APPELLATE JURISDICTION (*a*)

Regular Appeal No. 6 *of* 1866.

JOHN YOUNG.....*Appellant.*

MANGALAPILLY RÁMAIYA and others.....*Respondents.*

In a suit for recovery of a sum of money alleged to be due under an agreement for the sale of land dated 26th January 1851, the Lower Court decided that on the construction of the agreement the plaintiff was to put the defendants in possession of the lands besides assigning over the title deeds to them :—*Held*, that the terms of the original (Telugu) agreement did not warrant such a construction.

Where there is a contract of sale of land, an action can ordinarily be brought by the vendor for the purchase money, whether or not the Court in which the action is brought has jurisdiction over the land sold. The question is whether the Court has jurisdiction over the seat of the obligation which it is sought to enforce.

Mr. Serjeant Williams' rules for ascertaining whether covenants are dependent or independent, commented upon.

1866.
April 26.
R. A. No. 6
of 1866.

THIS was a regular appeal from the decree of C. Collett, the Civil Judge of Vizagapatam, in Original Suit No. 25 of 1865.

Brockman, for the appellant, the plaintiff.

The facts are fully set forth in the following judgments.

HOLLOWAY, J.—This suit was brought for the recovery of Rupees 1,527-5-6, alleged to be due under an agreement dated 26th January 1851.

The plaintiff alleged that he had already endorsed over to the defendant a deed of sale for half a Vrithi of land, which was part of the consideration for the agreement, and that he had always been ready and was now ready and willing to endorse over the deeds of the remaining Vrithi. The defendant admitted the execution of the agreement, but contended that on its true construction the plaintiff was bound to put the lands in the defendant's possession. Several other matters were urged, but this is the only one involved in the case at its present stage.

(*a*) Present Holloway and Innes, J. J.

1866. *April* 26. *R. A. No.* 6 *of* 1866.

The Civil Judge thus states the question to be determined : " As the defendants reside within the jurisdiction of " this Court, the suit will have been rightly brought in this " Court, provided the plaintiff has done all that he is bound " to do according to the right construction of exhibit A by " offering to endorse over to defendants the sale deed of " the land specified in exhibit A. But if, according to " exhibit A rightly understood, he is, as defendant charges, " bound to do more than that ; if on payment of the money " by the defendants or any of them, he is bound to put " them into actual possession of the land, then, as the land " is beyond the jurisdiction of this Court, and the decree " to be pronounced would have to include an order regarding " the delivery of the land, and as the land, it is admitted, " is not in possession of the plaintiff but of others, and it " would be necessary to add the persons in possession as " parties to this suit, it appears to me that the suit has not " been properly brought in this Court."

He then decided that on the true construction of the agreement the plaintiff was to put the defendants in possession of the land and that the mere offer to assign the title deeds was not such an offer of performance as justified the compelling of the defendant to perform his part.

If the Civil Judge intended to decide that ordinarily, where there is a contract of sale of land, no action can be brought by the vendor for the purchase-money unless the Court has jurisdiction over the land sold, I am unable to agree with him. The question is whether the Court has jurisdiction over the seat of the obligation which it is sought to enforce.

The contract of sale really consists of two separate sets of obligations, the one to be performed by the vendor and the other by the vendee. Over the contract of the vendee executed within the jurisdiction and by persons resident within it, the Vizagapatam Court is the only forum, and I am unable to see any principle upon which it can be said that, because, if it became necessary to enforce as against the vendee his part of the contract, it would be necessary to resort to another forum, the jurisdiction of the

1866. April 26. R. A. No. 6 of 1866.

Vizagapatam Court can be barred. In truth, however, if the Civil Judge's opinion is right that the delivery of the land, or at all events readiness and willingness to deliver the land is a condition precedent to the right to sue for the money, the plaintiff acknowledging his inability to perform that act, could not recover either in the Vizagapatam Court or in any other.

The question depends entirely upon the terms of the agreement A, which is in the following words.

"Sannad (agreement) executed by three persons, Managalapilly Rámaiya, Jagannátha Chárylu, and Gannipartthi Kurmaiya to John Young, Esquire, on Sunday, 10th Pushya Bahula of Sadharana, corresponding to 25th January 1851.

"Under the bond executed on stamped paper to the "name of Mr. John Mackenzie, by Baghavan Busiktha an "inhabitant of Sitápuram Agraháram attached to the Taluq "of Parlakemida in the Zillah of Ganjam on Tuesday the "9th October 1849 or 8th Aswayuja Bahula of Saumya, "for Rupees 1,252-13-0, the balance left due by him in the "matter of the Jaggery which he undertook to supply to "you, Rupees 1,360-10-9 remain due on this date to the "exclusion of what has been paid for the amount of principal "and interest; for this balance you have obtained by pur-"chase the Vrithi land possessed by Bavagan Buktha in "the said Sitàpuram Agrahárem and the ½ Vrithi of land "of his elder brother Brindavana Buktha. (Under such "circumstances) we hereby agree to pay you out of the "said amount Rupees 680-5-4½, within the end of May in "the current year and the remaining Rupees 680-5-4½, with-"in the end of May of the ensuing year 1852, and then to get "the said deeds of sale endorsed by you and the 1½ Vrithis "of land put into (our) possession as purchased by us. "We will therefore pay the said amount of Rupees "1,360-10-9 in two instalments and take back this sannad "along with the deeds of sale endorsed."

To the construction of this document we have given the greatest consideration, taking the opinions and hearing the arguments of the persons best acquainted with the

1856. *April* 26. *R. A. No.* 6 *of* 1856.

Telugu language. It is to be remembered that the document is the agreement of the defendants, a point to be kept steadily in view. The contract was obviously in its inception a contract of guarantee. A certain sum was due to the plaintiff, who had obtained for the balance by sale, 1½ Vrithis of land, belonging to two other persons; the defendants agree to pay that balance in two instalments, and the literal translation of the words following the amount of the Rupees in the original is, "we to you having paid, the abovementioned deeds of sale by you having caused to be endorsed (for our own benefits) the 1½ Vrithis of land we by sale (or through the contract of sale) for obtaining possession for our own benefit have agreed." The repetition of (we) in this sentence would be wholly unnecessary if the act of taking or getting possession was to be done by the same person as the endorsing. If so, the sentence would naturally and correctly have proceeded with perfect grammatical exactness, the first pronoun being quite sufficient for the exigencies of the sentence. If however, the act of taking possession was to be performed by the defendants themselves through the instrumentality of the endorsed bill of sale, evidencing the transferred bargain, the repetition of is quite explicable.

If moreover, after the payment of these instalments, delivery was to be made by the plaintiff and the plaintiff was to the knowledge of the parties in a position to make such delivery, a simple provision to that effect would have sufficed. The language of the document seems to show that all that the plaintiff had obtained was a bill of sale of the land in satisfaction of the balance.

The last paragraph, moreover, as is very common with the documents of Hindus, sums up the terms and certainly favors the construction that they were themselves, on the payment of the instalments, to get only the deeds of sale endorsed. In further support of the construction I may observe that the defendants having just used a causal verb would have been naturally led to use instead of the simple form of the verb. That causal form is however rather uncommon and no great weight would be given by me to this argument if it stood

1866. *April* 26. *R. A. No.* 6 of 1866.

alone. I think it clear, however, that the meaning of the document is, that the defendants were to pay the instalments, have the deeds of sale handed over to them, and get possession of the land by their own efforts. This seems to be the natural and grammatical construction of the words and I think that there is nothing in the nature of the transaction to forbid the following of that meaning. The surety is, when he has paid the debt, to receive from the creditors all the securities given by the principal debtor to the creditor. I am therefore of opinion that it was not incumbent upon the appellant, upon the true construction of this agreement, to deliver or aver readiness to deliver the land, and that the dismissal of the suit is therefore wrong.

I will just notice the question, which it is unnecessary to decide, whether the convenants in this case are independent. This case scarcely comes within Mr. Serjeant Williams' 1st rule, because a part only of the money which was the consideration was to be paid before the performance by plaintiff. Here there can be no doubt that, if the defendants had made default in payment of the first instalment in May 1851, plaintiff could successfully have sued without averring readiness either to endorse documents or to deliver land. The question whether covenants are dependent or independent, or whether a certain act is or is not a condition precedent, is one entirely of construction, and Mr. Serjeant Williams' rules are merely reasonable suggestions for the ascertaining of the intentions of the parties. *Roberts* v. *Brett* (XI H. L. 337, XVIII C. B. 361, VI C. B. N. S. 611) is a very striking example, that the question is one entirely of construction and to be determined in each particular case educing the intention of the parties from the language which they have used.

I think it is also necessary to say that I would not be supposed to accede to the argument that, whether this was a dependent covenant or not, so much as was due on the first instalment, must at all events have been awarded. There can be no doubt that if the action had been brought immediately on the breach as to the first instalment, the

1866. April 26. R. A. No. 6 of 1866.

plaintiff must have recovered. If, however, the plaintiff chose to delay until the second instalment became due and was then unable to perform his covenant, and that covenant was the sole consideration for the agreement to pay the instalments, I think it more than doubtful whether the plaintiff ought with our system of procedure to have been permitted to recover. Several other points have been raised by defendants in the answer, to which no doubt due attention will be given.

Unless some explanation is given, it would seem too that the statute of limitations has run against this demand. This point should also receive attention from the Civil Judge, who will remember that it is an action for money due upon a written contract.

The Judgment of the Civil Judge upon the preliminary point should be reversed and the costs of this appeal be provided for by the Civil Judge in his final decree.

INNES, J.—I am of the same opinion. The Civil Judge has dismissed the suit on the ground stated in the 3rd para. of his Judgment.

"As the defendants reside within the jurisdiction of "this Court, the suit will have been rightly brought in this "Court provided the plaintiff has done all that he is bound "to do according to the right construction of exhibit A, by "offering to endorse over to defendants the sale deed of the "land specified in exhibit A. But if, according to exhibit A "rightly understood, he is, as defendant charges, bound to "do more than that, if on payment of the money by the "defendants or any of them, he is bound to put them into "actual possession of the land, then, as the land is beyond "the jurisdiction of this Court, *and the decree to be pro-"nounced would have to include an order regarding the "delivery of the land*, and as the land, it is admitted, is not "in possession of the plaintiff but of others, and it would "be necessary to add the persons in possession as parties "to this suit, it appears to me that the suit has not been properly brought in this Court."

1866. *April* 26. *R. A. No.* 6 *of* 1866.

Now plaintiff has expressed his inability to give possession, so that, if on the true construction of the document A, plaintiff is bound to place defendants in possession of the land or satisfy the Court of his readiness and willingness to do so before he calls upon defendants to perform their part of the engagements of document A, then of course it is clear that plaintiff, who admits that he cannot give possession, cannot recover, as the cause of action cannot arise to plaintiff on document A until this concurrent condition be performed or he signify his readiness and willingness to perform it. But if it were otherwise, I think that the jurisdiction of the Court would not be excluded, by reason of the land being beyond it.

The ground upon which the Civil Judge appears to have proceeded is this, that the Court could not make a decree for plaintiff without making an order regarding the delivery of the lands, and that, as they lay beyond the jurisdiction of the Court, this could not be done.

But in determining the jurisdiction of a particular Court to entertain a suit, the real question, as my learned colleague says, is whether the Court has jurisdiction over the obligation which is the subject-matter of the suit.

Now the subject-matter of the suit here is the obligation of defendants to pay the money. The obligation of plaintiff to make over the land (supposing that to be the nature of the obligation on his part) has only to be looked at to enable the Court to see whether plaintiff has yet a cause of action. If the acts to be performed are concurrent, then the performance by plaintiff, or his readiness and willingness to perform his part of the agreement, must be shown, and he has no cause of action and cannot bring his action unless he has so performed it, or is able to satisfy the Court of his readiness and willingness to perform it.

The obligation of plaintiff to perform his part of the engagement would not be entered upon in the decree. The Court in the decree would be concerned with defendants' obligation alone, having already satisfied itself, so far as was necessary for the purpose of determining whether the

1866. *April* 26. *R. A. No.* 6 *of* 1866.

cause of action had yet arisen, that plaintiff has performed or is ready and willing to perform his part of the engagement. I think therefore that, supposing the conditions of the agreement to be what the learned Civil Judge has construed them to be, the only ground upon which he could properly dismiss the suit was the avowal by plaintiff of his inability to do what was requisite to give him a cause of action, and that the fact of the land being out of the Judge's local jurisdiction would not alone justify the dismissal of it.

I come however, to the same conclusion with my learned colleague as to the construction of A, and I think that all that was incumbent on plaintiff was to endorse over the document.

It is right perhaps that I should state the ground upon which in the construction of document A, I come to a different conclusion to that of the learned Civil Judge from whose decision the appeal is made.

The agreement A, after reciting the transactions out of which it arose, runs according to my construction thus: "we have agreed to pay Rupees 680-5-4½ before the close of May this year and the remaining amount 680-5-4¼ before the close of May 1852, and, having got the above said bills of sale endorsed over by you, to take possession as by sale of the 1½ Vrithi of land."

In place of the words "to take possession" the Civil Judge would read "to get you to give us possession." The words are and the way in which the sentence is to be construed partly depends upon whether the words (by you), occurring in the former ('having got the above said bills of sale endorse *you*") can apply also to the sentence and so the whole sentence signify "to take for ourselves (or on our account) possession *through you*."

The verb in the former sentence *to get* is *made* (the endorsement of the bills of sale) and this is the reflective causal of the active verb and the words show the agent by which the act is to be

1866. *April* 26. *R. A. No.* 6 *of* 1866.

done. might be applicable to the verb in the next sentence if that were also the causal of an active verb. But the verb in the next sentence is which is the reflectivs causal of the neuter verb to suffer, to happen; or more properly means to cause to happen, and meant to cause an entry to happen and it is commonly used to signify, to make an entry. With the reflective it means to make entry on one's own account or to obtain possession. This being the reflective causal of a neuter verb becomes simply in signification an active reflective verb. The person speaking is the agent. The act to be done is to take pessession. "We agree to take possession," and there is no room for the application of because there is not in the verb anything which implies agency on the part of others than the persons who are to take possession. Now has a causal and had it been intended to express that possession would be taken through the agency of the plaintiff, either this causal, or some word equivalent in sense, would, I think, have been used, and then there would be no reason to doubt that was dependent upon it as well as upon the causal in the former sentence and the construction of the Civil Judge would be correct.

Possibly, if the document be regarded as having been drafted with a view to perfect accuracy of expression, all the force which my learned brother attributes to it would attach to the repetition of the word but with great deference to his opinion I cannot but think that is here carelessly inserted and is simply redundant, and that no particular significance was attached to it by the person who drafted the document, or by the parties to it. I quite concur that the last sentence in the document is strongly in support of the construction we place upon it, and that there is nothing in the nature of the transaction to favor a different view.

I concur therefore in opinion that the decree must be reversed and the suit remanded for re-investigation.

Suit remanded.