1872.
Aug. 30.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 132 *of* 1872.

BHAGTIDA'S BHAGVA'NDA'S..... *Appellant.*

N. R. OLIVER, Manager of the Broach branch of the New Bank of Bombay, Ld. ..... *Respondent.*

Contract—Consideration—Mutuality—Statute of Frauds.

An agreement whereby the defendant undertook to pay to the plaintiff and two other co-creditors of an insolvent a share in any sums which he might recover from the insolvent, in consideration of receiving a share in any sums which might be recovered by the other creditors is not, though the plaintiff has passed no similar agreement in favor of the defendant, invalid for want of consideration or mutuality of obligation.

Where, however, one of the persons in whose favor the agreement was passed, without making the others parties sued the person who executed it to recover his share, *it was held* that the suit was not maintainable, as it could only be brought as a suit between partners for an account, and the result of all the partnership transactions must be brought at once under the view of the Court.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District of Surat, reversing the decree of the Subordinate Judge of Broach.

The facts of the case are briefly these:—

Mr. Bentley, on behalf of the Broach branch of the New Bank of Bombay, passed, on the 31st March 1869, to the plaintiff and two other creditors the following agreement:—"There is a debt due to you by Lukmánbhái Isábhái of Broach, and there is a debt due to me by him. Claims in respect thereof have been preferred as follows:—In the Court of the Principal Sadr Amin of Surat, I have instituted a suit No. 195 in respect of a claim for Rs. 15,000, while in the Court of the Sadr Amin of Broach, you Bhagtidás have preferred a claim for Rs. 2,185. In the Court of the Munsif of Broach, you Amratlál Mohanlál have preferred a suit No. 320 for Rs. 4,008-3-0, and you Amratlál Dayábhái have instituted no suit for Rs. 1,500

due to you; but you will file one. As regards the costs which may be incurred in all these suits, you and I are to pay the same in proportion. And as regards whatever may be realized on account of the above claims, I am to pay and receive from you the amount in proportion to my own claim. Should I make a private settlement, I am to pay and receive money according to the proportion mentioned above."

On the same day on which this agreement was executed, namely, the 31st of March 1869, the Bank obtained a decree in their favor, which they sold for Rs. 15,000. The plaintiff Bhagtidás claimed his proportionate share from this sum with interest.

The defendant answered that the agreement was genuine, but insufficiently stamped; that there was no consideration; that it was incomplete, as one of the parties failed to bring his suit; and that, as all the persons in whose favor it was passed had not presented their claims, they had violated its conditions.

The Subordinate Judge awarded the claim; but the Judge rejected it, holding that the argeement was void for want of mutuality.

The special appeal was heard by MELVILL and KEMBALL, JJ.

Anstey (with him *Shántárám Náráyan* and *Chunilál Maniklál*) for the appellant:—There is consideration on the face of the agreement. It was put in by the plaintiff in evidence and was in supersession of a former one which had been torn up. A document signed by one party is not necessarily unilateral. It is quite clear that there was a mutuality of assent whatever might be said as to the want of mutuality of obligation; but I contend that there was mutuality of obligation also, for the Bank could have recovered against the plaintiff. [Sugden's Vendors and Purchasers pp. 130 and 131 (14th edn.); Fry on Specific Performance pp. 134-136.] Even if there be no written agreement, a suit could be brought on a verbal one.

Pigot, for the respondent:—In case of executory contracts, mutuality of assent is not enough. There must

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be mutuality of obligation : Chitty on Contracts p. 14 ; *East London Water-works* v. *Bailey* (*a*). The decree obtained by the Bank was on the same day that their Agent passed the agreement in question. It could not have been intended that the other parties should recover notwithstanding that they have done nothing at all. The other parties to the agreement are not before the Court and no decree can be made in their absence : *Chanter* v. *Leese* (*b*).

Shántárám in reply :—The plaintiff did not undertake to prosecute his suit to a decree. The agreement itself allowed a settlement to be effected. All that was required by the agreement was that a common cause should be made to recover as much as possible from the insolvent.

MELVILL, J :—The parties to this suit are creditors of an insolvent Lukmánbhái, and the action is brought to recover a share in a sum of Rs. 15,000 realised by the defendant by the sale of a decree which he had obtained against Lukmánbhái. The plaintiff supported his claim by a document, Exhibit No. 3, by which the defendant agreed to pay to the plaintiff and two other creditors a share in any sums which he might recover from the insolvent, in consideration of receiving a share in any sums which might be recovered by the other three creditors.

The grounds for the District Judge's judgment are stated in the following passage :—

"In this case the consideration for appellant's (defendant's) promise to share sums recovered was the obligation by the plaintiff and the others to do the same ; but they neither passed a counter-agreement to him nor signed the agreement now sued on ; as the defendant has recovered first from the insolvent, the plaintiff has brought his action, and, if he got a decision in his favour now, the defendant might subsequently claim a share in any amount recovered by him, on the ground of his having recovered on the agreement ; but had the plaintiff been the first to recover, the defendant would have had no proof that the plaintiff had engaged to

(*a*) 4 Bing. 283. (*b*) 4 M. & W. 295.

be bound by the agreement, on which to make his claim. I find that the present action cannot be sustained by the agreement from want of mutuality."

We are of opinion that the judgment cannot be sustained on the grounds on which the Court below has rested it. The cases cited by the District Judge from English text-books turn upon the Statute of Frauds, which requires, in the case of certain agreements, that there should be a memorandum or note thereof in writing signed by the party to be charged or some other person by him lawfully authorized. The judgment of Lord Ellenborough in *Wain* v. *Warlters* (*c*), laid down that, in consequence of the introduction into the Statute of the word "agreement," the consideration, as well as the promise, must appear in writing. In the case, therefore, of an agreement falling within the operation of the Statute of Frauds, the agreement would be *nudum pactum*, unless the consideration were expressed on the face of the agreement. This, rather than the want of mutuality, appears to be really the ground of the decisions in the cases referred to by the District Judge. On the face of the agreement now sued upon, there is a consideration clearly expressed, so that, even if the Statute of Frauds applied, which, of course, it does not, there could be no objection to the agreement on the ground of want of consideration. Then, as regards the question of want of mutuality, it will be found that in the English cases this question also has been decided chiefly with reference to the Statute of Frauds. In *Laythoarp* v. *Bryant* (*d*), the defendant had purchased certain premises, and had signed a memorandum of the purchase, and it was argued that he was not bound because the memorandum was not signed by the vendor. Tindal, C.J., observed: "Then it is said, unless the plaintiff signs, there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract; but the object of the statute was to secure the defendant. . . And the whole object of the Legislature is answered when we put this construction on the statute. Here, when this party who

(*c*) 5 East 10. (*d*) 2 Bing. N.C. 735.

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has signed is the party to be charged, he can not be subject to any fraud. And there has been a little confusion in the argument between the *consideration* of an agreement and *mutuality* of claims. It is true the consideration must appear on the face of the agreement. But I find no case, nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement in truth is made before any signature." The authority of this case would be strongly opposed to the view taken by the District Judge, even if the question had to be argued on the basis of the Statute of Frauds. But in fact there is no law in the mofussil which requires such an agreement as that here sued upon to be signed or to be reduced into writing. In order that the plaintiff and the other parties to the agreement might be bound to the defendant, it was not necessary that they should, as the District Judge says, pass a counter-agreement to him (in writing) or sign the agreement now sued on. Exhibit No. 3 is only evidence but it is not the only evidence of the agreement. If the defendant had had to sue the plaintiff, it cannot be said that the defendant would have had no proof, because he held no written promise. He could have proved the plaintiff's obligation by verbal evidence and by compelling the production of Exhibit No. 3. It cannot be said there was want of mutuality merely because the plaintiff took care to secure stronger proof of the contract than the defendant.

But, while differing from the view taken by the District Judge, we think that his decree may be sustained on another ground.

The only construction of which Exhibit No. 3 appears to us to be susceptible is this: The four presons named therein agreed to their joint interests in regard to their claims against the insolvent. Those who had already filed suits were to prosecute them to a conclusion, while one who had not already instituted a suit was to do so. They were to share the costs and divide the profits of all the suits. The transaction was of the nature of a partnership in the four suits, and the intention must have been that the proceeds of the

four suits should be brought into hotchpot and divided. That seems to us to be the meaning of that portion of the defendant's written statement in which he says: "The parties to the document have violated the terms of the agreement. They have as yet obtained no decrees declaring the debts due to them to be valid. The claim, therefore, can not be maintained." In his memorandum of appeal the defendant raised the same question, and also objected to the non-joinder of the other parties to the agreement. We are of opinion that these objections constitute a good defence. It appears that the defendant obtained his decree on the very day on which Exhibit No. 3 was signed; and it can not be supposed that he intended to give the other creditors the benefit of this decree without receiving a corresponding benefit in return. It is not alleged that the plaintiff or the other two creditors have prosecuted their suits to execution, and no reason is given for their not having done so. No doubt they may have a good reason. The whole of the insolvent's property may have been seized by other creditors, and an abandonment of hopeless suits might be wise, though it could hardly be justified without showing the consent of the defendant who had an interest in the result. But, however this may be, this suit could only be brought as a suit between partners for an account, all the partners being made parties, and the results of all the partnership transactions being brought at once under the view of the court. In its present form, we think that the suit cannot be maintained, and, on this ground, we confirm the decree with costs.

Decree Confirmed.