision, the Court of Wards on 16th July, 1925, was placed in charge of Saleem's share with retrospective effect on the ground that he was a co-sharer with female wards. Soon afterwards, on 17th September, 1925, Saleem died leaving a widow and a daughter (defendants 2 and 3. in the present suit). As neither these ladies nor the Court of Wards were willing to recognise the plaintiffs' claim under the agreement of 2nd October, 1920, the present suit was brought against them on 16th October, 1928, asking for a decree for possession of 21/256ths share in the immoveable properties belonging to Souriya's estate, and for partition thereof, as well as for mesne profits since 10th May, 1925. The plaintiffs, Ram Sarup and Alopi Parshad, gave evidence and called on their behalf Mr. Abdur Rahman. For the defendants, Mr. Modad Ali, manager of the Court of Wards, Saleem's widow and a collateral relation of his called Nazir-ud-din were the main witnesses. The learned Subordinate Judge (30th October, 1935) held that the plaintiffs' claim being a claim for specific performance of an agreement was by virtue of article 113 of the schedule to the Limitation Act of 1908 barred as having been brought in October, 1928, more than three years from the date of the decree of 10th May, 1925. But he found in the plaintiffs' favour that Saleem was not of weak intellect, that the agreement of October, 1920, was executed by him of his own free will, and that the agreement was not unlawful nor opposed to public policy. The High Court on appeal (10th June, 1937) reversed the trial Court's decision as to limitation,

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holding that time did not begin to run against the plaintiffs on the date of the decree of 10th May, 1925, but only when the plaintiffs had notice that performance was refused. But the learned judges having referred to the evidence as to Saleem's being given to drink and being of weak intellect held that it was "highly probable that Saleem Mohammad Shah was induced to enter into an unfair bargain whereby he agreed to give up property worth a lac and fifty thousand rupees for a sum of ten or twelve thousand rupees." They held that the agreement of 2nd October, 1920, was highly detrimental to his interests and was inequitable and unenforceable. They assessed the reasonable expenses of Saleem's suit at Rs.8,440 and gave the plaintiffs a decree for that sum, refusing them any costs on the ground that the Court of Wards had offered Rs.8,500 before the suit was filed.

Upon the question of limitation their Lordships agree with the High Court that Saleem's obligation under the agreement sued upon was not that on the same day as that on which the trial Court should give judgment he should get the property partitioned or valued and should transfer the plaintiffs' share of the lands or pay the plaintiffs the value thereof in cash. The 10th May, 1925, cannot be regarded as the date fixed for the performance of the agreement of 2nd October, 1920.

On the merits, however, their Lordships consider that the High Court have taken an unduly unfavourable view of the agreement, which was neither extortionate nor inequitable. There is some dispute as to the amount of money found by the plaintiffs for the purposes of Saleem's suit. The plaintiffs produce four cheques amounting to Rs.19,000 which were paid by them to Mr. Abdur Rahman and are dated 23rd

August, 1920 (Rs.5,000), 13th January, 1921 (Rs.500), 21st February, 1921 (Rs.10,000), and 6th June, 1921 (Rs.3,500). Both they and Mr. Abdur Rahman deposed that these cheques were all given for the expenses of the suit. The latter says that by January, 1920, he had agreed with Saleem for an inclusive fee of Rs.10,000 to be paid in monthly instalments of Rs.100. The widow and Nazir-ud-din say that the fee agreed on was Rs.2,000, but the trial judge thought that there was " no reason to disbelieve the statement of Sir Abdur Rahman that his fee was Rs.10,000." The learned judges of the High Court do not say that they disbelieve the statement but express the opinion that a fee of Rs.10,000 was highly excessive. The plaintiffs cannot be held responsible for fixing the fee, which had been settled before they were approached, and their Lordships think it sufficiently proved that the fee was paid by the plaintiffs. The learned Subordinate Judge was satisfied that " about Rs.10,000 in all must have been spent on carrying on the litigation by the plaintiffs," but as there was a junior counsel and some expense upon commissions to examine witnesses it seems reasonably clear that the expenditure exceeded that figure by several thousands of rupees. According to Sir Abdur Rahman he got the money from the plaintiffs' cheques and used it all for the suit; giving money to Saleem, who kept an account of his expenditure which he showed to Sir Abdur's clerk and himself when asking for more money. It seems quite probable therefore that the whole Rs.19,000 was expended in this manner, and had the case gone on appeal to the High Court further moneys to a considerable amount might have become necessary. What then in the events that have happened has been the plaintiffs' reward? It is now admitted that, as the Court of Wards'

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accounts show, the total value of Saleem's share of his father's estate is Rs.88,753 of which three-sixteenths is Rs.16,641. So that the plaintiffs have got a poor return for their venture if indeed they have not actually lost money by it. The trial judge on a review of these matters held that the agreement sued on was neither unlawful nor opposed to public policy and their Lordships agree. The learned judges of the High Court based a contrary opinion mainly upon the statement of Alopi Parshad that he had seen the properties in Delhi which were mentioned in the agreement, and could approximately assess the value of those outside the city; and that he estimated the value of them all, including the jagirs, at about eight lacs of rupees. Mr. Modad Ali, the Court of Wards' manager, deposed, "The value of the property was fixed by the plaintiff (i.e., Saleem) as ten lacs in which he claimed his own share, but the value of the whole property in fact was about three lacs." The learned judges of the High Court taking three-sixteenths of eight lacs as Rs.1,50,000 say that by the agreement in suit Saleem "agreed to give up property worth a lac and fifty thousand rupees for a sum of ten or twelve thousand rupees." This, their Lordships think, is to mistake the business meaning of the transaction. Though the Court of Wards was not minded to accept Saleem as Souriya's legitimate son, he had, and was thought by his lawyer and by the plaintiffs to have, a good chance of establishing his legitimacy. Even so, he had certain difficulties to overcome, e.g., as regards the alleged will of Souriya. But beyond that lay a great difficulty—that of proving a custom, in derogation of the rules of Mahomedan succession, whereby he could succeed to the whole estate. On this point he would indeed appear to have had little chance of

success. To speak of the plaintiffs as though they were having three-sixteenths of eight lacs handed to them for ten or twelve thousand rupees is therefore a serious mistake. But in truth the figure of eight lacs refers in part to property which was not heritable at all, and takes no account of any mortgages or charges, still less of any question as to debts left by Souriya. The shrinkage in the value of Saleem's inheritance to the figure of Rs.88,753 may be due in part to a fall in values not expected in October, 1920; but even that is not a contingency too remote to be taken into account by business men striking a bargain for the finance of a suit to recover immoveable property. The High Court's conclusion appears to have been influenced by the evidence that Saleem was given to drink and of weak intellect. This they regard as rendering it "probable that he was induced to enter into an unfair bargain." But there is no evidence that the agreement sued upon was entered into by him while under the influence of drink and much to show that he took a long time to consider it, consulted with his wife and his lawyer and fully understood it. The evidence that he was of weak intellect is very thin indeed, and Sir Abdur Rahman denied this though he admitted that Saleem was occasionally intoxicated. The trial judge had very correctly dealt with the evidence upon this aspect of the case and had found against the contentions of the defendants, which the High Court appear to have accepted on the ground that they were "highly probable." The fairness of the agreement of 2nd October, 1920, must be considered independently of unproved suggestions that it may have been improperly obtained.

Champertous transactions are in their essence speculative and the fairness or otherwise of a parti-

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cular bargain is almost always open to some debate. Saleem was a poor man with a reasonable and, as it turned out, a just claim. He was put by the Court of Wards in the position of having to undertake expensive litigation. He was well justified in his own interest in resorting for finance to persons willing to take a risk; and the plaintiffs were *prima facie* justified in helping him to his rights upon terms that they would share in his good fortune if he succeeded and lose their money if he failed. Not only is there no proof to support the suggestion that the agreement of 2nd October, 1920, was obtained by unfair means or was not fully considered by Saleem and freely accepted by him, but in the events which have happened it appears that, after taking all risks of the suit being unsuccessful, the plaintiffs notwithstanding that it succeeded are likely—to put it no higher—to gain little or nothing by the transaction. Had the suit succeeded in all respects the plaintiffs' reward would doubtless have been high but Saleem would have become a rich man retaining thirteen annas in the rupee. In applying the principle that " a fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy " (*Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1)) it is essential to have regard not merely to the value of the property claimed but to the commercial value of the *claim*. This has to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly, it is more reasonable to regard this as confirming their shrewd estimate of the chances, than to condemn the agreement outright as unfair, by reason only of the possibility that a great gain to the

(1) (1876) L. R. 4 I.A. 23, 47.

claimant would have had to be shared with the financier. Though it is clearly not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging of the fairness of a bargain made at a time when the result of the litigation is problematical. The uncertainties of litigation are proverbial; and if the financier must needs risk losing his money he may well be allowed some chance of exceptional advantage. Their Lordships agree with the trial judge in thinking that the agreement of 2nd October, 1920, is valid and binding.

The order to be made on this appeal should, in their Lordships' opinion, direct that the appeal be allowed, and the decree of the High Court, dated 18th March, 1937, set aside; declare that the agreement, dated 2nd October, 1920, should be specifically performed; that the defendants should be permitted to elect whether to have a valuation of such of the properties mentioned in the said agreement as were recovered by Saleem Mahomed Shah in Suit No. 235/127 of 1920-22 in the Court of the Senior Subordinate Judge at Delhi and to pay three-sixteenths of such value to the plaintiffs, or to have a partition thereof; that the present suit should be remanded to the trial Court for further consideration in accordance with these directions and such other directions in that behalf as the High Court may think fit to give, having regard to the fact that some of the said properties are under management by the Court of Wards. Their Lordships will humbly advise His Majesty accordingly. The defendants must pay the plaintiffs' costs in the trial Court and in the High Court as also the appellant's costs of this appeal.

Solicitors for the appellant: *Lambert & White.*

Solicitor for the respondent: *The Solicitor, India Office.*