APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1918. *January* 16.

MANAGER VITHOBA MADHAV SHANBHAGI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 2 and 3), APPELLANTS *v.* MADHAV DAMODAR SHANBHAG AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT NO. 1), RESPONDENTS.*

Contract—Sale—Sale on condition that the vendor or his descendants should have the right to repurchase—Nature of the right reserved, whether personal or assignable—Specific Relief Act (I of 1877), section 23—Construction of document—Second Appeal—Civil Procedure Code (Act V of 1908), section 100.

One V obtained a decree against G. G being unable to satisfy the decretal debt sold his land to V in 1903 on condition that after the lapse of ten years G or his descendants should have the right to re-purchase it within two years for the same price for which the land was sold. After the death of G, his son was his only descendant and on his death his mother took as heir. She sold the rights reserved to G and his descendants in the sale deed to one M who in turn sold them to the plaintiffs. A suit having been brought to recover possession of the land sold by G, the question was raised whether on the terms of the sale deed of 1903 the intention of the parties was that the right reserved was to be a right personal to G and his descendants or a right which he could assign to any other person.

Held, on the construction of the sale deed, that the intention of the parties was that the assignees outside the family would not enforce the contract specifically. It was a case of personal quality mentioned in section 23 of the Specific Relief Act, 1877, as the personal quality need not necessarily be restricted to particular skill or learning but might include anything peculiar to a man or his descendants which would entitle them to special favour at the hands of the other contracting parties.

In second appeal the High Court will have as good a right as the lower appellate Court to put its own construction upon a document as a whole in order to arrive at the intention of the parties thereto.

SECOND appeal against the decision of E. H. Leggatt, District Judge of Kanara, confirming the decree passed by S. K. Patkar, Subordinate Judge at Kumta.

* Second Appeal No. 1069 of 1916.

Suit to recover possession.

The land in suit originally belonged to one Gidd Hegde. In 1902 Hegde's creditor Vaikuntha obtained a decree against him for certain sums borrowed for family necessity. Hegde being unable to satisfy the decree sold the land in dispute to the decree-holder Vaikuntha by a conditional sale-deed dated March 3, 1903, in satisfaction of the decretal debt. The terms of the sale-deed were :—

"In accordance with the decree passed in that suit Rs. 246-3-6 are due to you which you seek to recover by executing the decree against me. As unnecessary costs would be incurred by such execution of the decree, and as I am not in possession of sufficient funds to satisfy the decretal amount, the members of my family including myself, entreated you to purchase, in discharge of (Rs. 200) two hundred rupees, out of the above mentioned decretal amount, the survey numbers shown in the Khatas given below . . As you acceded to our entreaty, the aforesaid lands described below subject to the mulgeni have been sold to you in virtue of this deed . . . . . You and your descendants from generation to generation are to enjoy the same and you alone are at liberty to make any arrangement which you think fit, in the event of the mulgenidar (perinanent tenant) surrendering his lease to you. I and my descendants have no right nor title in the lands sold to you. All the rights are yours. I am responsible to get the Khatas transferred (to your name). If within two years after the next ten years, we (I or my descendants) get together in our hands Rs. 200 being the amount obtained from you in respect of the sale and if I or my descendants repay (the same) to you, then you are to reconvey the said property to us. If we do not pay within the fixed period, we shall have no right thereafter of re-purchase."

On November 27, 1905, Hegde's widow who inherited the property as heir to her deceased son sold her right in the land in suit with the other property to one Manja Hegde. Manja sold half of the property he purchased to Nagama *kom* Shiva Hegde. On March 18, 1912, Nagama sold the same to plaintiff No. 1. On June 17, 1912, Manja sold the remaining half to plaintiff No. 2. Plaintiffs offered to repurchase the land from the heirs of Vaikuntha (defendants Nos. 1 to 3) under the terms of the sale deed of 1903. They having

1918.

VITHOBA MADHAV v. MADHAV DAMODAR.

refused the plaintiffs filed the suit to redeem and to recover possession of the land.

The defendants 1 to 3 contended that the condition in the sale deed of 1903 was inserted for the personal benefit of the vendor and his descendants and that the assignees from the vendor could not take advantage of it to re-purchase the land in suit from the defendants.

The defendants Nos. 4 to 6 were the assignors of the plaintiffs.

The Subordinate Judge allowed the plaintiffs' claim holding that there was nothing to show that the condition in the sale deed was restricted to the vendor and his posterity ; that the vendor reserved to himself a right to re-purchase the land at a particular period which right was capable of assignment under section 6 of the Transfer of Property Act, 1882.

On appeal, the District Judge, confirmed the decree.

The defendants Nos. 2 and 3 appealed to the High Court.

G. P. Murdeshwar, for the appellants :—I submit that the lower Courts were wrong in holding that the contract to re-purchase was assignable. The sale deed disclosed either a mortgage or a sale out and out with a convenant to repurchase. It was common ground that it was a sale out and out. The covenant in the deed is similar to one in the case of *Situl Purshad* v. *Luchmi Purshad*[1]. The Privy Council held in that case that the power of repurchase was personal to the vendor and could not be assigned : see also *Jhanda Singh* v. *Wahid-ud-din*[2]. Conditions on the exercise of options are strictly construed. Dart on Vendor and Purchaser, pages 272 and 835. The intention of the parties was that the vendor's family only and no others was to have the benefit of the convenant

[1] (1883) 10 Cal. 30 at p. 35. [2] (1916) 38 All. 570.

to re-purchase. The vendor contracted that he or his descendants would pay from their own pocket. The case of *Uthandi Mudali* v. *Ragavachari*[1] is in point.

[COURT :—The contract is not assignable ; it is neither an actionable claim nor an interest in property.]

That is so : vide section 54 (2) of the Transfer of Property Act, 1882. The plaintiffs have purchased a mere right to sue.

Nilkanth Atmaram for the respondents Nos. 1 and 2 :—The question of intention is one of fact. Both the Courts below have taken the view that parties did not intend that the convenant should be personal. The contract to re-purchase is "property" within the meaning of section 6 of the Transfer of Property Act, 1882. The term "property" is used there in the widest sense. The contract in question is assignable : see section 23 of the Specific Relief Act, 1877. It is only when a personal quality is involved in the contract that it is not assignable.

BEAMAN, J.:—In 1903, Gidd Hegde being indebted to Vaikuntha, and Vaikuntha having obtained a decree which Gidd Hegde was unable to satisfy, Gidd Hegde sold the land in dispute to the decree-holder on condition that after the lapse of ten years Gidd Hegde or his descendants should have the right to re-purchase it within two years for the same price for which the land was sold. After the death of Gidd Hegde his son appears to have been his only descendant and on his death his mother took as heir. She then proceeded to sell the right, reserved to Gidd Hegde and his descendants in the sale-deed of 1903, to one Manj Isra, who in turn seems to have sold half to the plaintiff No. 1 and the other half to the plaintiff No. 2.

[1] (1905) 29 Mad. 307.

1918.

VITHOBA MADHAV v. MADHAV DAMODAR.

The question for our determination is whether on the terms of the sale-deed of 1903 and in the light of the facts and circumstances then existing, the intention of the parties was that the right reserved was to be a personal right to Gidd Hegde and his descendants or a right which he might assign to any other person. The assignability of interests in land arising out of contracts has been so long recognised in England that no difficulty ever appears to be felt now in reconciling it with the fundamental doctrine of all contracts, namely, privity between the contracting parties. This difficulty becomes more apparent and often has been felt in England where contracts affecting moveable property, such as the supply of chalk in *Tolhurst* v. *Associated Portland Cement Manufacturers*, (1900)[1], or the supply of eggs in in *Kemp* v. *Baerselman*[2], have been assigned. But running through the whole of this law, whether it relates to immoveable or to moveable property, where the rights originate in contract, we think it safe to say that the principle is that Courts must decide whether it was the intention of the promisor to make the contract personal to the promisee. In India even the general principle now so well settled in England is much complicated by the provisions of the Transfer of Property Act. That is the Statute which governs Courts in this country and it becomes extremely difficult under its provisions to say that a right, if it be a right, of the kind in suit here can be transferred at all. It falls outside the definition of choses in action, for these are confined exclusively to moveables. Nor can it very easily be brought within the terms of section 6, for correctly analysed it amounts to no more than a contract on the part of Vaikuntha to sell the land to Gidd Hegde and his descendants after the lapse of a certain time at a certain price, and such mere contract or agreement for

[1] [1903] A. C. 414.

[2] [1906] 2 K. B. 604.

the sale of land creates no interest in the land as expressly declared in section 54. It is difficult, therefore, to say what form of property could be transferred in a case of this sort within the meaning and language of the Transfer of Property Act. Waiving such difficulties, however, and confining ourselves to what we conceive the true ground of all cases of this kind, we are very clear, although in this we differ from the lower Courts, that the intention of the parties was that Gidd Hegde and his descendants and they alone should be given the privilege of repurchasing this land after the lapse of ten years and within the limited period of twelve years at the same price at which it was originally sold.

We need not pause upon the construction of the term "descendants" favoured by the Courts below. It may be that for the purposes of enforcing the intended rights under this sale-deed of 1903 a mother within the family might by stretch of language have been included within the term "descendants." That is, however, a point of minor importance.

What we find is that Gidd Hegde under the severe pressure of adverse circumstances was compelled to part with his family land. At that time he had no means of saving it from the decree-holder and the terms of the document indicate that he had very little hopes of being in a position to buy it back even after the lapse of ten years. The sentiment of the agricultural classes in this country towards their land is well-known to every Judge of experience; and we can well understand that the creditor may have so far relented as to have given his debtor this *locus pœnitentiæ* after the lapse of ten years and so enable him to get back his family land. Founding the motive of the whole contract in this sentiment, it would be apparent that the vendee would have had no like inducement to allow any stranger to buy

1918.

VITHOBA MADHAV v. MADHAV DAMODAR.

this land from him after the lapse of ten years at the price he had paid for it. There may have been a very good and sufficient reason why he should have made this concession to the original owner of the land and his descendants, meaning by that term his family, but we can see no reason whatever why the vendee should have bound himself in like manner to sell to anyone who had no previous connection with or interest in the land. That being my view of the true nature of the sale-deed of 1905 and the intention of the parties when the reservation clause was made, it follows that assignees outside the family could not enforce the contract specifically.

This would then be a case of personal quality mentioned in section 23 of the Specific Relief Act. Personal quality need not necessarily be restricted to particular skill or learning but may include anything peculiar to a man or his descendants which would entitle them to especial favour at the hands of other contracting parties. Such I believe to have been the case here.

It has been urged that the intention of the parties was found upon by the lower appellate Court, and what was or was not the intention of the parties to a document of this kind is a question of fact, the answer to which is binding upon us. I do not, however, think that this is so in a case of this very peculiar kind. In the first place there is the distinct question of construction, upon which the Courts have to pronounce—and this is a case of real construction—before the plaintiffs could have any show or colour of right at all. I am not prepared myself to say that the lower Court's construction was correct, but even if it were, in the result we have to deal with a question which is quite as much dependent upon the construction of the deed as upon any other materials ; and where that is so, it seems to me that we in second appeal have as good a right as the

lower appellate Court to put our own construction upon the document as a whole in order to arrive at the intention of the parties thereto.

I would, therefore, allow this appeal, reverse the decree of the Courts below and dismiss the plaintiffs' suit with all costs.

HEATON, J. :—I need not restate the facts which my learned brother has set out. I only wish to comment on three points. The first is this. Seeing that the conclusion arrived at by the lower Courts is to so considerable an extent based on what is undeniably the legal construction of a document, it is open to us in second appeal to arrive at our own conclusion.

The second point is this, that the point before us is to determine the intention of the parties and that must be by us determined, mainly on our interpretation of the document. Taking the document I feel in my own mind absolutely no doubt that the intention of the parties did not extend to a possibility of assigning the right of purchasing the property to any one outside the family of the original vendor. In England a right of this kind would be assignable unless it were shown not to be so. But in India I think the sentiment of the people as regards ownership of land is altogether antagonistic to the English idea of assignability. In the first instance, one would assume that where there was an agreement to sell back family land to a member of the family, that agreement was intended to subsist only for the benefit of members of that family. In this particular document I think the recitals and terms used suggest that the parties were dominated by the common sentiment and that there was no intention that the right to buy back should pass to any one outside the family.

1918.

VITHORA MADHAV v. MADHAV DAMODAR.

The third point is this. Assuming that the right to buy back this land had become vested in the lady, who was the mother of the original seller, she parted with her right to a third person. This third person divided or purported to divide the right into two portions, and he sold each of these portions to a different person. It seems to me very difficult to conclude that by assigning or selling a portion of this right he was in fact assigning or selling anything whatever. The purchaser of half the right seems to me to have bought nothing. In this particular suit we have the two purchasers of the halves of the right joining together as plaintiffs. Whether by so doing they could overcome the difficulty which I have suggested is a point which arises in the case, but it is a point which we need not determine, because the case is decided against the plaintiffs on other grounds.

I agree that the suit should be dismissed as suggested by my learned brother.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1918.

January 17.

LAKHICHAND CHATRABHUJ MARWADI (ORIGINAL PLAINTIFF), APPELLANT *v.* LALCHAND GANPAT PATIL AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS.*

Indian Evidence Act (I of 1872), section 58—Fact admitted need not be proved—Defendant's admission of signature to a bond—Proof of the bond—Inference from facts which are not evidence—Inference not according to law—Error of law—Interference by High Court on second appeal.

The plaintiff having sued on a mortgage, the sons of the mortgagor, some of whom were minors, denied all knowledge of the mortgage. One of the sons

* Second appeal No. 938 of 1916.