Appellate Jurisdiction(a)

Regular Appeal No. 129 *of* 1872.

NA'MASIVA'YA GAUNDAN.....*Appellant.*

KYLASA GAUNDAN.....*Respondent.*

Plaintiff sued to recover from defendants, his brothers, rupees 25,000, with interest, on a deed of assignment "B" granted to him by one Rájah Gaundan, dated 30th October 1870, transferring to plaintiff a promissory note "A" for rupees 25,000, executed by 1st and 2nd defendants to the aforesaid Rájah Gaundan, as one of the mediators, in conjunction with one Subbráya Gaundan, in a division of family property between plaintiff and defendants and others, agreeing to pay over on demand by the 30th September 1870 to plaintiff, through the mediators aforesaid, 25,000 rupees in lieu and on account of family property in possession of defendants.

The defendants admitted the execution by them of the document for 25,000 rupees, to be paid by them to plaintiff, (A.) and pleaded that it was given on consideration of the withdrawal of a criminal prosecution or, if not, that there was no consideration at all; and that, at the time of its execution by them, there was no dispute or question between them and plaintiff as to a partition of family property, which had been definitely settled by the Civil Court at Salem in Original Suit No. 2 of 1868, under the decree in which the defendants had recovered rupees 13,000 and odd from the plaintiff.

They denied any division of family property by mediation, as also that they agreed to pay 25,000 rupees on account of family property in their possession, also the validity of A and that it was legally binding upon them.

The Court of First Instance found; (1), that a partition of family property was effected by mediation and the document A was executed to the mediators by defendants on account of family property in defendants' possession; (2), that A was valid in law and binding on defendants,—and gave judgment for plaintiff for the amount sued for.

Upon appeal by the first defendant—*Held*, by the High Court, that as the decree in Original Suit No. 2 of 1868 (finally disposed of in appeal by the High Court) settled all the rights of the parties and, among other matters, the question of this alleged concealment, or theft, which the Court found the present plaintiff to have falsely asserted—there was here, therefore, no "res dubia" or "lis incerta," nor could either party believe that there was such. The final judgment of a competent Court in a suit to which the plaintiff was a party, had determined the matter.

That, on the facts of the case, it seemed impossible to doubt that the note was executed as a consideration for getting rid of the criminal proceedings, and that, as such a consideration is not only null but vicious, the decree of the Civil Judge should be reversed.

1873. *March* 3. *R. A. No.* 129 *of* 1872.

THIS was a Regular Appeal against the decision of E. F. Eliott, the Civil Judge of Salem, in Original Suit No. 4 of 1872.

The plaint was as follows:—"This is a suit for Rupees 25,000 under a document made over.

(a) Present: Morgan, C. J. and Holloway, J.

1873. *March 3.* *R. A. No.* 129 *of* 1872.

My father Áthiyanna Gaundan had four sons, my deceased elder brother Rangasámi Gaundan, myself, Námasiváya Gaundan, and Pongaly Gaundan. In consequence of a long disagreement between us in respect of division in the family, we were contending before the Magisterial, Civil, &c., tribunals. Thereupon, Subbaráya Govindar, the Zamindár of the muttah of Komaramangalam, &c., and Rájah Govindan, the Zamindár of the muttah of Puttúr, &c., interceded as mediators to effect a compromise between us, divided our muttah and other real and personal properties, and made a settlement that the 1st and 2nd defendants should pay me through Subbaráya Govindar and Rájah Govindar among the said mediators, a sum of Rupees 25,000 in cash for the ready money, gold and silver jewels, &c., which were in the 1st and 2nd defendants' possession, and the 1st and 2nd defendants have executed a promissory note on stamp paper to Rájah Govindar, among the said (mediators), on the 21st September 1870, promising to pay Rupees 25,000 on demand.

By order of Subbaráya Govindar, Rájah Govindar has made over to me his right under a stamped and registered bond executed to me by him on 31st October 1870, saying that the said 1st and 2nd defendants did not pay the amount according to that (promissory note), and that I might recover and take the same.

The said 1st and 2nd defendants did not pay according to that bond, though they were often asked.

I therefore pray that the defendants may be adjudged to pay me the principal, Rupees 25,000, according to the said document, together with subsequent interest."

Defendants filed the following written statement:—"Not a cash of the amount of the document A in question was received (*by us*); and this fact is clear from the documents A and B and the plaint.

With a view to bring shame upon us and usurp our property, the plaintiff filed a Magisterial complaint against us as if we had committed fraud in respect of family property; and during the time the Sub-Magistrate of Trichen-

1873. *March* 3. *R. A. No.* 129 *of* 1872.

gode was enquiring into the said complaint, the plaintiff urged that if we gave him a document for 25,000 Rupees and the largest muttah in the family estate, he would cause the dismissal of the complaint without attempting to get the same proved; and, accordingly, the plaintiff having greatly threatened and forced the 1st defendant, who was in custody of the Police, and also the 2nd defendant, who was let on bail to address a petition to the Revenue Officer, (*we*) were compelled to yield to the force used by the plaintiff for fear (*we*) should be disgraced; and the plaintiff then caused the document A to be executed, ostensibly in the name of Rájah Gaundan, and obtained it forcibly as stated above. But it was not executed of our free-will and in our ordinary and unperturbed state of mind.

Soon after the execution of the document A and the drawing up of the petition aforesaid, both parties appeared before the Magistrate, and the said case brought against us was then dismissed.

At the time of the execution of the document A there was no dispute whatever between both parties in respect of division. But, so far back as two years prior thereto, the question of division was fully settled through the Civil Court, and Rupees 15,000 and odd were paid to us by plaintiff, according to the decree passed in Original Suit No. 2 of 1868. Hence there having been no dispute whatever regarding division at the time of the execution of A, and no ready cash having been received (*by us*) under the said document, the allegation in the plaint that our real and personal property was divided by arbitrators, and that we had agreed to pay plaintiff, through arbitrators, Rupees 25,000 in cash for the ready money, jewels, gold, silver, &c., said by plaintiff to be in our possession, is false and fraudulent.

The document A having been obtained (*from us*) under duress, while (*we*) were in custody on a criminal charge falsely brought against us through enmity, is opposed to law and justice; and it is, therefore, not valid, nor are we liable to pay anything for it.

We pray, therefore, that the plaintiff's suit may be dismissed with costs."

1873.
March 3.
R. A. No. 129
of 1872.

The following Issues were framed:—

I.—Whether a partition of family property was effected by mediation, and whether the document A was executed to the mediators by defendants on account of cash and gold, silver ornaments, &c., belonging to the family property in their possession.

II.—Whether the document A is valid in law and binding upon the defendants 1 and 2.

The following is taken from the judgment of the Civil Judge:—

"A, is a promissory note executed by defendants to one Rájah Gaundan for the payment of Rupees 25,000, value received by them, and dated 21st September 1870. B, is the deed of assignment thereof by Rájah Gaundan to plaintiff.

The evidence of these witnesses, Subbaráya Gaundan (1st witness) and Rájah Gaundan (2nd witness), shows that on the 21st September 1870, A was written out by the 1st defendant in his own handwriting, and executed by both defendants of their own free-will and consent in a mediation expressly called for by them regarding a partition of family property between them and plaintiff, in respect to which there had been endless strife and disputes between them, and which came off at about 4 or 5 P. M. on that day, in the house temporarily occupied by these witnesses at Trichengode, to Rájah Gaundan, one of the mediators, and 2nd witness, by order of Subbaráya Gaundan, another and chief mediator and 1st witness, whom the plaintiff at the time distrusting the defendants asked to be security for the payment to him of the 25,000 Rupees then agreed to by defendants on account of the cash and jewels, &c., and other moveable family property in their possession, and which sum was fixed by the mediators on a rough calculation to be the value of the plaintiff's share in the said moveable property and represented the same. They affirm that no consideration in cash was actually paid by Rájah Gaundan *then* on A to defendants, nor received by them, as stated therein, because of this special arrangement at the time, by

1873. *March* 3. *R. A. No.* 129 *of* 1872.

which this was understood to be a mere paper accommodation and name-lending of Rájah Gaundan as a security to plaintiff for repayment to him of consideration belonging to him, but actually enjoyed by defendants, to the amount of A, and to save an actual transfer of goods. In short, it is shown to be a transaction on paper, of a promise to pay in cash instead of in kind, for consideration received in the matter of goods duly received by defendants, and parted with by plaintiff, upon this mediation, to the value stated in A, and executed to a mediator as security for the same, who, upon its non-fulfilment by defendants on demand by him, has assigned the promissory note to plaintiff to recover upon under the deed "B." In further proof and corroboration of the fact that a partition of family property was effected then by mediation, the plaintiff has filed the document "C," an authenticated copy of a petition for transfer of registry of certain villages which had been settled on the same day and at the same time between the parties by drawing of lots, and presented to the Tahsildar of Trichengode on that date, the 21st September 1870, in person, by the parties, as deposed to by him as 3rd witness for plaintiff, and which is admitted by the defendants. With all these documents admitted by defendants, and if such be the truth and *bonâ fides* of this transaction under A, which there seems little reason to doubt, judging from the respectability of the witnesses who depose to it and their relationship to the parties in this suit, as well as by the fact that they profess to be wholly disinterested personally therein and are the witnesses cited on both sides, there appears nothing objectionable or illegal in such an arrangement in itself by the consent of all parties, and A would, therefore, be necessarily valid and binding upon the defendants in ordinary circumstances, except it is otherwise invalidated by any of the pleas of duress, &c., pleaded by defendants in justification and acquittance, which has now to be considered.

The defendants urge that A is not valid and is not legally binding upon them, because; (1), they have never received the consideration of it; (2), that it was executed under duress during the pendency of a criminal charge

1873. *March* 3. *R. A. No.* 129 *of* 1872.

preferred against them before the Sub-Magistrate of Trichengode, and to save the further disgrace of their committal for trial to the Sessions Court; (3), that at the time of its execution there was no question of a division of property to be mediated upon, that having been definitely settled by the decree of the Civil Court of Salem in Original Suit No. 2 of 1868, upon which they had recovered from plaintiff.

The first of these objections has already been disposed of in the definition of the nature of the transaction under A, as explained by common witnesses and mediators, which the Court has accepted as the truth, and which establishes the fact that consideration has been received by defendants upon it, if not actually in hard cash, at all events its equivalent in reality, in kind.

On the second point, of duress, the defendants have examined the 1st defendant himself on their side, who, as naturally might be expected, supports it, even at the expense of truth, which he has greatly overstepped, and has had no hesitation whatever in grossly perjuring himself. He can get no one whomsoever to support him in his statements, and his evidence stands singly by itself, and is further flatly contradicted in its facts by all alike who have been examined in this case, the common witnesses, the Tahsildár, and his own vakil who conducted his defence in the criminal charge before the Sub-Magistrate; and it is in point of credence utterly worthless, as it is impossible to believe it at all, and it is besides, at its best, the evidence of a most interested party to this suit. The Court, therefore, rejects the testimony as totally incredible and untrustworthy, and excepting it, there is no evidence as to duress at all. It is perfectly true that this criminal charge against defendants was disposed of on this day, but, as the Tahsildár and vakil both say it was closed between 2 and 3 P. M., it must have been before the execution of A, which was after 4 or 5 P. M., even according to the statement of the 1st defendant himself, and so A could not possibly have been executed during the pendency of this criminal trial, if even it had any connection with it.

1873. *March 3.* *R. A. No.* 129 *of* 1872.

According to 1st defendant, this criminal charge was dismissed upon the execution of A, which was read out first aloud to the Sub-Magistrate, along with C, in the Kacharí, and then they were discharged. This is most positively and solemnly denied by both Tahsildár and defendant's vakil, who profess, neither of them, to know anything about A at all.

The defendant's vakil, on the other hand, now pleads that although A was executed after the criminal trial, yet the preliminary arrangements connected with it were all got up during the pendency of the trial, or on the last day of it, and while the 1st defendant was in legal custody at the Kacharí, and therefore A was connected with the trial and was given under duress.

This, in itself, is manifestly a contrary pleading to that of defendant himself, who says the case was dismissed upon A itself, and not in connection with it. The Court, however, holds most certainly that the trial was not dismissed upon A as stated by defendant, and that it is not in the least probable that it was dismissed in connection with A either, but on its merits alone. It appears, moreover, to have been called up for trial by the Sessions Judge subsequently, believing a *primâ facie* case to exist, and to have been ultimately dismissed by him. Further, the defendant's vakil most positively affirms that he did his very best to dissuade the defendant against signing any document of the kind of A, and advised him most strongly not to do so, assuring him that the case against him was certain to be dismissed, but that the defendant seemed to have made up his mind differently, and to have suspected his intentions in saying so. Considering all this, the Court entirely fails to see where the duress complained of existed at all, and dismisses that objection accordingly.

The only remaining objection is easily disposed of by the fact that it is well known that for a very long time past, both before and since the decree in Original Suit No. 2 of 1868 referred to by defendants, these brothers have been fighting unmitigatingly regarding their shares in the

1873. *March* 3. *R. A. No.* 189 *of* 1872.

family property, and that charges and counter-charges against one another with reference thereto have been the rule rather than the exception, and, therefore, it is to be inferred that that suit did not contain the whole facts of their disputed property, or definitely settle all matters between them with regard thereto, and there is ample room for supposing that this bickering aud strife was all entirely owing to fraud and concealment of property of some kind by one or other, which, besides being difficult to bring to light, could never be brought conclusively home to any one party in particular criminally, and which from disgust eventually led them mutually to seek some reconciliation of this kind. It is the natural inference to be drawn in the circumstances, and the Court is prone to do so.

Looking at the period of two years that have elapsed since the execution of A by defendants, without any steps being taken by them with regard to it by criminal complaint or otherwise in disputing it, either on the score of duress, or for any other reason whatever, nor until this suit had been first filed against them by plaintiff for the amount thereof, when for the first time they file such pleas in answer, their only explanation of their laches being that they believed A to be valueless for want of consideration paid thereon, the Court considers that thereby a suspicion, attaches to their case, as unfavorable to their pleadings, as it is advantageous to the truth of plaintiff's cause, and which by rendering those pleas worthless in themselves is most fatal to their rebuttal of plaintiff's claim. For these reasons the Court finds in the affirmative on both issues, viz. :—

I.—A partition of family property was effected by mediation, and the document A was executed to the mediators by defendants on account of cash and gold and silver ornaments belonging to the family property in their possession.

II.—The document A is valid in law and binding upon the defendants 1 and 2; and adjudges for the plaintiff as sued for in the sum of Rupees

1873. *March* 3. *R. A. No.* 129 *of* 1872.

25,000, together with interest and subsequent interest and all costs."

The 1st defendant appealed upon the following grounds:

1. The decree is against the weight of evidence.

2. There is no consideration whatever for the promissory note sued on.

3. The facts of the case shew that it was extorted from the defendant through threats, fear and undue influence.

4. The Civil Judge was wrong in awarding past interest when it was not even prayed for by the plaintiff.

Sanjiva Rau, for the appellant, the first defendant.

Scharlieb, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—The defence is that the promissory note was given on consideration of the withdrawal of a criminal prosecution, or, if not, that there was no consideration at all.

The proceedings are undoubtedly open to very great suspicion. The Sub-Magistrate had ordered the defendant into custody, refusing to allow him to be longer at large upon bail. After so proceeding upon the evidence before him, he dismissed the complaint on the ground that there was no evidence justifying a committal. These proceedings appeared so suspicious, that a committal was ordered and an acquittal followed.

On the very day of the discharge in these very suspicious circumstances, there occurred what is called an arbitration, and this note was executed as part of the matter of the compromise. If the case depended upon this alone, strong as might be our suspicions, we should, perhaps, not be able to say, in opposition to the conclusion of the Civil Judge, that the pressure of the prosecution was the defendant's motive, and its withdrawal the consideration for the execution of this note. The matter alleged to have been compromised is important both as matter of law and as throwing light upon this evidence.

1873. *March* 3. *R. A. No.* 129 *of* 1872.

After a suit finally disposed of by the High Court, in which the substantial question in dispute was whether the money and jewels were in possession of the present plaintiff, or had been wrongfully taken out of his hands by the defendants, the Court came to a conclusion which it has never been sought to impeach, that the plaintiff was in fact in possession, and the decree for division settled all the rights of the parties, and, so far as the Civil Courts were concerned, set them at rest for ever. Among other matters was the question of this alleged concealment, or theft, which the Court found the present plaintiff to have falsely asserted.

There was here, therefore, no "res dubia" or "lis incerta." Moreover, neither party could believe that there was such (*Callisher* v. *Bischoffsheim*, L. R., 5, Q. B., 449 ; *Cook* v. *Wright*, 1, B. & S., 559). These later cases bring the English law much nearer to sound principle than the earlier. The principle of these was that there must be between the parties a question really doubtful in point of law (*Longridge* v. *Dorville*, 5, B. & A., 117.)

It is, however, as clear law in England that the foregoing of a claim which the claimant knows to be unfounded is no consideration for a promise (*Wade* v. *Simeon*, 2, C. B., 548). In this case the final judgment of a competent Court in a suit to which the plaintiff was a party had determined the matter. The rule of the Roman law is distinct. "Si post rem judicatam quis et solverit repetere "poterit idcirco quia placuit transactionem nullius momenti "esse."

The exceptions to the rule (12, 6, 23, s. 1) have no application to this case. This final judgment, independently however of its bearing in point of law, reflects upon the weight of the evidence. It is impossible to believe that the defendant, who had for several years successfully contended that the property was in plaintiff's possession, without external pressure and moved merely by conscientious scruples, agreed to re-open, to his disadvantage, this concluded controversy.

1873. *March* 3. *R. A. No.* 129 *of* 1872.

It is impossible not to see that the pressure of the criminal prosecution was the real ground, and difficult to doubt that the acts of the arbitrators, the complainant and the Sub-Magistrate, conjointly conduced and were intended to conduce to the admission of a liability which a conclusive decision of a competent Court had decided not to attach to the defendant. On the facts of the case, therefore, it seems impossible to doubt that the note was executed as a consideration for getting rid of these criminal proceedings, and as such a consideration is not only null but vicious, the decree of the Civil Judge must be reversed and the original suit dismissed. There will, however, be no costs throughout.

Appellate Jurisdiction(*a*)

Regular Appeal No. 40 *of* 1871.

RA'JAH RA'JAH VARMA VALIA RA'JAH OF CHERAKAL KOVILAGOM..... } *Appellant.*

KOTTAYATH KIYAKI KOVILAGATH REVI VARMA MOOTHA RA'JAH AND 2 OTHERS... } *Respondents.*

Plaintiff (the Cherakal Rájah) sued to establish his right to the custody, management and appropriation for the purposes of a pagoda, of certain jewels, &c., used in the religious ceremonies performed in the pagoda, which jewels he alleged had been assigned to him by the Urallers of the pagoda. The Civil Judge dismissed the suit.

Upon Regular Appeal by the plaintiff

Held, by KINDERSLEY, J.—That the trustees of a pagoda cannot lawfully alienate the trust property subject to all the trusts attaching to it.

By HOLLOWAY, J.—That while seeing no reason to doubt that a religious office cannot be made the object of sale, the present case is a much more simple one—Here the plaint is for certain jewels which are materials used in religious worship, to the custody of which the alleged vendor is entitled and to the careful custody of which he is bound. That these articles are by all systems of law, and by the Hindu law almost more emphatically than by any other, absolutely "extra commercium."

1873. *February* 20. *R. A. No.* 40 *of* 1871.

THIS was a Regular Appeal against the decision of J. W. Reid, the Acting Civil Judge of Tellicherry, in Original Suit No. 3 of 1869.

In this case the plaintiff (the Cherakal Rájah) sued to establish his right to the custody, management, and appro-

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