

Government Paper in which the bail has stood and the market rate from the time the bail was given until the excessive bail be released, and that that amount be set off against the judgment debt. It should be referred to the Registrar to fix the amount but if the parties agree as to the amount before the decree is signed, the reference need not be included in the decree, and the amount agreed on may be inserted in the decree as the amount to be deducted from the judgment debt. The amount of bail was excessive so far as it exceeded £4,000 for salvage reward, and £500 for costs.

We think the appellants must have their costs of the appeal. The appeal, as we have already held, is under the High Court Act and the Letters Patent, and the procedure in it is mainly governed by the Civil Procedure Code, and we think the usual practice of this Court in appeals from the Original Side should therefore be followed.

Costs of filing cross-objections will be allowed to the respondents. The appeal is allowed with costs on scale No. 2.

Appeal allowed.

Attorneys for the appellants: Messrs. *Watkins & Co.*

Attorneys for the respondents: Messrs. *Morgan & Co.*

C. D. P.

CIVIL REFERENCE.

Before Mr. Justice Pigot and Mr. Justice Rampini.

TOOMEY (PLAINTIFF) v. RAMA SAHI (DEFENDANT).^o

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July 1.

Contract—Personal Contract—Assignment—Suit by assignee—Construction.

When considerations connected with the person with whom a contract is made form a material element of the contract, it may well be that such a contract on that ground alone is one which cannot be assigned without the promisor's consent so as to entitle the assignee to sue him on it.

Stevens v. Benning (1) referred to.

By an agreement in writing, dated 13th December 1882, and executed in favour of *M. D.* and *H. D.*, who were the proprietors of an Indigo concern, the defendant Rama Sahi agreed to sow indigo, taking the seed and *tandi* from *M. D.* and *H. D.*'s concern, on four biggahs of land out of his holding

* Reference No. 2A of 1889, made by Moulvie Abdul Barry, Mansiff of Mozufferpore, dated the 9th of May 1889.

(1) 1 K. and J., 168.

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selected, measured, and prepared by *M. D.* and *H. D.* or their *Amlah*; and when the indigo was fit for weeding "to weed, re-weed and turn it up to the extent necessary according to the directions of the *Amlah* of the concern;" and when the indigo was fit for reaping to "reap and load it on carts according to the directions of the *Amlah* of the concern;" and "if any portion of the said indigo land" was "in the judgment of the *Amlah* of the concern found bad;" in lieu thereof to get some other land in his holding measured, and "on the land so measured in *Bysack*" to "sow *Bhadbon* crops only which will be reaped in *Bhadur*." The defendant also agreed not to sow on the land measured any crop that might "cause obstacle to the cultivation of indigo," and, if he did so, "the *Amlah* of the concern" should "be at liberty to destroy such crop," and he should not "oppose the destruction thereof nor sue in the Courts Civil or Criminal for destruction of the same." As regards a breach of any condition it was provided: "If I or my heirs depart from the conditions of this indigo engagement directly or indirectly, or in any way neglect to cultivate or do not cultivate indigo, I or they shall pay to the above-named *M. D.* and *H. D.* damages for the same from my or their person and property and shall raise no plea or objection."

In 1886, *M. D.* and *H. D.* assigned the entire benefit of this agreement to the plaintiff.

In a suit by the plaintiff against the defendant for damages on account of his alleged failure to cultivate indigo for the plaintiff's concern in accordance with the terms of the agreement of the 13th December 1882: *Held*, that the agreement must be construed as one, which had been entered into by the defendant with reference to the personal position, circumstances, and qualifications of *M. D.* and *H. D.* and their *Amlah*; and that therefore, it was not assignable so as to give the assignee a right to sue upon it in his own name as for a breach of contract.

THIS was a reference by the First Munsiff of Mozufferpore exercising Small Cause Court powers, and arose out of a suit for damages for breach of contract.

The plaintiff, George Toomey, who was the owner of the Kanti Indigo Concern, brought a suit against the defendant Rama Sahi for damages, on account of his alleged failure to cultivate indigo for that concern in the years 1293, 1294, and 1295 Fasli, in accordance with the terms of an agreement, dated the 13th December 1882, and executed by him (the defendant) in favour of Baboos Mathura Das and Hanuman Das, who had assigned the agreement to the plaintiff.

At the time when Baboos Mathura Das and Hanuman Das established a rival factory, called the Mirzapore Indigo Concern, there

was a dispute between them and the owner of the Kanti Concern, the plaintiff. This dispute was shortly after settled, and the owners of the rival factories entered into an agreement, dated the 4th March 1886, whereby a certain boundary line was fixed, and the proprietors of each of the two factories agreed not to have their indigo sown by ryots holding jotes outside the boundary line so drawn on their side of the factory. In consequence of this agreement the jotes of some of the ryots, who had executed agreements to sow indigo for Baboos Mathura Das and Hanuman Das, fell within the area over which the Baboos had given up their rights to have indigo sown for themselves; and accordingly the Baboos assigned the entire benefit under the agreements executed by these ryots in favour of the Kanti Concern. The defendant was one of these ryots; and the agreement to sow indigo, which he executed in favour of the Baboos, was dated the 13th December 1882. The plaintiff sued the defendant on that agreement as the assignees of the Baboos. The defendant contended that the plaintiff was not entitled to sue him on his agreement of the 13th December 1882, inasmuch as he had never agreed to cultivate indigo for the assignees of Baboos Mathura Das and Hanuman Das, and there was no provision in the agreement that the representatives or assignees of the Baboos should have the right to enforce it. On behalf of the plaintiff it was urged that, although the term "heirs" was not expressly mentioned in the defendant's agreement, it must nevertheless be implied, especially as s. 45 of the Contract Act of 1872 provided for such an omission; and that similarly the word "assignees" must be implied. The Munsiff dismissed the suit with costs, contingent on the opinion of the High Court to which he referred the following question:—

"Whether by operation of law the word assignees could be imported into the agreement of the defendant dated the 13th December 1882."

This agreement was as follows:—

"I the declarant do of my own free will and accord appear before Baboo Mathura Das and Baboo Hanuman Das proprietors of Mirzapore Indigo Concern Chakleh Nye Pergana Besarrah give

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in writing this indigo engagement for cultivation of indigo on four biggahs of first class land by a six and half cubit measuring pole within the area of mouza Beerpore Tuppeh Bhatsala Pergana Besarah out of my holding as per details at foot from 1290 to 1296 (one thousand two hundred and ninety-six) Fashi on receipt of Rs. 16 as advance and validly declares as follows:— In the commencement of the month of Assin and Kartick I or my heirs in company with the Amlah of the concern shall on the requisition of the above-named Baboos get the said (four) biggahs out of my holding as selected by the Amlah of the concern and the above-named Baboos measured and till plough and turn up the same well as may be necessary for the term of this indigo engagement: And when the indigo land in the said mouza will be fit for sowing indigo the above-named Baboos or their Amlahs shall get it measured and prepared: After the measurement and preparation when the sowing season will come in Falgoun and Chait I or my heirs shall sow it taking indigo seeds and *landi* from the concern: When the indigo will be fit for weeding I or my heirs shall forthwith weed re-weed and turn it up. . . . to the extent necessary according to the directions of the Amlah of the concern for the term of this indigo engagement: When the indigo will be fit for reaping I or my heirs shall in the indigo manufacturing season reap it and load it on carts according to the directions of the Amlah of the concern: I or my heirs shall plough the land with stumps in time and when the indigo grown from stumps will be fit for manufacture I or my heirs shall in the season of manufacturing indigo grown from stumps reap and load on carts the same also: If any portion of the said indigo land is in the judgment of the Amlah of the concern of the above-named Baboos found bad I (or my heirs) shall in lieu of such bad land again get measured some other land in my holding in the month of Bysack for the future and shall on the land so measured in Bysack sow Bhadbou crops only which will be reaped in Bhadur: I or my heirs shall not sow on the land so measured in Bhadur any *rabi* crop such as *rahar bunga* etc. the sowing of which may cause obstacle to the cultivation of indigo from the commencement of the month of Assin: Should I or my heirs do so the Amlah of the concern of the above named Baboos shall be

at liberty to destroy such crop and I or my heirs shall not oppose the destruction thereof nor sue in the Courts Civil or Criminal for destruction of the same: Should I or my heirs sue in the Courts Civil or Criminal such suit shall under the terms of this indigo engagement be inadmissible and invalid: As regards the bad land that the above-named Baboos or their Amlah may of their own will and accord give up on taking some other land in exchange I shall sow on it any crop I like: I shall take from the above-named Baboos value of the indigo at Rs. 12 per biggah year by year for the term of this indigo engagement: As regards the sum of Rs. 16 now taken as advance I shall at the end of the year 1296 Fasli which is the last year of the term of this indigo engagement set off this sum against the value of the indigo of that year and take the remaining value due to me according to account: I shall take advance on the 1st Assin make weeding in Bysack and take value in full in Bhadur every year during the term of this indigo engagement: If I or my heirs depart from the conditions of this indigo engagement directly or indirectly or in any way neglect to cultivate or do not cultivate indigo I or they shall pay to the above-named Baboos damages for the same at Company's Rs. 20 per biggah from my or their person and property and shall raise no plea or objection. To this purport I give in writing these few words in the shape of an indigo engagement for a term of seven years to come to use when required."

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Mr. *Evans*, and Mr. *O'Kinealy*, (instructed by Mr. *G. B. McNair*) for the plaintiff.

Baboo *Kali Kishen Sen* for the defendant.

The opinion of the Court (PIGOT and RAMPINI, J.J.) was as follows:—

This is a reference made by the First Munsiff of Mozufferpore upon a point arising in a suit brought by the owner of the Kauti Indigo Concern against the defendant for damages on account of his alleged failure to cultivate indigo for that concern in the years 1293, 1294, and 1295, in accordance with the terms of an agreement entered into by him and dated the 13th of December 1882. The Munsiff has referred to us the question

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whether by operation of law the word "assignees" can be imported into that agreement. The agreement was made with Baboos Mathura Das and Hanuman Das, who assigned, or attempted to assign, it to the plaintiff, and the plaintiff as such assignee now sues on that agreement.

The arguments of the two learned Counsel, who appeared before us on behalf of the plaintiff, went over a very wide range. In stating our opinion that the conclusion of the Munsiff was right, we shall limit ourselves to one ground only. We do not propose to deal with the general questions with regard to the rights of persons to whom contracts of various kinds are assigned in this country. Assuming for the purposes of the argument as a general rule the assignability of contracts in this country, and the power of the assignees to sue upon them, we do not think that in the present case the contract was one, which, upon a fair construction of it, can be held assignable so as to give the assignee a right to sue upon it.

This agreement is described by the defendant Rama Sahi as an "engagement for cultivation of indigo on four biggahs of first class land by six and a half cubit measuring pole within the area of mouza Beerpore Tuppeh Bhatsala, Pergana Besarah out of my holding as per details at foot from 1290 to 1296 Fashi on receipt of Rs. 16 as advance." It provides that "in the commencement of the month of Assin and Kartick I or my heirs in company with the Amlah of the concern shall on the requisition of the above-named Baboos get the said four biggahs out of my holding as selected by the Amlah of the concern and the above-named Baboos measured." When it is fit for sowing indigo the Baboos or their Amlah, shall get it measured. "After the measurement in Falgoon or Chait, I or my heirs shall sow it taking indigo seeds and *tandi* from the concern. When the indigo will be fit for weeding I or my heirs shall forthwith weed, re-weed, and turn it up . . . to the extent necessary according to the directions of the Amlah of the concern." When the indigo is fit for reaping I shall "reap and load it on carts according to the directions of the Amlah of the concern." Then again "if any portion of the said indigo land is in the judgment of the Amlah of the

concern of the above-named Baboos found bad, I or my heirs shall in lieu of such bad land again get measured some other land in my holding," and, on the land so measured "sow Bhadbon crops only which will be reaped in Bhadur." Then there is a provision that he is not to sow on the land measured any crop which may cause obstacles to the cultivation of indigo. Should he do so, "the Amlah of the concern of the above-named Baboos shall be at liberty to destroy such crops, and I or my heirs shall not oppose the destruction." Then as to the bad land which the Baboos or their Amlah give up on taking other land in exchange, he is to be entitled to sow it as he pleases. Then there is a provision for payment of damages to the Baboos in case of his neglecting to cultivate.

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We think that this contract is one which may reasonably be viewed as having been entered into with reference to the personal position, circumstances, and qualifications of the Baboos and their Amlah. It makes the Baboos and their Amlah solé judges in matters of great importance; and it does seem to us that it would be an unreasonable construction of this agreement were we to hold that it could possibly have been in the contemplation of the provision that any persons, the servants of any persons, the managers of any concern to the owners of which the Baboos may please to assign this contract, were to stand in the place of the Baboos and exercise the powers conferred by this agreement on the Baboos and their Amlah. When considerations connected with the person with whom a contract is made form a material element of the contract, it may well be that such a contract on that ground alone is one which cannot be assigned without the promisor's consent, so as to entitle the assignee to sue him on it.

We have not before us the question whether or not the benefit of such a contract as this would have passed to the executors of the Baboos, supposing they had any. We should perhaps in that case be disposed to construe the contract as one which, together with the right to sue on it, the defendant might reasonably be supposed to have intended to be passed to the executors carrying on the same concern. This of course is but an *obiter dictum*, as the question does not arise in the case.

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We may, with reference to the principle to which we have just referred, that when considerations relating to the person with whom a man is willing to contract, as, if personal relations between the parties, or the personal condition or qualifications of the promisee, form an element or may fairly be supposed to have done so in the entering into of the contract, mention a passage in Vice-Chancellor Wood's judgment in the case of *Stevens v. Benning* (1), at pp. 175-6. In this case we limit ourselves to the proposition that this contract cannot be construed as one which was entered into save with reference to the person, qualifications, status, and position of the Baboos of the concern of which they had charge. Therefore, we hold that neither by importation into the agreement, nor by any equitable principle, is the plaintiff entitled to sue, in this case in his own name as for a breach of contract.

C. D. P.

PRIVY COUNCIL.

P. O.*
 1889
 March 27
 and 29.
 May 14.

TARACHURN CHATTERJI (DEFENDANT) v. SURESHCHUNDER
 MUKERJI AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

Hindu law—Will—Construction of will of Hindu testator—Power to adopt conferred on testator's widow ended on estate vesting in his son's widow—Gift of beneficial interest.

On a claim by the children of the testator's daughter, as against his brother's son, held that the testator's direction to his executor (who was his elder brother), to make over whatever remained of his estate, after payment of debts, to his, the testator's, son ("when he comes of age") had the effect of a gift to that son operating at that time; and that the words in the will, "if my minor son dies," meant, in order to be consistent with the above, "dies before attaining full age."

On the death of the testator's son, after attaining full age and leaving a widow, the testator's widow, although empowered by the will to adopt if the testator's son should die without son or daughter (which he did) could not exercise this power after the estate had, consequently upon the son's death, vested in his widow for her widow's estate.

* Present: LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

(1) 1 K. and J., 166.