Present : Mr. Justice Wendt and Mr. Justice Wood Renton.

1908.
September 9.

MOHAMED BHOY *et al. v.* MARIA DIAS *et al.*

D. C., Colombo, 25,576

" Bill of sale "—Agreement to convey share allotted in a partition suit—Assignment of money that may be realized—" Chose in action "—" Movable property "—Registration—Ordinances Nos. 8 and 21 of 1871.

The defendants, who were parties to a partition suit pending in the District Court of Colombo, agreed with the plaintiffs by a notarial instrument, dated January 27, 1906, and registered in the Land Registry Office on May 22, 1906, to convey to the plaintiffs, within ten days of the final decree, the divided portion of the land that may be allotted to them; and in the event of a sale being decreed, instead of a partition, the defendants assigned to the plaintiffs all sums of money which then may become payable to them for their share of the property, and also all their rights in the decree.

The property was sold under the Partition Ordinance and the money deposited in Court, and the plaintiffs applied to draw the money which was allocated to the defendants for their share of the property. The defendants opposed this application; and the parties were referred to a separate action. The plaintiffs accordingly instituted this action.

Held, that the instrument did not deal with " movable property," and was therefore not a " bill of sale " within the meaning of Ordinance No. 8 of 1871, and did not require to be registered within fourteen days of its date, as provided by the Ordinance; and that the plaintiffs were entitled to succeed.

APPEAL by the plaintiffs from a dismissal of their action. The facts and arguments fully appear in the judgment of Wendt J.

Bawa, for the plaintiffs, appellants.

Elliott, for the defendants, respondents.

Cur. adv. vult.

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[1] *S. C. Min., July 14, 1908.*

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September 9, 1908. WENDT J.—

The facts out of which this appeal arises are as follows. The first defendant, who is the wife of the second defendant, was entitled to an undivided one-third share of house No. 38, Prince Street, Colombo, and on April 14, 1905, the defendant instituted an action to obtain a judicial partition or sale of the property. Pending that action, on January 27, 1906, the defendants entered into an agreement with the plaintiffs, the effect of which we have upon the present appeal to determine. That agreement, after reciting in detail the title of the first defendant and the pendency of the action, witnessed that, in consideration of the payment of a sum of Rs. 5,000 made at the execution of the agreement and of a further sum of Rs. 5,000 to be paid later, the defendants agreed to sell and the plaintiffs to purchase, within ten days from the date upon which final decree shall be entered in the action, the divided one-third share, which might be decreed to the first defendant in the event of the said final decree being one for a partition of the said premises; that in the event of the final decree being one for sale of the property and distribution of the proceeds, the defendants " do hereby absolutely sell, cede, assign, transfer, and set over unto the plaintiffs all sums of money that may be brought into Court or become payable to the first defendant as and for her share of the proceeds sale of the said property under the said decree, and also the rights of the said defendants in the said action, and in, to, or under the said decree, and all benefit, profit, sum and sums of money, and advantage whatsoever that now can or shall or may hereafter be obtained by reason or means of the same."

This agreement was registered in the Land Registry Office on May 22, 1906. The property was sold under decree of the Court in the partition action and the proceeds paid into Court, out of which a sum of Rs. 12,938.97 was allocated to the first defendant as the equivalent of her undivided one-third share of the property. The plaintiffs thereupon, alleging a due tender of the balance Rs. 5,000 under the agreement, applied to have the Rs. 12,938.97 paid out to them. The defendants opposing the application, the Court refused it, and referred the plaintiffs to a separate action. Hence the present action. During its pendency the first defendant was permitted to take out of the Court a sum of Rs. 5,000 out of the Rs. 12,938.97 as the equivalent of the balance consideration due by the plaintiffs.

A number of issues were framed at the trial, all of which, with the exception of the 5th, were decided in plaintiff's favour. Defendant's counsel at first sought to support the decree in their favour by contending that some of those issues had been wrongly determined by the District Court, but at the close of the argument he was constrained to abandon that contention and rely solely on the 5th issue. This issue raised the defence that the agreement sued upon was a " bill of sale " within the meaning of the Ordinance

No. 8 of 1871, and therefore void by reason of its not having been registered within fourteen days of its date as required by that Ordinance. The learned District Judge upheld his defence and dismissed plaintiff's claim to the fund in Court, but decreed the defendants to repay the price paid them by the plaintiffs.

The District Judge's attention was apparently not called to the provisions of section 1 of the amending Ordinance No. 21 of 1871, which, in my opinion, rendered it unnecessary to register the agreement within fourteen days. That section enacts that no conventional hypothecation or bill of sale of any movable property shall be deemed to be invalid or in any respect ineffectual for want of registration under the provisions of the said Ordinance No. 8 of 1871, if such conventional hypothecation or bill of sale shall be effected by any instrument which also contains any mortgage or assurance of immovable property, and if such mortgage or assurance of immovable property shall be duly registered in pursuance of the Land Registration Ordinances, Nos. 8 of 1863 and 3 of 1865, or either of these. The agreement in question is contained in an instrument which deals in the same way with immovable property, and as the Land Registration Ordinances limit no period of time for the registration of instruments affecting land, it must be taken to have been duly registered under those Ordinances. As to the suggestion that the later Ordinance, while making a different form of registration sufficient, intended to retain the limiting period of fourteen days, it is sufficient to point to the words in section 1, " registration under the provisions of the said Ordinance No. 8 of 1871," which includes the provision for registration within fourteen days.

I am further of opinion that the agreement in question was not a " bill of sale," because the subject of it was not " movable property," and because it was not a power of attorney or licence to take possession of personal property as security for a debt.

The contention that the parties intended to create only a security for the Rs. 5,000 paid in advance was, indeed, submitted to us, but it was not put forward in the District Court, and we were clearly of opinion that in view of the express terms of the instrument it was not sustainable. It is therefore unnecessary to consider whether the subject of the agreement was " personal property," a term which is not co-extensive with " movable property." Was it then movable property?

It was pointed out in *Croos v. De Soysa* [1] that movables regularly constituted both in the Roman and Roman-Dutch Laws a subdivision of corporeal property, and that it was only for certain purposes that incorporeal property and obligations were classed with movables. If the fund here in question is to have attributed to it the character of the property out of which it was realized, it would be immovable property. I think also that the analogy of the *ratio decidendi* in

[1] *(1903) 7 N. L. R. 32.*

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Humble v. Mitchell,[1] a case to which I referred in *Croos v. De Soysa*,[2] applies. As under section 17 of the Statute of Frauds, so also under section 2 of the Ordinance we are construing, "delivery" is an alternative to a written record as the condition precedent to the validity of the transaction, and that is a reason for holding that the kind of property contemplated was such as is capable of delivery. The property here dealt with was incapable of delivery, for, although it has been spoken of as a sum of money, that money was not anywhere to be found *in specie*. In *Dawson v. Van Geyzel* [3] the question was whether a share in the compensation still to be awarded for land taken up for public purposes was movable property under the Ordinance of 1871, and in deciding it was not, the Court (Lawrie A.C.J. and Withers J.) expressed the opinion that the Ordinance was limited to corporeal movables. I venture to agree in that opinion. In *Arunasalam Chetty v. Appuhamy* [4] the question was whether the assignment of a share of a sum of money lying in Court as the proceeds sale sold in a partition action was obnoxious to the Ordinance of 1871, and Moncreiff J., Layard C.J. concurring, held that it was not an assignment of a "chose in action," as the latter term was defined by Blackstone. Moncreiff J. said that the District Court was trustee of the fund for, or agent of, the person to whom it had been adjudicated, and that it could not correctly be said that the allottee had a mere right of action to recover the fund; after adjudication it was his, as the land had been his before. That case is clearly distinguishable from the one now before us, on the grounds that here the land had not yet been sold at the date of the transaction we are considering, and it could not therefore be said, in the words of Blackstone, that the assignor had the enjoyment of the fund, either actual or constructive; it was not yet in being. But the term "chose in action" has undergone much extension in England in modern times; and, besides, in *Arunasalam Chetty v. Appuhamy* [4] the Court was not asked to define "movable property" as used in the Ordinance, and it does not follow that any particular property which is not a "chose in action" is necessarily "movable property."

I think the subject of the assignment we have to do with was not movable property within the meaning of the Ordinance, and the assignment therefore did not need registration.

I would allow the appeal, and give judgment for the plaintiffs as prayed for with costs in both Courts.

WOOD RENTON J.—I agree.

Appeal allowed.

[1] *11 A. & E. 205.*
[2] *(1903) 7 N. L. R. 32.*
[3] *(1893) 3 C. L. R. 36.*
[4] *(1903) 3 Bal. 166.*