APPELLATE JURISDICTION. (a.)

Regular Appeal No. 21 *of* 1862.

VIRDÁCHALA NÁTTÁN.....*Appellant.*

RAMASVÁMI NAYAKAN and others.....*Respondents.*

The ascertainment of the amount of damages is a necessary preliminary to a decree under Act VIII of 1859, sec. 192 for specific performance of a contract and payment of damages as an alternative in case of non-performance.

The application of the doctrine of specific performance to partnerships is governed by the same rules as those which govern it in other cases.

There are only two classes of cases in which specific performance of an agreement to enter into a partnership has been decreed : first, where the parties have agreed to execute some formal instrument which would confer rights that would not exist unless it was executed ; secondly, where there has been an agreement, which has come to an end, to carry on a joint adventure, and the decree that the agreement is valid, prefaced by the declaration that the contract ought to be specifically performed, is made merely as the foundation of a decree for an account.

Injunction granted to restrain a partner from excluding his co-partner from the partnership-business, and from doing any act to prevent its being carried on according to the articles.

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THIS was a regular appeal from the decision of E. W. Bird, the Civil Judge of Negapatam, in Original Suit No. 4 of 1862. The suit was brought by Rámasvámi Nayakan and two others against the appellant, and another to compel specific performance of an agreement in Tamil, dated 21st June 1861, by which the parties contracted to work in partnership an ábkári form of the ta'aluks of Negapatam and Nánilám, which was to continue for five faslis from fasli 1271 (A. D. 1861). The following is a translation of the agreement :—

" *Kaul entered into between M. Ramasvami Nayakan, K. Vairamuttu Pillai, Velu Mudaliyar and Virdachala Nattan, residing at Vilippalaiyan on the 27th June* 1861.

" As K. Virdáchala Náttán obtained in a public sale the lease of toddy and liquor in the two ta'aluks of Negapatam and Nánillám for five years from fasli 1271 to 1275 and gave it to us, the said four persons at ¼ pangu each, and as we accepted the same, the affairs thereof shall be transacted by each of us upon his own responsibility in the manner below described.

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"Ramasvami Nayakan should remain in the kachhari of the kasbá village of Vilippálaiyan, and not only cause the money collected every day in the kasbá village, as also in Kilvelur, Tiruvarur, Nánilám and Kuduvásal, to be entered in the memo. of ready-money collection after it is examined by the shroff, and a balance sheet completed for the same every night, but also keep it in the chest, and at the end of the month, prepare a tukkadi account showing the whole amount so collected. He should pay off the kist on the said two ta'aluks at the end of each month, and make payment to the establishment on the 5th of the following month. Honest and clever servants must be selected on examination for employment in the kasbá kachhahri and in the godowns. The servants found guilty of fraud shall on proper enquiry be punished either by fine or by removal, as the crime may deserve, and new hands taken in their room The said Rámasvámi Nayakan should also attend to the ready-money income and disbursement.

"Velu Mudaliyár will have to remain with (him) and examine the memorandum of ready-money collections made in the kasbá village and other places every day. He will also check the accounts kept by the shroff for the same, and sign the memos. of ready-money, and of the amount collected and the balance-sheet which will bear the signatures of the kuruppu and kaiyedi varnams and of the shroff. Rámasvámi Nayakan also should sign every night the balance-sheet showing the amount in the chest under his custody.

"K. Vairamuttu Pillai and Virdáchala Náttán shall appoint servants to collect money in Kilvelur, Tiruvarur, Nanilám and Kuduvásal ta'aluks, and in so doing, they should select on examination clever, honest and trustworthy servants to be in the godown in the kasbá village of Nánilám. They shall give strict orders to the káryagárs, karnams and peons, who are appointed to collect money daily from the shops regarding the opening of the shops in the places mentioned in the list, and the purchase of jaggery and other ingredients to prepare liquor in the godown. The money collected in one day must be called for the following day in the local kachhahri, and as soon as all the collections are received, a particular memo. and balance-sheet must be prepared and checked once in two days and sent to the kachhahri in the kasbá

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village of Velippolyum. If the karyagárs, karnams and peons appointed for the collection of money shall be found guilty of fraud on proof, they may be punished by fine or removal as the crime may deserve.

"Money should be received from the kachhahri in the Vilyppolyam village on the 5th of every month, and distributed among the servants on account of their wages for the previous month on their signing the receipt prepared on a paper for all of them, and as soon as the payment is over, the said receipt will be forwarded to the kasba kachhahri here.

" The ready money collected in the kasbá village must at first be brought and entered in the accounts here, and then received for distribution among servants there. No, payment whatever shall be made out of such collection there previous to the registry of the same in the accounts here.

" Muchalkás shall be obtained from persons having toddy and arrack shops under ámáni or Sarkár management according to the accompanying form, and forwarded to the kasbà kachhahri hereof ; documents should be obtained from the servants employed for the collection of money, and ready money security taken from the shroff. If these servants be found guilty of fraud in money affairs, an enquiry should be made into the matter, and if the fraud is proved, a report should be made of the same to authority who will punish the offender suitably."

On the 20th July 1861, in consequence of a default (for which none of the parties were to blame) in regard to the payment of the deposit-money for the Nánilám ta'aluk, the farm of the latter was re-sold by the Collector and purchased by the 2nd defendant, one of the contracting partners in the document A. The first defendant by his answer admitted that the agreement had been entered into between the parties, bnt submitted that A had been cancelled by the re-sale by the Collector, on the 20th July 1861 of the ábkári farm of Nanilám ta'aluks, and that consequently there had never been a partnership between the plaintiff, the second defendant and himself. The Civil Judge delivered a judgment from which the following is an extract.

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"The question now arises whether this court can award the specific performance of the partnership contract sued for by the issue of an injunction, the duration of which must be four years and whether the court can, in a suit of this nature whether neither a desolution, nor a partnership settlement is sought to be enforced, award compensation to plaintiffs for the past, and probable future breach by the first defendant of his partnership agreement with them.

"It is clear that injunctions of the nature now sought in partnerships for a fixed term have been repeatedly granted by the courts in England in similar cases. (See pages 54 55,56, &c., Collett on Injunctions.) The court in the exercise of its jurisdiction as a court of equity appears bound to interfere to compel the first defendant to refrain from a continued fraudulent violation of his contract, which if permitted may lead to the ruin of the plaintiffs. The court therefore holds that the plaintiffs are entitled to a decree awarding then specific performance of the partnership agreement ; the first defendant being restrained by an injunction from the future violation of his covenant with the plaintiffs.

"In regard to the damages claimed there is a greater difficulty. The plaintiffs are not entitled to sue, prior to the final adjustment of the partnership accounts or a dessolution, for the amount of profits they may have lost by the first defendant's breach of his partnership agreement with them. No accounts of the partnership have been adjusted ; no balance struck, and under the present circumstances the court holds that the plaintiffs cannot legally or equitably claim for compensation for past damage alleged to have been sustained.

"Nor indeed does the court find any credible or authentic accounts or evidence on record which could afford material enabling the court to assertain the amount of such damage said to have been sustained already by plaintiffs.

"The alleged future damages are even more uncertain and doubtful still. It is obvious that future profits on such partnership as that in issue cannot be calculated, with even the most remote degree of certainty, and that a thousand contingencies may arise (a tempest, a flood, a season of drought, pestilence, the death of the contractors, the first and

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second defendant's) which may convert possible profits into absolute losses and even annul the partnership itself at any moment.

" The damages claimed therefore by the plaintiff's for past and future breach of the partnership-agreement cannot be granted by the court, in the shape in which they are claimed.

" The Court having decided that the plaintiff's are entitled to a specific performance of the partnership-contract as sued for, decrees the same accordingly against the defendants, and resolves to issue an injunction directing the first defendant to refrain from excluding the plaintiffs from the benefits of the partnership-agreement, and directing the said defendant to conform the same in all particulars, the second defendant in the manner admitted by him before this court ? And with reference to section 192 of the Code of Civil Procedure, the Court further directs that if the defendants or either of them fail to conform to their said agreement with the plaintiffs, they the said defendants or either of them do pay the plaintiffs as compensation the sum of rupees 15,000, fifteen thousand an amount which under all the circumstances of the case the court considers will be an equitable award as an alternative for the specific performance now decreed.

" The first defendant will pay all the costs of suit incurred by the plaintiff's. The second defendant is to bear his own costs."

Sadagopacharlu for the appellant, the first defendant. First; the appellant's admission of the partnership was obtained under duress. Secondly, no consideration existed for the agreement.

Mayne for the respondents, the first and third plaintiffs, *contra*.

Sadagopacharlu replied.

The Court delivered the following.

JUDGMENT :—This suit was brought for damages for the alleged breach of a partnership-agreement and for the enforcing of the agreement.

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The first defendant (the appellant), among other objections, denied the existence of the partnership-agreement and of the amount of profits alleged to have accrued from the abkari contracts.

The Civil Judge found the partnership proved, decreed a specific performance of its articles, and by injunction directed that the defendants should not exclude the plaintiff from the benefits of the contract, and decreed that they or either of them should pay rupees 15,000 if they did.

There can be no doubt of the existence of a partnership in point of fact. It has been solemnly admitted by the first defendant himself, and no evidence whatever has been given of the allegation that the statement was made under duress. Questions which a public officer, authorized to ask them, put to the first defendant elicited his answers, and such questions can in no point of view be regarded as putting an illegal pressure upon the defendant. As to the argument that no consideration existed for the agreement, the mutual stipulation and promises are a sufficient consideration.

As to the defendant's allegation that in consequence of the difference between himself and the plaintiff, the old contract has been surrendered by him and a new one taken, it is plain upon the evidence here that this would be so obvious a fraud that it can furnish him with no defence to this action.

It is clear, however that the alternative damages awarded must be disallowed. Section 192 of the Civil Procedure Code (*a*) applies to cases in which an action having been brought for damages for a breach of contract, the Court, with the assent of the plaintiff, decrees as an alternative that the contract be specifically performed. It is manifest that as a necessary preliminary to such a decree the amount of damages is to be ascertained. In this case, supposing the nature of the suit to admit of damages being recovered, there has not been the slightest evidence upon the point, and it

(*a*) This section enacts that "when the suit is for damages for breach of contract, if it appear that the defendant is able to perform the contract, the Court with the consent of the plaintiff may decree the specific performance within a time to be fixed by the Court, and in such case shall award an amount of damages to be paid as an alternative if the contract is not performed."

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would depend in a great measure upon an account of the partnership-transactions.

There is another point upon which we think it necessary that the decree of the Court below should be modified, in order to avoid misapprehensions and difficulties that are likely otherwise to arise. Taking the judgment and decree together, the Civil Court appears to have decreed absolutely against the defendant specific performance of all the stipulations in the partnership-contract. This, we think, should not be decreed. Specific performance is a branch of the jurisdiction of the English Courts of Equity, not taken from the Roman law, and its application to partnerships is governed by precisely the same rules as those which govern it in other transactions. As is stated in a book of authority (*a*), the natural remedy for a breach of an agreement to enter into a partnership is an action for damages ; and there exist only two classes of cases in which the specific performance of such an agreement has been decreed.

I. Where the parties have agreed to execute some formal instrument which would confer rights which would not exist unless it was executed. *England* v. *Curling* (*b*) is a case of this kind.

II. Where there has been an agreement which has come to an end to carry on a joint adventure and the decree that the agreement is a valid agreement, prefaced by the declaration that the contract ought to be specifically performed is made merely as the foundation of a decree for an account. *Dale* v. *Hamilton* (*c*), is an instance of this class of cases. From the earliest to the latest cases upon the subject it will be found, we believe, that a Court of Equity has never made a decree for the specific performance generally of a partnership. In decreeing specific performance the

(*a*) Lindley on Partnership II. 796, citing *Stocker* v. *Wedderburn*, 2 K. & J. 393 : 26 L. J. Ch. 713. See too Fry on specific Performance 18, 407, *Sichel* v. *Mosenthal*, 8 Jur. N. S 275, 797 et seq.

(*b*) 8 Beav. 189. See *Buxton* v. *Lister*, 3 Atk. 385 and Mr. Swanston's note to *Crawshay* v. *Maule*, 1, Swanst 513. "The principle upon which a court of equity proceeds in a case of this description, is the same as that which induces it to decree execution of a lease under seal, notwithstanding the term for which the lease was to continue has already expired." Lindley on Partnership II. 797, citing *Wilkinson* v. *Torkington*, 2 Y. & C. Ex. 726. See too per Sir T. Plumer, M.R., *Nesbitt* v. *Meyer*, 1 Swanst. 226.

(*c*) 5 Ha. 369. S. C. on appeal, 2 Phil. 266.

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Court has always to consider whether it can enforce the whole of the agreement, and where it cannot do so, this peculiar relief will always be refused. Here it would be quite impossible for the Court to compel the parties to carry out their own positive stipulations: a decree for a specific performance would therefore be a mere brutum fulmen.

As regards, however, the granting of the injunction the case is different. There is no doubt that Courts of Equity interfere by injunction between parties where the conduct of the defendant, either by misapplying the monies of the co-partnership or by excluding from the business a partner entitled to join in it, is practically violating the partnership-contract. This will sometimes be granted where the partnership is dissoluble at will, but always where it is, as the agreement in this case renders it, a partnership for a definite period. So upon the evidence in this suit, we think the plaintiff is equitably entitled to an injunction to restrain the first defendant from doing anything to exclude the plaintiff from participating in the contract and benefits of the partnership under the agreement. The decree ought, we think, to declare that the partnership is a subsisting partnership for the period specified in the agreement and that the defendant is enjoined not to exclude the plaintiff from the exercise of his rights under the said partnership. The conduct of the defendant renders it necessary that he should pay the costs of this appeal.

The decree of the Court will be, to reverse so much of the decree of the Civil Judge as awards rupees 15,000 compensation, and so much of it as appears to decree a specific performance of the partnership contract. Declare that a partnership for four years subsists under the agreement dated 28th June 1861, also restrain the defendant by injunction from excluding the plaintiff from the partnership-business and from doing any act to prevent it being carried on according to the articles.