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propound this contention on the evidence which he adduced has a bearing on the question as to the proper inference to be drawn in fact from that evidence.

As the case was framed, the jurisdiction of the Civil Courts in India was apparently not ousted. But in the view which their Lordships now take, the right of the Government to resume these lands could not be questioned in the Civil Courts.

In the result their Lordships will humbly advise His Majesty that the decree of the High Court at Bombay should be set aside and the suit dismissed with costs, here and in the Courts below.

Solicitor for appellant : *Solicitor, India Office.*

Solicitor for first respondent : *Mr. Edward Dalgado.*

*Appeal allowed.*

A. M. T.

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 PRIVY COUNCIL.
 

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HARICHAND MANCHARAM (DEPENDANT) v. GOVIND LUXMAN GOKHALE SINCE DECEASED (PLAINTIFF).

J. C.<sup>o</sup>

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[On Appeal from the High Court of Judicature at Bombay.]

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 December 20.
 

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*Vendor and purchaser—Specific performance—Agreement for sale—Stipulation for preparation of contract by Vakil—"Condition"—Construction.*

Documents may upon their true construction constitute a binding contract for the sale and purchase of immovable property, enforceable by specific performance, although they stipulate for a contract to be prepared by a Vakil, and that stipulation, together with others, is described in the documents as a condition.

*Von Hatzfeldt-Willdenburg v. Alexander*<sup>(1)</sup>, distinguished.

Judgment of the High Court affirmed.

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<sup>o</sup> Present:—Lord Atkinson, Lord Sumner, Lord Carson, and Mr. Ameer Ali.

(1) [1912] 1 Ch. 284.

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APPEAL (No. 23 of 1921) from a judgment of the High Court in its appellate jurisdiction (29th July 1919) reversing a judgment of Marten, J. (1st February 1919).

The suit was brought in the High Court by the respondent, since deceased, against the appellant for specific performance of an agreement for the sale by the defendant to the plaintiff of certain immoveable property in the City of Bombay, or for damages in lieu thereof.

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

The trial judge, Marten, J., dismissed the suit. The learned judge was of opinion that the agreement was subject to the preparation of a formal contract, and consequently was not a binding contract having regard to the authorities.

Upon appeal that decision was reversed by Macleod C. J. and Heaton J. The learned Judges were of opinion that there was a concluded contract, the stipulation as to the preparation of a contract not being a condition to which the agreement was made subject.

1922, November 7:—*Uppjohn, K.C., De Gruyther, K.C., Holman Gregory, K. C., E. B. Raikes and Parikh* for the appellant.—The two documents did not constitute a binding contract, but were an agreement subject to the preparation of the contract through a *Vakil*: *Pym v. Campbell*<sup>(1)</sup>; *Winn v. Bull*<sup>(2)</sup>; *Ridgway v. Wharton*<sup>(3)</sup>; *Von Hatfeldt-Wildenburg v. Alexander*<sup>(4)</sup>. The evidence of a separate oral agreement, which was rejected, was admissible under the Indian Evidence Act, 1872, section 92, proviso. 3: *Rogers v. Hadley*<sup>(5)</sup>.

<sup>(1)</sup> (1856) 6 E. & B. 370.<sup>(3)</sup> (1857) 6 H. L. C. 238 at p. 263.<sup>(2)</sup> (1877) 7 Ch. D. 29.<sup>(4)</sup> [1912] 1 Ch. 284.<sup>(5)</sup> (1863) 2 H. & C. 227.

[LORD SUMNER:—No oral agreement was pleaded.]

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*Clauson, K. C., Tomlin K. C., and R. J. T. Gibson*, for the respondent :—The documents constitute a complete agreement in Gujarati, the Vakil having merely to draw up in English the terms agreed to.

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Reference was made to *Rossiter v. Miller*<sup>(1)</sup> and *Bonnewell v. Jenkins*<sup>(2)</sup>.

*E. B. Raikes* replied.

December, 20:—The judgment of their Lordships was delivered by

MR. AMEER ALI :—The suit which has given rise to this appeal was brought by the plaintiff in the High Court of Bombay in its Original Civil Jurisdiction for a decree against the defendant for specific performance of a contract entered into on 28th November, 1917, for the sale, by the defendant to the plaintiff, of certain immovable property in Bombay. Two documents in the Gujarati vernacular were prepared on the occasion, one of which was signed by the defendant, Harichand Mancharam, the other by the plaintiff, the vendee, Govind Luxman Gokhale. Both bear one and the same date, and are practically in identical terms.

The document executed by the defendant is marked in these proceedings as Exhibit "A"; the other, signed by the plaintiff, is marked Exhibit "A1". Exhibit "A", after giving the name and designation of the intending purchaser, the plaintiff, and describing the vendor, Harichand Mancharam, proceeds thus:—"I agree to give you in sale the said immovable property, together with the messuage building (standing thereon), for the price of Rupees two lacs and fifteen thousand".

<sup>(1)</sup> (1878) 3 App. Cal. 1124.

<sup>(2)</sup> (1878) 8 Ch. D. 70.

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It then gives the "conditions" of the sale in these terms :—

"The conditions thereof are as follows :—

"1. The bargain paper in respect of the sale of the said immovable property shall be made through a vakil within two days from this day and at the time of making the bargain paper I am to take from you by way of earnest money in respect thereof Rupees ten thousand that is you are to pay the same to me and as regards Rupees two lacs and five thousand being the balance you are to pay the same to me at the time of the execution of the sale deed by me and by way of earnest thereof I am to take from you that is to say you are to pay to me Rupees ten thousand at the time of the (execution of the) bargain paper and the balance of Rupees two lacs five thousand is to be paid to me by you at the time when the deed of sale is executed by me.

"2. As regards the said Jaga premises to be sold suits are pending against me in the High Court. If perchance these suits are decided against me then this bargain shall be treated as cancelled and if such a thing happens then I am to return to you the Rupees ten thousand without interest received as earnest money by me.

"3. As to the costs in respect of stamp, registration, Vakil, &c., in the matter of the said sale which may be incurred on behalf of both the parties, i. e., you and myself the same shall be totalled up and borne by you and me half and half.

"4. The time of completing the said matter of the said sale deed is agreed to be six months from the date of the bargain paper on the decision in the case being given in my favour during the said period,\* I am to get passed, i. e., made out marketable title for you and to complete the matter of sale. If perchance the suit pending in the High Court not disposed of within six months then this agreement shall be in force till the disposal of the said suit and on the said suits being decided in my favour I am to complete the matter of this sale, and if the High Court suits be decided in my favour within six months I am to complete and you are to get completed the matter of sale within six months.

"5. For the purpose of the sale you are to get for me the signature of Ishwarlal the adopted son of Shankerbhai along with your signature on the sale deed.

"6. In the matter of this sale I am not to pay brokerage.

\* The equivalent of I and you are partly altered in the original.

"The agreement I have given and taken from you to the above effect of my and your free will and pleasure. The 28th day of November 1918 correspond with the sud 15th of Kartak 1974, Wednesday."

Exhibit "A1", after reciting the terms of the contract, in clause 7 says as follows:—"7. This bargain is for the purchase of this immovable property together with buildings and structures thereon, (you) have given and and I have taken from you the agreement to the above effect, of our free will and pleasure. The 28th day of the month of November in the year 1918 (corresponding with) the 15th of Kartak sud of Samvat 1974, Wednesday".

The case came on for trial before Marten J. on the Original Side of the Court. The plaintiff contended that the two documents which formed the foundation of the suit, formed a completed contract; whilst the defendant-vendor urged that it was only a provisional arrangement conditioned to the preparation by a Vakil of a formal document evidencing the contract. The learned Judge framed a number of issues, but so far as the present appeal is concerned only the two following are material:—" (1) Whether suit is maintainable having regard to fact that the writing sued on was conditional upon an agreement being entered into? " (2) Whether there was a concluded contract between the parties and if so what are the terms thereof? "

At the trial the defendant attempted to tender some oral evidence to show what actually took place on the occasion when the parties entered into the agreement relied upon by the plaintiff. The trial Judge refused the application in these words: "I reject that evidence; irrelevant and inadmissible."

In their Lordships' opinion he was quite right, under section 92 of the Indian Evidence Act, in rejecting the evidence, and no attempt appears to have been made on appeal to take exception on behalf of the defendant to

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this part of Marten J.'s order. Their Lordships do not think it necessary to refer further to this matter.

On the main case the trial Judge came to the conclusion that Exhibits "A" and "A1" did not constitute a completed contract, chiefly relying on the use of the words, "The conditions thereof are as follows." He considered that the condition that the "bargain paper" in respect of the sale shall be made by a Vakil within two days from the date of the agreement was a condition to which the whole bargain was subject, so that until the Vakil prepared a bargain paper "there was no completed contract". He accordingly dismissed the plaintiff's suit with costs. On appeal by the plaintiff to the High Court in its Appellate Jurisdiction the learned Judges (Macleod C. J., and Heaton J.) arrived at a different conclusion. They held that the two documents executed on 28th November, 1917, constituted a "binding agreement", and that the provision relating to the preparation of a "bargain paper" by a Vakil was not a condition to which the contract was subject, and accordingly they reversed the order of the trial Judge and decreed the plaintiff's suit.

On appeal before the Board it is urged, on behalf of the defendant as it was urged in the appellate Court in India, that the Gujratihabers of 28th November, 1917, represented only a provisional arrangement on which no decree could be made. In support of this contention various clauses in the document executed by the defendant were referred to. It is said that the fact that the bargain paper was to be made within two days from the date of the execution of the documents "A" and "A1", and was to be prepared by a Vakil, and that at the making of the bargain paper the earnest money is to be paid, shows that the real and effective contract was to be founded on the paper prepared by the Vakil.

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Again, reference was made to clause 4, Exhibit "A", viz., that "the time of completing the said matter of the said sale deed is agreed to be six months from the date of the bargain paper on the decision in the case being given in my favour during the said period". It may be remarked here that two suits had been brought against the defendant contesting his title to the property which he had bargained to convey to the plaintiff, and the reference in paragraph 4 is to these two suits. Their Lordships understand that these two actions were subsequently settled, and there is no dispute now as regards the title of the vendor (the defendant).

The appellant's counsel refers also, in support of his contention, to the fact that formal documents were prepared by the defendant's solicitors, in which certain additional terms were inserted, and he urges that the insertion of those terms indicates that the original agreement entered into on the 28th November, 1917, was not intended to be a completed contract.

On behalf of the respondent reliance has been placed on the whole tenor of the two documents, and especially on clause 7 of Exhibit "A1", to show that the parties intended to have a definite and completed agreement on that date when they executed those two papers, and what was left to be done by the Vakil was only to embody the contract in a formal document and to insert in it such subsidiary terms as are usual in such conveyances.

The learned Chief Justice points out in his judgment that the word "conditions" used at the beginning of Exhibit "A", in connection with the preparation of the "bargain paper" by a Vakil, does not mean that it is a condition to which the bargain is subject, but that it is only one of the "terms" of the contract. Their Lordships concur in that view.

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He has also examined at some length the cases in which the principle applicable to the construction of such documents is laid down; it is, therefore, not necessary to refer to them in detail in this judgment. Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway v. Wharton*<sup>(1)</sup> the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In *Von Hatzfeldt-Wildenburg v. Alexander*<sup>(2)</sup> Lord (then Mr. Justice) Parker laid down that where the acceptance by the plaintiff was subject to a condition "that the plaintiff's solicitors should approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract", the negotiations did not form a binding agreement between the parties.

The facts of that case were wholly different from the present, but the judgment marks the difference between a completed and binding agreement and one subject to a condition. Here Exhibits "A" and "A1" show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The reservation in respect of a formal document to be prepared by a Vakil only means that it should be put into proper shape and in legal phraseology, with any subsidiary

<sup>(1)</sup>(1857) 6 H. L. C. 238 at pp. 263, 264.<sup>(2)</sup>[1912] 1 Ch. 284.



terms that the Vakil might consider necessary for insertion in a formal document.

The letter of 1st December, 1917, by the defendant's attorney to the plaintiff's solicitor shows that the terms of the vernacular document "A" were regarded by them as forming the foundation of the contract. They are as follows:—"With reference to your letter of yesterday, delivered to us by your articulated clerk after 4 p.m., we note that you agree that the alterations which you had made in English draft agreement prepared by us and handed to your client are not in consonance with the terms of the Gujrati Chitti which our client gave to yours. We, however, do not agree with you that the English agreement as drafted by us originally, or as sent to you with our letter of the 29th ultimo, is not in consonance with the terms of the said Chitti."

Clause 7 of Exhibit "A 1", to which reference has already been made, is explicit:—"This bargain is for the purchase of this immovable property, together with buildings and structures thereon, (you) have given and I have taken from you the agreement to the above effect, of our free will and pleasure. The 28th day of the month of November in the year 1918 (corresponding with) the 15th of Kartak sud of Samvat 1974, Wednesday". It shows clearly that a completed bargain was intended by the plaintiff.

On the whole, therefore, their Lordships are of opinion that the judgment appealed from is correct, and that this appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondent: Messrs. *Hatley & Hart.*

*Appeal dismissed.*

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