

Appellate Jurisdiction (a)*Referred Case No. 8 of 1869.*

CHETU NARAYANA PILLAY,

against

AYAMPERUMAL AMBALOM and 5 others.

The defendants entered into a contract with the plaintiff in writing, by which in consideration of the trouble taken and large sums of money advanced by the plaintiff on behalf of the defendants, the defendants promised that they would from generation to generation pay to the plaintiff rupees 100 per annum out of a specified fund. The plaintiff brought a suit to recover a sum within the pecuniary jurisdiction of the Small Cause Court under the written contract.

Held, that the Small Cause Court had jurisdiction to entertain the suit, and that the undertaking of the plaintiff to forbear from enforcing the debt due to him prior to the contract was a sufficient new consideration to support the contract.

Held also that on the death of one of the co-contractors the whole liability to the plaintiff attached to the surviving co-contractors.

THE following case was referred for the opinion of the High Court by J. R. Daniel, the Acting Judge of the Court of Small Causes of Madura, in Suit No. 2,034 of 1868. 1869.
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This suit was brought to recover rupees 389-2-2, due under the following agreement dated June 19th 1861.

“ This is an agreement dated 19th June 1861, or 7th
“ Ani of the year *Dunmadi*, executed by 1 *Ayamperumal*
“ *Ambalom*, son of *Danukodi Ambalom*, 2 *Chittren Sambanotti*, 3 *Kuppayan Sambanotti*, 4 *Muttunambiyam Sambanotti*, 5 *Mutukarpen Sambanotti*, and 6 *Chokalingam Sambanotti*, son of *Pachayan Sambanotti of Karayur*, in
“ *Ramasweram*, to *Shetunarayana Pillai*, son of *Kalimuttu Pillai of Paumben*.

“ In consideration of the trouble taken and large sums.
“ () of your own money spent on our behalf
“ in relieving us from the annoyance to which we had been
“ subjected by the Mussalmans and others of *Ramesweram*
“ demanding a share in our fishing at *Karayur sea-port* and

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“ preferring complaints against us in the Offices of the
 “ Magistrate, &c., we shall from generation to generation
 “ (Putrapoutraparamparyam) pay you and your descendants
 “ (Santati) rupees 100 per annum from out of three-fourths of
 “ the fees (brokerage) which may be collected from the mer-
 “ chants at one or two annas per rupee on the price (accord-
 “ ing to the quality or size) of Sudai and other fish that may
 “ be caught by the use of the six dhonies belonging to
 “ us and others, the remaining one-fourth share of the said
 “ fees being appropriated to the service, &c., of the Maria-
 “ men Covil. If more is collected, you will have no claim
 “ whatever. If we shall fail to pay the above sum of
 “ rupees 100 every year, we shall be responsible from our
 “ own property. This was executed with our own free-will.
 “ One rupee stamp not being procurable, two stamps at
 “ eight annas each have been purchased, and on one of
 “ which this agreement has been drawn, while the other is
 “ used merely as an additional stamp. ”

“ (Marked) Ayamperumal Ambalom.

“ As the share which we used to give to the Mussul-
 “ mans of Rameswaram was discontinued to be given by
 “ your exertions, if any of us and others get dhonies, we
 “ shall join them with us and pay you as abovesaid.”

(Marked) Ayamperumal.
 („) Chittren Sambanotti.
 („) Kuppayan Sambanotti.
 („) Muttunambeyan Sambanotti.
 („) Muttukarupen Sambanotti.
 (Signed) Chokalingam Sambanotti.

Attested by

(Marked) Thillakutty.
 („) Velludian of Rameswaram.
 (Signed) Chinniah Pillai, son of Chi nna
 vampillai of Rameswaram.

I, Babamia *alias* Moor Moidheen Sáheb, son of Shaik
 Baboo Sáheb of Paumben, have written this in the presence
 of those who have subscribed.”

The defendants 1 and 4 admitted the execution of the agreement, the remaining defendants denied the agreement. It has, however, been proved by the attesting witnesses, and I entertain no doubt of its genuineness.

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The 6th defendant, Manar Karupan, was not a party to the agreement, but was included as the heir of Kuppayan, one of the obligors (deceased). This Kuppayan has, however, left a son; the 6th defendant is his son-in-law, and was made a party on the ground that he had succeeded to the boat of the deceased Kuppayan. Even this, however, has not been established, and he can in no way be held liable.

The pleader for all the defendants pleads.

I. That the Court has no jurisdiction because the agreement involves an eventual payment of more than rupees 500.

II. That the agreement is void and not enforceable because

1. There is no consideration.

2. If there is, it is so grossly inadequate as to amount to fraud.

3. The consideration is past and cannot, therefore, support the promise.

4. The agreement is not binding upon the heirs of the contracting parties, and as the contract is not divisible, it must be wholly null and void.

5. It is a restraint upon trade, inasmuch as the defendants can only relieve themselves from the obligation of paying by giving up their trade as fishermen.

4. The case was heard before me on the 12th day of February 1869, and a decree has been passed in favor of the plaintiff subject to the opinion of the High Court upon the following case:—

The six contracting parties are fishermen of the village of Karayur, and it appears that in 1861 and previously certain Mussulmans claimed a right to fish in that part of

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the sea where the defendants were in the habit of fishing and, as an acknowledgment of that right, claimed a per-centage of one out of every ten fish caught ; this led to disputes between the Mussulmans and defendants before the Magistrate, who ordered the Mussulmans not to interfere, as the sea was common, and they could have no such right as they claimed ; the plaintiff assisted the defendants, in prosecuting their claim before the Magistrate, and in consideration of the trouble taken and the money expended, the defendants executed this agreement promising to pay rupees 100 annually, and also binding their heirs to pay the heirs of the plaintiff. This rupees 100 was to be paid out of a fund made by a small per-centage paid by merchants buying the fish in addition to the price of the fish.

5. As regards the plea of want of jurisdiction, I was of opinion that this Court had jurisdiction, as the amount claimed is within rupees 500 ; that the plaintiff had a complete cause of action for the annual payments in arrears (*High Court Reports, Volume II, page 469.*)

6. Regarding the 2nd plea that the contract is void, I was of opinion that it was not legally void as regarded the contracting parties, but that it could not bind their heirs.

As to want of consideration, the agreement itself shows that there was consideration, viz. large sums of money paid by plaintiff on their behalf and the trouble taken by him to free them from the illegal exactions.

I was of opinion that the consideration was not so grossly inadequate as to render the contract void, though it is undoubtedly a foolish one. The plaintiff himself cannot tell the exact sum of money he expended. He says roughly rupees 1000, probably a great exaggeration. It was expended on batta to witnesses, fees to vakils, food to the defendants, who, he says, were fed by him for some time whilst the dispute was going on, and also in hire to coolies for dragging the nets, because the Mussulmans had combined to prevent the regular coolies from working for the defendants. Though therefore the amount cannot

be determined, the expression in the document itself "much money" shows that a considerable sum was expended; and though it would have been better had they agreed to pay a fixed sum, they have chosen to make annual payments, and I do not think that the consideration is so grossly inadequate as to render the agreement void. The defendants have, from that time to this, been undisturbed in their fishing.

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As to consideration being past.

It is laid down in Chitty on Contracts that a past or executed consideration is not sufficient to support an *assumpsit* unless such consideration was moved by the precedent request, express or implied, of the party promising. In the present case, the plaintiff acted and spent his money not voluntarily, but at the request of the defendants.

The plea that because the contract is not binding on the heirs of the obligees, therefore it cannot bind the obligees themselves, appears to me unsustainable.—An agreement to pay a certain per-centage out of the profits can scarcely be considered an agreement in restraint of trade; it is not an agreement that they will not exercise their trade as fishermen.

I was therefore of opinion that the contract was binding upon the contracting parties, but not upon the heirs. The annual payment is to be made out of a certain fund, and only if the defendants fail to apply the proceeds of that fund will they be liable personally. As this fund is an uncertain one and difficult to ascertain the execution of the decree would be difficult, but this is a consideration which cannot affect the decision.

The questions for the decision of the High Court are

1. Whether a Small Cause Court has jurisdiction to try this case or not?
2. Whether the contract is valid and can be enforced?
3. Whether, if it is binding on the obligees, is it also binding upon their heirs; and if not binding upon the heirs, whether the surviving obligees would be compellable

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to pay the whole sum of rupees 100, or only their proportionate share deducting the share of those deceased ?

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—The suit being for a debt alleged to have accrued due under the contract and within the pecuniary limit of the jurisdiction of Courts of Small Causes, was clearly cognizable by the Court.

The second question submitted involves two points (1) Whether there was a good and sufficient consideration to support the promise of the defendants ; (2) Whether the contract was illegal as being in restraint of trade. The latter point we may dispose of with the single observation that the written instrument contains no stipulation imposing the least restraint on trade. As to the first point, we take it to be the fact that at the time the plaintiff made the advances and rendered the services to the defendants, no undertaking had been come to that he was to participate in the sale proceeds of the fishing business. That the advances and services were simply made at the request of the defendants and not gratuitously.

That being so, a *complete* implied contract to repay such advances and give the plaintiff a reasonable remuneration for his time and labor existed at the date of the execution of the written instrument, and reasonably in such a case the law requires some new good consideration to support a second express contract imposing a different liability. If it were otherwise, there would be, as was observed in the case of *Hopkins v. Logan & Mees. & Wells.* 249, two varying promises on one consideration.

And in the present case we think there is a sufficient new consideration. An undertaking to forbear from enforcing a valid debt for a certain time is clearly a good consideration and such an undertaking appears. The effect of the agreement was to bind the plaintiff to forbear from suing as he might at any moment have done, for a year, and then only for a fixed sum on account, and the same

in regard to the next instalment, and so on. Our opinion therefore is that the contract is a valid one.

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With respect to the second of the two points submitted in the third question, we are of opinion that, on the death of one of the co-contractor, the whole liability to the plaintiff attached to the surviving joint co-contractors, and that the plaintiff was entitled to the general judgment which has been passed against them.

Upon the other point we can say nothing, as it has not arisen in the suit. It may hereafter arise in a suit brought by the plaintiff against the legal personal representative of either of the joint debtors or by the defendants or some of them for contribution.

Appellate Jurisdiction. (a)

Referred Case No. 20 of 1869.

K. SANJEEVIYAH, *against* NANJIYAH.

A suit does not lie to enforce a liability specifically by the decree of a Civil Court in the Mofussil, the right of suit in such case being taken away by Section 11 of Act XXIII of 1861.

THIS was a case stated under Section 22, Act XI of 1865, by P. Terumul Row, District Munsif of Purgli.

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The case was as follows :—

This is an action to recover the sum of rupees 29-0-3 being the amount of principal and interest of a decree of this Court in Original Suit No. 73 of 1863, under date the 19th February 1863.

The facts of the case are these :—

The plaintiff sued the defendant for the recovery of rupees 16 on a bond in Original Suit No. 73 of 1863 on the regular file of this Court, and obtained a decree on the 19th February 1863. On the 20th January 1865, the plaintiff moved, in decree Execution Case

(α) Present: Scotland, C. J. and Innes, J.