LATE SUPREME COURT, EQUITY SIDE.

1864. March 17.

VISHVANAT'H A'TMA'RA'M .....*Plaintiff.*
BA'PU NA'RA'YAN and KAYA'BA'I his wife...*Defendants.*

Specific Performance—Material Parts of Agreement must be carried out by Plaintiff—Variation of Written Agreement by Parol Evidence.

One who asks the Court for a decree for specific performance of an agreement must show that he is willing and able to carry it out in all its material parts so far as he is concerned, and also that no act of his own in relation to the agreement has in any material degree damnified his opponent. He cannot select one part of the agreement for breach and another for performance. He must be prepared to carry out the entire of his own part of the contract before he can call upon his adversary, through the instrumentality of the Court, to specifically execute the latter part of the agreement.

In resisting specific performance of an agreement it is competent to the defendant to show by oral evidence that the real intention of the parties to the agreement has not been correctly expressed in the written document.

IN this case a bill had been filed on the Equity side of the late Supreme Court by the plaintiff against the defendants, for specific performance of an agreement in the Maráthi language, dated the 16th of July 1859, in counterpart, one part being addressed to the plaintiff, and signed by Rámchandra Náráyaṇ and Dináji Morobá, the constituted attorneys of the defendant Bápu Náráyaṇ. The translation of this counterpart, as set out in the bill, was as follows :—

"An agreement paper, Saturday, the 2nd of the month of Ashád Vadya in the (Shálivahan) year 1781, in the year named Sidhárthi, the 16th of the month of July One thousand eight hundred and fifty-nine, on that day to him who receives in writing the agreement paper (namely), Mr. Vishvanáthji A'tmárám Seṭ Sadávart, residing in Bombay. From him who gives in writing the agreement paper (namely), Bápuji Náráyaṇ Seṭ Mángle, inhabitant of Bombay, now residing at Penang, on his behalf (write) his fully authorised attorneys, Rámkrishṇa Náráyaṇ Seṭ and Dináji Morobá Seṭ, in all two persons, jointly and severally residing in Bombay. The

1864.

VISHVANA'TH A'TMA'RA'M v. BA'PU NA'RA'YAN *et al.*

reason we give in writing the agreement paper is as follows:—There is money of yours claimable from the abovenamed Bápuji Set for about Rupees eighteen thousand (due) on his private account; a decree has been passed against him in the Supreme Court; and for a balance appertaining to the counting-house account (there are due) about Rupees thirty-two thousand: (these sums) being added together, there are due to you Rupees 50,000 (fifty thousand) in all; besides this he is indebted to other persons, the particulars of which are as follows:—About Rupees 7,000 to Purshotam Prán̄jivandás, to whom there is mortgaged an 'estate;' and Rupees 11,000 (eleven thousand) to Kallián̄ji Hunsráj Bengáli, to whom there is mortgaged an 'estate;' and Rupees 2,500 (two thousand and five hundred) to Morobá Fakarji, to whom there is mortgaged an 'estate.' And besides this there are debts due to sundry persons amounting to about Rupees 500 (five hundred). As thus described, there are due altogether seventy-one thousand rupees, including your rupees. Thereupon you have now brought an attachment against his estate, in consequence of which those estates will be sold through the Sarkár (*i.e.*, by the Court or the Sheriff), and eight annas in the rupee will be realised, and a very great loss will be sustained. Seeing such a probability, we on his behalf made a representation to you, and requested you would act in such a way that the said debtor's deliverance from his difficulties might be effected, and that a settlement might be made relative to the money due to you and to (other) people. Thereupon, having consented to that, you said, 'the whole of Bápuji Set's estate should be delivered into my possession:' consequently his estates (which) are to be delivered into your possession, are as follows:—

"1. The *oart* in which there is a bungalow at Chaupati of 2 (two) water-wheels.

"1. The Sátej *oart* at Máhim of 4 (four) water-wheels.

"1. The Khájarbhát *oart* at Máhim of 1 (one) water-wheel.

"1. A bungalow at Matungá with a stable adjoining it, and a small tank and the surrounding ground, and the house which stands upon a rising ground, and the estate consisting of the vacant ground which there may be surrounding that estate.

"1. The (*oart* called) Dongar or (the Hill) *oart* of 2 (two) water-wheels.

"1. One (*oart* called) Mándvi *oart* at Mahim of 2 (two) water-wheels.

"1. The field land, containing about nine hundred *bargás*, which is within (the circle of the) racecourse.

"1. Near the old jail there is (the district named) Bengálpurá. The *fazendár* ground which is there situated, that produces ground-rent to the amount of about Rupees 140 annually.

"1. The house in which Bápuji Set himself resides, together with the stable.

"The 'estates' as thus described (above) are delivered into your possession. Now, in order to strengthen (and complete) this (transaction), the whole of such papers as there may be appertaining to the above 'estate' having been given into your hands, the whole of the management, use, and enjoyment (thereof) are made over to you. And besides this Chandrabhágábái and Harkubái, these two (persons), having sued you, there are notes of the Bengal Treasury (issued) through the Sarkár (or Government offices) to the amount of about Rupees four thousand eight hundred. They are in the Accountant General's office. Having procured out of that office and brought the notes for those rupees, we will give them in your hand. In the way thus described we will make over to you the 'estates' and property of Bápuji Set. Having taken the same into your possession, you may carry on the management (thereof) as you may see fit, and you are to make a settlement for the debts due to you and for the debts due to (different) persons. With regard to that, you are possessed of full and absolute power. That full and absolute power is as follows:—exactly in the same way as Bápu Set was the owner of the said 'estates,' so we by this paper have constituted you owner. As regards that, whatever you seeing fit may do, all that is duly agreed to by and binding upon us and Bápuji Náráyan Set, and his heirs and representatives. With regard to that, should Bápuji Set, or we or any one else on his part, (wish to) swerve from this writing, (then in order that) he (or we &c.)

1864.

VISHVANA'TH A'TMA'RA'M v. BA'PU NA'RA'YAN *et al.*

may not (so) swerve, and that what you may do may be confirmed, another paper, in such a way as you may wish, is to be made through an English lawyer, and delivered (to you) for the purpose of strengthening (and completing) this (transaction) ; we are to sign the same and to have it attested. As regards his own house, in which Bápuji Set's family are now residing, the said (house) only you are not to sell, and the said house you are to make a gift of to Bápuji Set's wife, the respected Kayábái, when she will maintain herself in the said house in such way as she may be able. The management of the remainder of the 'estates' you may carry on in such way as may appear fit to you, and you are fully empowered to act in such a manner that a settlement of his debts shall be effected. And if any persons shall raise any impediment with respect to the above-mentioned 'estates,' we shall answer relative to the same, and we shall make a clearance with regard to those 'estates.' And the house which you are to give as a gift to Kayábái she is not to sell, and she is not to mortgage it. Should she sell it, or should she mortgage it, that will not be agreed to, nor be binding on you. This agreement paper we have duly given in writing of our own pleasure, with our free will and consent, the date and year aforesaid."

The bill prayed for specific performance of the agreement so far as the same remained unperformed, and offered to secure to the defendant, Kayábái, a life-interest in the family house, that being, according to the plaintiff's construction of the agreement, all that the defendant, Kayábái, was intended to take.

The defendants filed a demurrer to the bill, relying mainly on the fact that it appeared sufficiently on the face of the bill that the plaintiff had himself so far departed from the agreement, and committed breaches of its provisions, as to disentitle him to the relief sought. This demurrer was, however, overruled after argument, on the ground that this did not appear sufficiently clearly on the face of the bill itself, and the suit came on for hearing on evidence, on the 23rd of January 1864 and several subsequent days, before SAUSSE, C.J., and ARNOULD, J.

Lewis (Advocate General) and *Bayley* for the plaintiff.

White and *Green* for the defendants.

During the hearing, the Court, having intimated an opinion that, according to the true construction of the agreement, the defendant Kayábái was intended to take a life-estate only in the family house, the defendant's counsel claimed, by cross-examination of the plaintiff and his witnesses, and by examination as witnesses on their own behalf of Diná Morobá and Rámchandra Náráyan, the persons who negotiated and concluded the agreement of the 16th of July 1859 as the constituted attorneys of the defendant Bápu Náráyan, to show that, supposing the true construction of the agreement to be that the defendant Kayábái was to take a life-estate only in the family house, then the true intention of the parties to the agreement, or, at any rate, of the attorneys of the defendant, had not been correctly expressed in the document as drawn up. After argument in which the cases of *Woollam* v. *Hearn* (*a*), *Winch* v. *Winchester* (*b*), *Clinan* v. *Cooke* (*c*), *Manser* v. *Back* (*d*), and *Squire* v. *Campbell* (*e*) were cited, the Court decided that the defendants were to be allowed to give evidence that the true intention of the parties, or, at any rate, of those who represented the defendants on the occasion of the instrument of the 16th of July 1859 being drawn up, was that the defendant Kayábái was to be entitled to the family house absolutely. The judgment, however, proceeded on the other grounds of defence set up, and it was not necessary for the Court to express its opinion on the evidence given as to the real intention of the parties.

On the 17th of March 1864 the judgment of the Court, which states sufficiently the other parts of the case, was delivered by SAUSSE, C.J., and was as follows :—

In this case the plaintiff prayed for specific performance by the defendant Bápu of an agreement entered into upon the 16th of July 1859, and that, in default of his being able to make good title to the subject-matter of the agreement, an account should be taken on foot of the sum mentioned in it to be due to the plaintiff, and that the defendant should be decreed to secure the sum so found due upon all the premises intended to be included in the agreement to which the de-

(*a*) 7 Ves. 211. (*b*) 1 Ves. & B. 375-378.
(*c*) 1 Sch. & Lef. 40. (*d*) 6 Hare 443.
(*e*) 1 Myl. & Cr. 459-480 ; 6 L. J. Ch. 41.

1864.
VISHVANA'TH ATMA'RA'M v. BA'PU NA'RA-YAN *et al.*

fendant can make title, and that in default of payment at a certain date the latter should be foreclosed of the equity of redemption in the said premises.

It appears that the defendant Bápu had in 1854 been convicted and sentenced to transportation for seven years at the prosecution of the plaintiff, who is his nephew, and that the defendant was allowed to return to Bombay in 1860. Before leaving, he appointed two relatives to be his attorneys for the general management and settlement of his property and affairs, which were in a very embarrassed state. In June 1869 the plaintiff obtained a judgment for Rs. 16,000 against the defendant, and very shortly after caused the defendant's entire property to be seized under an execution for that amount. The attorneys for the defendant then applied to the plaintiff to come to an arrangement with them about his own claim and the defendants' property, in order, as the bill states, "to prevent the properties so seized from being sold hastily and at a loss" through the Sheriff. The plaintiff, at his own desire, was furnished by the attorneys with a memorandum of the liabilities of the defendant and of the estimated value of all his property; the latter was set down in detail at Rs. 77,000, and the former at Rs. 47,000, including the plaintiff's execution debt, some mortgages, and about Rs. 8,000 of unsecured creditors. The surplus of Rs. 30,000 was in that memorandum proposed to be appropriated for the benefit of the defendant, that is, the defendant's family house, valued at Rs. 12,000, and the balance Rs. 18,000, as a fund to provide maintenance for him and his family upon his return to Bombay. The plaintiff retained this memorandum for some days, had other interviews upon the subject, and finally fixed a meeting for the purpose of coming to a settlement, when the agreement in question was entered into in the Maráthi language, and was signed by the plaintiff and the attorneys for the defendant. The plaintiff, as executor of his father (who died in 1850), had some years previously filed a bill for an account of a partnership in which his testator, the defendant Bápu, and one Kisandás were copartners. An account had been decreed, charge and discharge (at least on behalf of Kisandás) had been filed, and by that discharge it appeared that the partnership was indebted to the plaintiff's father at the time of his death in Rs. 32,000, but no proceedings had been taken in the reference for some years. The plaintiff having in the same capacity sold property mortgaged to his father

by the defendant, it appeared that the defendant's sisters had a life-interest in a sum of Rs. 4,800 charged upon it, and that sum had been by decree directed to be invested, and the interest to be paid to them during their lives.

At this meeting, on the 16th of July 1859, the plaintiff, as the condition of his suspending the sale by the Sheriff, insisted upon having the entire property of the defendant transferred to him for the payment of his judgment-debt of Rs. 16,000, and also for the payment of the entire sum, Rs. 32,000, alleged by him to be due to his father's estate from the defendant Bápu and Kisandás, as surviving copartners, and in addition he insisted that the attorneys of the defendant Bápu should procure the life-interest in the Rs. 4,800 to be assigned to him. These attorneys were not aware of the amount due on the partnership account, but they agreed to all those terms, upon certain conditions, which were agreed to by the plaintiff after considerable discussion at that meeting. An agreement in the Maráṭhi language was accordingly drawn up at the dictation of the plaintiff's nephew, and in the presence of the plaintiff and the two attorneys for the defendant, who respectively signed it. The debts mentioned in it are the execution debt, "about Rs. 18,000," and the shop or partnership debt, Rs. 32,000, Rs. 50,000 in all to the plaintiff; creditors by mortgage to the amount of Rs. 20,500, and sundry small debts to the amount of Rs. 500: in all Rs. 71,000. The agreement recites the estate being under attachment of seizure, and that if sold through the Sheriff "*they would not produce eight annas in the rupee (or half-value), and that a very great loss would be sustained.*' The plaintiff was empowered to carry on the management and sale of the estates as he should think fit, and to make a settlement for the debts due to himself and to the other persons, and was constituted owner with equal powers as the defendant could have had for those purposes. It was also agreed that an English deed should be drawn up. The agreement as translated then concluded thus:—

"As regards his own house, in which the defendant's family are now residing, the said house only you are *not to sell*, and the said house you are to make a gift of to the defendant's wife, Kayábái, when she will maintain herself in the said house in such a way as she may be able. The management of the remainder of the estates you may carry on as may

1864.
VISHVANA'TH A'TMA'RA'M v. BA'PU NA'RA'YAN *et al.*

appear fit to you, and you are fully empowered to act in such a way as that a settlement of his debts may be effected. * *

"And the house which you are to give as a gift to Kayábái she is not to sell and she is not to mortgage it. Should she sell it, or should she mortgage it, that will not be agreed to, nor be binding on you."

Under that agreement the plaintiff was put into possession, and received the rents of all the unmortgaged property, except the family house, and the attorneys having procured the consent of the annuitants to release it, the plaintiff agreed, at the instance of the former, to bear the expense of getting the Rs. 4,800 out of court, and in addition to pay Rs. 500 out of it to discharge the small debts mentioned in the agreement, and incurred by the attorneys on behalf of the defendant's family.

The plaintiff, however, went back of this latter agreement, and upon the 11th of October, by notice, demanded that within four days the Rs. 4,800 should be paid, and also that a conveyance of the entire property should be executed to him subject to a life-interest only in Kayábái in the family house, or that he would consider the agreement at an end, and proceed to sell the defendant's property through the Sheriff. The attorneys for the defendant insisted that, under the agreement, Kayábái was to have an absolute property in the house, and not an interest for life only, and they declined to comply with the plaintiff's demand in this particular. After various communications, the plaintiff received under his execution the entire property of the defendant (including the family house), and had them advertised by the Sheriff upon the 24th of November. On the 22nd the attorneys for the defendant filed a bill praying for specific performance of the agreement of the 16th of July 1859, and for an injunction against sale by the Sheriff. An injunction was granted, until answer or further order, to the extent of restraining the present plaintiff from selling the family house. The plaintiff then proceeded with the sale under his execution, and sold all the other property through the Sheriff, and in the names of other persons became himself the purchaser of some of the properties. He thus levied very nearly the amount of his execution debt. On the evidence we entertain no doubt that the property sold at a considerable disadvantage, and much under the value it would have produced if the spirit of the agreement had been carried out by the plaintiff. No further proceedings were taken in the

suit for specific performance, and in August 1860 the present plaintiff dismissed that bill for want of prosecution.

1861.
VISHVANA'TH A'TMA'RA'M v. BA'PU NA'RA'YAN *et al.*

In January 1861 the plaintiff, after having thus sold all the other properties by Sheriff's sale, called upon the defendant to convey the family house to him subject to a life-estate in Kayábái, and to procure the assignment of the life-interest in the fund of Rs. 4,800, both of which the defendant refused to do. In July 1862 the present bill was filed, the plaintiff alleging in it that *he had performed his part of the agreement in every respect*, that Kayábái was only entitled to a life-interest in the family house under it, and that the defendant was bound to execute the agreement in the plaintiff's favour. The defendant thought proper to demur to the bill so framed, and the demurrer was overruled, the Court intimating its opinion that, upon the construction of the agreement as pleaded, Kayábái took an estate for life only in the house. This cause now comes to a hearing under these circumstances. The plaintiff and the defendant entered into an agreement with mutual stipulations in June 1869. In October following, the plaintiff in effect gave notice that he considered the agreement at an end, and proceeded shortly after to do exactly the contrary of that which he had stipulated to perform. The defendant thereupon insisted that the plaintiff should be compelled to carry out his part of the agreement, and having filed a bill for that purpose, he raised an injunction which restrained the plaintiff from violating one of its provisions. In a few months the defendant allowed that bill to be dismissed by the present plaintiff, and with it of course the injunction stood dissolved. The parties then stood in this relation. The plaintiff had in a most material point broken the agreement, and treated it as at an end. The defendant, on the other hand, after insisting upon it, had abandoned that agreement by allowing the bill for its performance to be dismissed by the plaintiff. In effect the parties appear to have been thus remitted to the positions they relatively occupied before the agreement was entered into.

The plaintiff, after a delay of nearly two years, files this bill to set up the same agreement, and the defendants resist his right to do so. We think it plainly appears that the main object of the attorneys for the defendant in entering into the agreement was to prevent the sacrifice of the defendant's property anticipated to be the result of a sale by the

1861.
VISHVANA'TH A'TMA'RA'M v. BA'PU NA'RAYAN *et al.*

Sheriff. In order to accomplish that principal object, they consented to confer upon the plaintiff, with the exception of the family house, the entire dominion over the defendant's property; to recognise as a lien upon it the large unascertained partnership claim of Rs. 32,000, which thus acquired not only the character of a debt entirely due by the defendant Bápu, but it also acquired priority over all his other simple contract debts; and they further engaged to obtain for the plaintiff the actual possession of the fund of Rs. 4,800, which was then, by a decree of that court, postponed for the lives of two annuitants. That this prevention of a sale through the Sheriff was the principal consideration appears abundantly from the agreement itself, which states that "if the estates were sold through the Sheriff they would not produce eight annas in the rupee, and that a very great loss would be sustained;" from the bill, which states the object to have been "to prevent the properties seized from being sold hastily and at a loss through the Sheriff;" and also from the plaintiff, who admits in his evidence that "the intention was that I should take the property into my own hands, and sell it leisurely." And his witness Anandráv Bháskar further says: "the object was to prevent a sale by the Sheriff, to prevent the deterioration of the property by such a sale." It is admitted that the plaintiff did not sell the property "leisurely," but did sell through the deteriorating medium of the Sheriff's office, and he offers an excuse in these words:—"When the attorneys for the defendant brought improper constructions on what was written, I was obliged to sell through the Sheriff. I then told the Sheriff to continue the sale under the writ." It is evident, from the notice of the 11th of October 1859, coupled with the statement of the plaintiff and his witnesses, that he did by the fact of sale intentionally violate the agreement in this principal stipulation. He also admits that in the name of another person he became the purchaser of some of the property sold at the Sheriff's sale. He thus took advantage for his own benefit of the deteriorating circumstances, which it was the object of the agreement to prevent.

It is clear that, if the case stood here, the plaintiff could have no pretence for coming into this Court to ask for a specific performance (of a contract which he had broken), but he insists that the attorneys for the defendant, by filing a bill in November 1859 for the specific performance by him of this contract, and by having then obtained an *ad interim*

injunction against a sale of the family house, have condoned his prior violation, and have entitled him now to rely upon the agreement as still subsisting for the purpose of being specifically carried into execution. If the plaintiff upon the filing of that bill had stayed his hand, and re-adopted the agreement, that argument might have been well-founded; but, instead of doing so, the plaintiff, who had not then sold any portion of the defendant's property, deliberately proceeded to sell under the execution the entire of it, except the family house, which he was only restrained by the injunction of the Court from selling. The plaintiff did not answer that bill, and admit his being bound by the agreement, as he might have done; but in August 1860 he caused the bill to be dismissed for want of prosecution, and with that order the injunction against his proceeding with the sale of the family house, as a matter of course, stood dissolved. At this stage the parties appear to us to have been in effect remitted to the positions they relatively occupied before the agreement, but now, after having as an execution creditor reaped the advantages of a violation of that part of the agreement which he was bound to perform, the plaintiff in effect seeks to compel a fulfilment by the defendant of his part, although the interests of the latter under that agreement would appear to have been irretrievably injured by the forced sale of his property through the Sheriff. The circumstance of the plaintiff offering by this bill to give a life-interest in the family house to Kayábái does not alter his position. A party who comes into this Court to ask for the specific execution of an agreement must show that he is willing and able to carry it out in all its material parts so far as he had himself stipulated for, and also that no act of his own in relation to the agreement has in any material degree damnified his opponent. The present offer by the plaintiff amounts only to an undertaking to carry out (according to the plaintiff's construction) one of several stipulations which he had contracted to perform. He cannot be allowed to select one stipulation for breach and another for performance. He must be prepared to carry out the entire of his own part of the contract before he can call upon his adversary, through the instrumentality of this Court, to specifically execute the latter portion of the agreement. In the present case, before the plaintiff filed his bill, he had put it out of his power to perform in favour of the defendant the very material stipulation of selling the latter property by private sale, instead of