PRIVY COUNCIL.

CHEDAMBARA CHETTY (PLAINTIFF) *v.* RENJA KRISHNA MUTHU VIRA PUCHANJA NAIKER (DEFENDANT).

P. C.*
1874
May 7. 8.

[On appeal from the High Court of Judicature at Madras.]

Champerty and Maintenance—Fraud—Novation—Undue Influence and Threats.

The three childless widows of a zemindar instituted a suit against the rightful heir to their husband's estate, in which they unsuccessful by disputed his legitimacy. Previously thereto they had obtained advances of money from the present plaintiff, and executed in his favor an agreement and a bond, whereby they secured to him the payment of large sums in case they recovered their husband's estate, and virtually gave to him the entire control of their suit. Subsequently they agreed with the rightful heir to compromise the suit, which compromise however was never acted upon, partly owing, it was alleged, to the subsequent conduct of the heir. At the date of the compromise, the heir, who had just attained his majority, and was without proper counsel or assistance, and acted under threats from the plaintiff a powerful and wealthy banker, that he would carry on the litigation against him *per fas aut nefas*, was induced contrary to his own judgment and sense of right, and without any evidence that the sum claimed was really due to the plaintiff to execute a bond in his favor, whereby he bound himself to pay a large sum of money claimed by the plaintiff as being due from the widows; the plaintiff on his part agreeing that he would treat such payment as a satisfaction of his claim against the widows, but meanwhile that he would retain the securities which he held from them.

In a suit brought by the plaintiff against the heir to enforce the last mentioned bond,—*Held* that the bond was wholly invalid and fraudulent as against the defendant, and that as there was no privity of contract between the plaintiff and defendant independently of the bond, it could not stand as a security for anything which might be justly due from the widows.

Semble—The transaction, even if valid, did not amount to a novation; for the plaintiff never abandoned his claim against the widows, but only agreed to abandon his remedy against them, in case he obtained satisfaction of his claim from the heir.

Quære.—Whether the plaintiff could have recovered from the widows, if they had been successful against the heir, the large sums of money secured by their bond and agreement?

The law of champerty and maintenance is not the same in India as in

* *Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR L. PEEL.

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England. The English Statute with regard to champerty is not applicable in the mofussil in India. The Indian Courts in every transaction must decide upon the facts whether it is merely the acquisition of an interest in the subject of litigation *bona fide* entered into.or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt or other improper motive.

Fischer v. *Kamala Naicker* (1) distinguished.

APPEAL from a decision of the High Court at Madras (Holloway and Kindersley, JJ.,) dated 3rd June 1872, affirming a decision of the Civil Judge of Trichinopoly, dated the 16th November 1871.

Terumala Puchya Naiker, the zemindar of Marungapury, an ancient and hereditary zemindari of a class known as an unsettled polliam, died on the 17th July 1864, leaving three widows, Lekamani, Paddamani, and Chinammani (the senior widow being Lekamani), and his reputed step-brother the defendant in the present suit who, on the 17th September 1864, was recognized by the Government as the person entitled to be zemindar in succession to the deceased. The estate was taken under the managment of the Court of Wards, the defendant being a minor; and the widows received a monthly allowance paid to them through the Collector. The family so formed lived as an undivided family under the law of the Mitakshara.

About the middle of 1866 the widows laid claim to the zemindari, on the ground that the defendant was not the legitimate brother of the late zemindar. They thereupon ceased to draw their respective monthly allowances, and on the 21st December 1866 entered into an agreement with the present plaintiff, a wealthly *saukar* or banker in the district, which was as follows :—

"As with reference to the moneys to be borrowed of you by executing loan-bonds in view to meet the exprenses incidental to suing out (our claims) in the Revenue and Civil Courts and before the superior authorities respecting our zemindari, which is now held by the Court of Wards, in their management on behalf of another to whom it is intended to be transferred, and to meet our maintenance expenses

(1) 8 Moore's, I. A., 170.

we have agreed, of our own free-will, to repay, on demand, the amount so borrowed of you with interest at the rates provided for in such bonds, and in consideration of the aid you propose to give us in money and in exertions towards establishing our title to the said zemindari to pay you as allowance and gratuity, immediately after the zemindari is granted to us, one lakh of rupees out of the incomes thereof, and a moiety of the surplus proceeds that may be transferred to us by the Court of Wards; you shall accordingly prosecute the claims, and shall, immediately after the said zemindari is granted to us, have the zemindari under the management of your own agent, disburse the maintenance amounts due to us as per agreement, the *peshkash* (revenue), and the establishment charges, and pay yourself from the surplus proceeds the lakh of rupees above agreed to be paid to you, and we shall redeem the zemindari from your agent's management only after the said amount has been fully paid to you. In the meantime we shall not transgress the directions of your agent in the matter either of the said claim or of our household affairs, &c., or of the management of the zemindari. If on the contrary, we fail so to conduct ourselves, we agree of our free-will to pay you at once without any objection, from out of our assets and those of our heirs, the principal and interest due on the loan bonds, the allowance of one lakh of rupees agreed above to be paid, and the amount forming a moiety of the surplus proceeds remaining with the Court of Wards on that day. We further agree not to execute any bonds in the matter of this claim or debts to anybody other than yourself."

On the 6th May 1867 the three widows executed a bond to the plaintiff, wherein they stated as follows :—

"For the costs of the suit which is now pending about the frauds used against our zemindari, for our domestic expenses, and for the discharge, of the debt contracted by us heretofore, we have this day borrowed of you Rs. 20,000. These Rs. 20,000 we shall pay on demand in cash with interest thereon at I per cent. per mensem."

In September 1868, a suit, No. 30 of 1868, was commenced in the name of Lekamani, the senior widow, against the Collector of Trichinopoly, as agent of the Court of Wards and representative of the present defendant's estate, for the recovery of the zemindari and other property of the value of Rs. 4,11,997-3-1. Lekamani therein raised the question of the defendant's legiti-

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macy. The Collector pleaded that the polliam was an unsettled one, that the Government in consequence had a right to nominate a successor, and that their nomination of the defendant was an act of State which could not be questioned by any Municipal Court; also that the defendant was the lawful heir. On the 23rd July 1869 the defendant, who had recently attained his majority, was put in possession of the zemindari, and immediately afterwards was added as a party defendant in that suit, No. 30 of 1868.

The suit was set down for hearing on the 16th August 1869; and, on the 11th, Commissioners arrived to take the evidence of the widows at their palace. The widows then appear to have become desirous of compromising it, and negotiations for a compromise took place on the 12th August in the presence (as was found by the Civil Judge, whose finding was accepted by the Judicial Commitee), not only of the agents and vakeels of the widows and of the defendant, but also of certain persons acting on behalf of, or as agents for, the plaintiff. The latter represented that a large sum was due from the widows to the plaintiff, and that something was payable to him in respect of his interest under the agreement of the 21st December 1866; and it was further found, that although Lekamani stated that only a small sum was due to the plaintiff, the plaintiff's agents threatened, that unless the defendant would make himself liable for the sums claimed, to the extent of Rs. 62,000, the plaintiff would refuse to a consent to the compromise, and that in consequence of these threats the defendant gave a note of hand for Rs. 62,000 to one Runga Iyengar, who was one of the persons acting on the plaintiff's behalf. The next day (13th August) a *razinama* was signed by both parties and by their vakeels, which declared that the parties had entered into an amicable settlement of the suit; it being agreed that the defendant should place Lekamani and the other two widows in possession of certain private lands of the zemindari for their lives with reversion to the defendant, and that each party should pay their own costs; and concluded by praying that a decree might be entered up in accordance with its terms.

On the 15th August 1869, the plaintiff, who had arrived at Marungapury on the previous day, represented that a sum of

Rs. 67,000, and not of Rs. 62,000, was necessary to meet all demands, and demanded and obtained from the defendant a bond for that amount in lieu of the note of hand which he returned. The material part of this bond was as follows :—

"With reference to the dealings which you had heretofore held with Lekamani and others, widows of my elder brother Terumala Puchya Naiker, the late zemindar, on account of their maintenance and Court costs, as per a loan bond for Rs. 20,000, and an agreement for Rs. 1,00,000, the accounts being adjusted up to date, the sum which was found due by them, and which alone was assigned to be made by me is Rs. 67,000. As I have undertaken to pay you the same, I hereby bind myself to pay you the said sum of Rs. 67,000 within the 30th September of the current year, and get back this bond, and the bond and agreement above referred to. On failure to pay the money within the above prescribed time, I bind myself to pay you, on demand, the said sum of Rs. 67,000 with interest at ½ per cent. per mensem, and receive back this and the aforesaid bonds."

On the 16th August 1869, the *razinama* was filed in the suit No. 30 of 1868. But Counsel for the defendant objected to it, the Civil Court refused to act upon it, and the defendant subsequently repudiated it before the High Court. On the 1st September the Court dismissed the suit with costs on the ground that the polliam being an unsettled one, the Court was not competent to entertain the suit. On the 27th May 1870, the Hight Court at Madras reversed the decree of the Civil Court on the question of jurisdiction, but declined to bind the defendant by the *raziama* which he repudiated. An issue was directed to try his legitimacy, and after much conflicting evidence taken upon two remands, the High Court ultimately decided that the zemindar had been begotten out of wedlock, but born in wedlock, and was therefore legitimate, and on that ground dismissed the suit, but without costs as against the defendant. This finding was afterwards confirmed by Her Majesty in Council.

Before the hearing of the appeal by the High Court, and therefore before the repudiation of the *razinama*, the defendant made default in payment of the bond for Rs. 67,000, and, accordingly, the plaintiff, on the 19th Mach 1870, sued the

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defendant in the Civil Court of Trichinopoly to recover the amount thereof with interest. The defendant admitted the execution of the bond, but pleaded that it was invalid, inasmuch as it had been obtained by fraud and threats and without any consideration.

On the 6th August 1870, the Civil Judge of Trichinopoly, without settling issues, or taking any oral evidence on either side, dismissed the suit with costs. The material passage of his judgment was as follows :—"Inasmuch as I find that there is sufficient evidence on the face of the Exhibits A, B, and C (*i.e.*, the bond of 15th August 1869, the agreement of 21st December 1866, and the bond of 6th May 1867, respectively) coupled with what has been elicited at the hearing, to leave no room in my mind for doubting that the entire transactions, commencing with Exhibit B and culminating in Exhibit A, are tainted with fraud ; that no consideration was received either on account of Exhibit B, or on account of Exhibit A, and that the transaction out of which the plaint matter arose savoured of champerty, I dismiss the suit with costs."

On the 6th February 1871, the High Court at Madras reversed this decree, and remanded the suit for investigation on its merits. On the 16th November 1871, the Civil Court passed its revised decree, after taking evidence dismissing the suit with costs ; the issues settled being, first, whether the bond A had been obtained from the defendant under undue influence and threats of the plaintiff or his people or not ? and secondly whether the bond had been given without any consideration ?

The plaintiff appealed to the High Court, who, on the 3rd June 1872, dismissed the appeal (1). The plaintiff then preferred the present appeal to Her Majesty in Council.

Mr. *Kay*, Q. C., and Mr. *Mayne*, for the appellant, with reference to the consideration for the bond, contended that the abandonment of the transaction evidenced by the agreement of 21st December 1866 was a sufficient consideration to support a fresh contract with the respondent who accepted such abandonment. There was reasonable ground for the claim under that

(1) 7 Mad. H. C. Rep., 85.

agreement, or at least the appellant believed his claim to be valid and therefore the case is within the principle of the cases of *Cook* v. *Wright* (1) and *Callisher* v. *Bischoffsheim* (2). The appellant accepted the respondent as his debtor, although he kept the widow's bond as collateral security; this amounts to novation. The acceptance of a new debtor is the discharge of an old one; see *Spencer's* case (3). With regard to the issue as to undue influence and threats, there were no fiduciary relations between the appellant and respondent, which is an essential element in cases where relief is given againt undue influence—*Lyons* v. *Home* (4). Moreover, a threat to exercise a legal right is not a threat against which a Court will relieve—Pothier on Obligations, p. 18. If there has been a failure of consideration, such failure resulted from the respondent repudiating the *razinama*, and the respondent cannot take advantage of his own act for that purpose—*Stray* v. *Russell* (5). The bond at least is security to cover actual advances made under it whether for costs or maintenance; it would be so even if the English law of Champerty were applicable (which it is not)—*Wood* v. *Downes* (6). The transaction and bond cannot be set aside without restoring the appellant to his original position—*Oldershaw* v. *King* (7), *Wilson* v. *Coupland* (8), *Israel* v. *Douglas* (9), and *Price* v. *Easton* (10).

Mr. *Leith*, Q.C., and Mr. *T. B. Norton*, for the respondent, contended that the whole transction was tainted with fraud, and that the bond was no security even for advances made. No consideration had been proved; the agreement was against public policy, and had been extorted by undue influence and threats. The law of champerty as applicable in India differs from that administred in England. The Courts there regard the substance of the transaction, and take into consideration the question whether there has been a *bonâ fide* intention

(1) 1 B.& S., 559.
(2) L. R., 5 Q. B., 449.
(3) L. R., 6 Ch., 362.
(4) L. R., 6 Eq., 655.
(5) 28 L. J. (Q. B.), 279; S. C. in Ex. Ch., 29 L. J. (Q. B.), 115.
(6) 18 Ves., 120.
(7) 2 H. & N., 517.
(8) 5 B. & A., 228.
(9) 1 H. Bl., 239.
(10) 4 B. & Ad., 433

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to acquire property, or whether the intention is to promote litigation or to profit by inequitable or unconscionable bargains—*Fischer* v. *Kamala Naicker* (1), *Sheikh Abed Hossein* v. *Lalla Ramsaran* (2). It is unnecessary that a fiduciary relation

(1) 8 Moore's I. A., 170; see 1 Mad. H. C Rep., 153.

(2) *Before Mr. Justice Kemp and Mr. Justice E. Jackson.*

SHEIKH ABED HOSSEIN (PLAINTIFF) *v.* LALLA RAMSARAN AND OTHERS (DEFENDANTS).*

The 3rd May 1870.

Champerty—Unconscionable Agreement.

Mr. *C. Gregory* for the appellant.

Baboos *Debender Narain Bose* and *Kishen Sukha Mookerjee* for the respondents.

The following judgments were delivered :—

KEMP, J.—The plaintiff in this case is a mukhtar of the Mozufferpore Zilla. His allegation is that the defendants, having occasion to bring a suit to set aside certain alienations made by their father, and being straightened for means, applied to him, the plaintiff, and entered into an arrangement with him that he, the plaintiff, should carry on the suit on their behalf, furnishing all the expenses of the suit, and that in the event of success he, the plaintiff, was to receive a moiety of certain properties, This was the first arrangement made. This arrangement, it is said, was reduced to writing, and it is alleged that a rough copy of the arrangement, and a piece of blank stamp paper bearing the signatures of the two defendants, were made over to a third party, Goodur Sahoy, on the understanding that if the High Court pronounced in favor of the defendants' claim in the suit to set aside the alienations made by their father, the deed was to be copied out fair on the blank stamp paper and made over to the plaintiff. I will mention here that the alleged original agreement was admittedly, as far as the plaintiff's allegation is concerned, departed from ; and subsequently, it is alleged by the plaintiff, the parties agreed that the sum of Rs. 2,000, which plaintiff alleged he had expended for the purposes of the suit brought by the defendants, was to represent the consideration-money for which the defendants were to give to the plaintiff an *istimrari mukarrari* lease of a share in certain properties, one amongst these properties being the mauza in which their own family residence is situated. It appears that on a former occasion the plaintiff in bringing his suit was met by a plea of under-valuation by the defendants. The plaintiff then prudently withdrew his suit, and has now brought it valuing it at Rs. 800, being one year's profits of the disputed property. Now in a case of this description where the plaintiff, who is a mukhtar of a Court, claims to be entitled to carry into specific performance an agreement alleged to have been entered into by him and the defendants, which agreement savours of champerty, it is necessary that such a claim should be certain, fair, and just in all its parts. In the case before us we have a mukhtar who asks the Court to believe that he advanced

* Regular Appeal, No. 26 of 1873, against a decree of the Sudder Ameen of Tirhoot, dated the 10th July 1870, transfered to the file of the High Court by order of the 15th February 1870, in Special Appeal, No. 2016 of 1869.