Appellate Jurisdiction.(a)

Regular Appeal No. 57 of 1873.

THOTA VENKATACHELLASAMI CHETTIAR *(Plaintiff) Appellant.*

KRISTNASAWMY IYER and another.. *(Defendants) Respondents.*

Even where formalities in the embodiment of contracts are at the option of the parties, there may be a concluded and binding contract, although there is an intention to put its terms into a more formal shape. The existence of such intention is evidence that neither party was to be bound until the intended formalities have been complied with. But when a sale, so as to pass an interest, requires certain formal steps, and nothing turns upon the intention of the parties, no inference against a concluded agreement can be drawn from the non-completion of formalities which are not of their selection.

The parties to a suit executed a written agreement, which was duly registered, whereby the plaintiff agreed to accept the property of the defendant, specified in the agreement, in adjustment of the said suit. The agreement was not recorded under Section 98, Act VIII of 1859. Plaintiff proceeded with his suit, obtained a decree, and sold the property mentioned in the agreement in execution of the said decree. The sale proceeds being insufficient to satisfy the decree, other property belonging to the defendant was attached and sold for Rs. 23,360. In a suit for damages brought by the defendant :—*Held*, that the agreements to withdraw the previous suit and to accept the properties of the present plaintiff in discharge of the claim were concluded agreements, and that, therefore, present plaintiff was entitled with interest, to the sum which property, not mentioned in the agreement, fetched at the sale under the decree obtained by the defendant.

1874. *July* 15. *R. A. No.* 57 *of* 1873.

THIS was a Regular Appeal against the decision of Mr. R. Davidson, the Civil Judge of Trichinopoly in Original Suit No. 66 of 1871.

The present 1st defendant sued the present plaintiff in Original Suit No. 20 of 1869 for money due on an instrument of hypothecation. While the suit was pending the parties applied to have the hearing of the case adjourned for seven days to allow of an amicable adjustment being made. The adjournment was granted, and the parties entered into a written agreement, Exhibit A, which was duly registered, whereby the present plaintiff promised to sell, and the 1st defendant agreed to accept the property, consisting of a

(a) Present :—Holloway and Kindersley, JJ.

1874. *July* 15. *R. A. No.* 57 *of* 1873.

village and four bungalows, mentioned in A, for the sum of Rs. 60,000 in adjustment of the suit. No agreement or compromise was, however, recorded under Section 98 of the Civil Procedure Code. Notwithstanding this agreement the 1st defendant proceeded with his suit, and obtained a decree for Rs. 52,988-2-5, with interest, and a lien on so much of the hypothecated property as belonged to the 1st defendant in that suit (present plaintiff) was declared in his favor. The present plaintiff then appealed to the High Court in R. A. No. 7 of 1871. That appeal was dismissed on the ground that the agreement entered into under A was not a final adjustment of the suit which precluded its being further proceeded with. Present plaintiff then brought a suit against the present 1st defendant, to compel him to perform the terms of the deed of sale A. The plaint was rejected under Section 2 of the Civil Procedure Code; whereupon he brought the present suit to recover Rs. 1,00,000 as damages alleged to have been sustained by him owing to the 1st defendant's breach of contract.

In framing his plaint the plaintiff divided his claim under three heads, viz., Rs. 60,000 value of the property as agreed upon in document A; Rs. 5,000 damages sustained by perishable articles in consequence of 1st defendant's attachment of them in O. S. No. 20 of 1869; and Rs. 35,000 on account of loss sustained by the plaintiff owing to the alleged breach of contract.

The defendants, who were undivided father and son, admitted the breach of contract by 1st defendant, but pleaded:—*1st*, that the plaintiff had not been damnified thereby; *2nd*, that the damage, if any, which the plaintiff sustained, was too remote; and *3rd*, that the 2nd defendant could not be held responsible for his father's acts during his father's life-time.

The Lower Court held that the suit was not barred by Section 2 of the Civil Procedure Code, that the claim for Rs. 60,000 was untenable, and that as regarded the claim for Rs. 5,000 plaintiff was not entitled to the relief sought. As

1874.
July 15.
R. A. No. 57
of 1873.

to the third item of Rs. 35,000 claimed by the plaintiff the Lower Court observed :—

" Now this item of Rs. 35,000 is made up thus, viz. :—

1*st.*—Rs. 19,600 the difference between Rs. 60,000 the sale price of the village and four bungalows fixed in A, and Rs. 40,400 the actual price they fetched at the Court sale.

2*nd.*—Rs. 23,360 the price realized by the sale of 15 other bungalows required to satisfy the balance of the 1st defendant's decree in O. S. No. 20 of 1869 in consequence of 1st defendant having withdrawn from A. Less Rs. 7,960 remitted by plaintiff on account of stamp duty.

" All these are admitted to be the correct prices realized. It is very obvious that the plaintiff would have been in a better position than he is at present had the 1st defendant adhered to the agreement he entered into with the plaintiff under A as he would still have retained possession of the 15 houses in question, which, in the absence of anything apparent or alleged to the contrary, may be taken to represent Rs. 23,360.

" But the question arises, did the price of Rs. 40,400, which the villages and four bungalows mentioned in A fetched at the Court sale, represent the fair market value of the property, for if so, the 1st defendant would hardly have been expected to accept them as representing the value of Rs. 60,000 when he discovered the mistake he had made in agreeing to the terms of A.

" There is no doubt a great deal to be said on both sides of the case, but in deciding the point at issue it seems to me that the real question that presents itself for solution is this —Is the particular result in this case such as might have been contemplated by the parties as naturally flowing from the act done? Because I think that before the plaintiff can become entitled to any favorable decree at all, it is necessary that it should clearly appear that the damage for which

1874. *July* 15. *R. A. No.* 57 *of* 1873.

compensation is claimed was the natural and reasonable consequence of the defendant's act.

"Now, I do not think that the three witnesses whom the plaintiff examined to prove this part of his case, have succeeded in establishing this proposition.

"I by no means intend it to be understood that I think it impossible the sale of the property may not have been prejudiced in some degree by the 1st defendant's act, but I am of opinion that there is no sufficient proof of such having been the case even remotely, and no intimation was given to the 1st defendant that the plaintiff was likely to suffer any probable loss in consequence of the 1st defendant's withdrawing from the original agreement.

"My finding on the 2nd issue therefore is, that the plaintiff is not entitled to recover any sum from the 1st defendant as damages, and the result is that I dismiss the suit, but there are circumstances in the case which induce me to think that the dismissal should be without costs."

From this decision the plaintiff appealed on the following grounds :—

I.—The decree is against the weight of evidence.

II.—The defendants having admitted breach of contract, the plaintiff was entitled in law to a decree for damages.

III.—The plaintiff is at all events entitled to recover as damages the two sums of Rs. 19,600 and Rs. 23,360, with interest from the date of the execution of the decree in O. S. No. 20 of 1869, these two sums being the loss incurred by plaintiff in consequence of the defendant's withdrawal from the agreement entered into with him in compromise of the above mentioned suit then pending between them.

Mr. Miller and *Mr. Scharlieb* for the appellant, the plaintiff, contended that the contract to sell being admitted, the only question was as to the measure of damages for the

1874.
July 15.
R. A. No. 57
of 1873.

breach of that contract, and submitted that the damages should be the full value of the fifteen bungalows.

Mr. Shephard for the respondents, defendants, contended that the plaintiff had aggravated his damages. Rs. 1,500 must be deducted as that sum never came to defendant, but went to pay other creditors.

Ramachendraiyar, for the 2nd respondent, defendant.

Mr. Miller, in reply.

The Court delivered the following

JUDGMENT:—At its final stage, the two contracts to withdraw the suit and to accept through the medium of a sale the properties of the plaintiff in discharge of the claim there made are admitted by the defendant, who has persistently denied that there were any such agreements.

The evidence that the agreements were concluded was of the most cogent character, and the success of the defendant in evading justice for so many years has arisen from the not distinguishing between a concluded contract to sell and a sale; between an agreement to compromise and a compromise.

It has been long settled, even where formalities in the embodiment of contracts are at the option of the parties, that there may be a concluded and binding contract although there is an intention to put its terms into a more formal shape; *Fowle* v. *Freeman* (1). The existence of such intention is evidence that neither party was to be bound until the intended formalities have been complied with; *Ridgway* v. *Wharton* (2). Where, however, as here, a sale so as to pass an interest requires certain formal steps and nothing turns upon the intention of the parties, it is manifest that no inference against a concluded agreement can be drawn from the non-completion of formalities which are not of their selection. In the present case the evidence of the completion of those formalities so as to bind the defendant is of the most cogent character. The mode in which the

(1) 9 Ves., p. 351. (2) 6 H. L., p. p. 238, 264, 268, 305.

1874. *July* 15. *R. A. No.* 57 *of* 1873.

plaintiff has been advised has prevented him from obtaining more relief than we have given by our decree. That relief is probably very incommensurate with the wrong which he has sustained.

Appeal allowed.

DECREE :—"This Court doth order and decree that the decree of the Lower Court be, and the same hereby is, reversed, and this Court doth direct that the defendants do pay to plaintiff Rs. 31,050 being Rs. 23,000 with interest at 12 per cent. from the 15th August 1871 the date of the sale, to the date of this Court's decree, together with further interest at 6 per cent. from the date of this decree to the date of its execution on the judgment debt and costs"—with costs of both hearings.

Appellate Jurisdiction.(a)

Special Appeal No. 481 *of* 1871.

VITLA BUTTEN.....*(Plaintiff) Special Appellant.*

YAMENAMMA.....*(3rd Defendant) Special Respondent.*

A long course of decisions in this Presidency recognise the right of a co-parcener to dispose of his interest in the joint family property before partition: a co-parcener cannot, however, before partition, convey away as his interest any specific portion of the joint property.

In a suit by an adopted son to set aside a Will made by his adoptive father disposing of immovable ancestral property; *Held*, that the Will was of no effect as a valid devise of property. At the moment of death the right of survivorship was in conflict with the right by devise. Then the title by survivorship, being the prior title, took precedence to the exclusion of that by devise.

1874. *October* 16. *S. A. No.* 481 *of* 1871.

THIS was a Special Appeal against the decision of V. Jayaram Row, the Principal Sadr Amin of Mangalore, in Regular Appeal No. 725 of 1869, modifying the decree of the Court of the District Munsif of Mulki, in Original Suit No. 23 of 1868.

Plaintiff sued as the adopted son of the 1st defendant, to set aside a Will made by his adoptive father on the 4th January 1868, whereby he bequeathed his immovable property to his daughter, the 3rd defendant, and another daughter, a minor named Kistnamah. The plaintiff further sought to obtain immediate possession of the property in dispute on the ground of the imbecility of his adoptive father.

(a) Present :—Sir W. Morgan, C.J., Innes and Kernan, JJ.