1880
OCT. 28.

APPELLATE CIVIL.

5 B. 140.

of those offences. Section 511 of the Code is perfectly clear, and however desirable it may be to award enhanced punishment in the case, I am of opinion that we cannot take into consideration the penalty the prisoner might have been subjected to had he been convicted under s. 379.

[In consequence of the difference of opinion the case was laid before the Honourable the Chief Justice, under s. 271-B of the Code of Criminal Procedure, for his opinion.]

OPINION.

WESTROPP, C. J.—The accused, Nana Rahim, comes within the first of the two conditions required by s. 75 of the Penal Code to warrant the enhanced punishment allowed by that section,—that is to say, he has previously been convicted of offences punishable under chap. 17 of the same Code. But his case does not satisfy the second condition required by s. 75. He has not on the present occasion been guilty of any offence punishable under chap. 12 or chap. 17 of the Code, but has been guilty of an offence, *viz.*, an attempt to commit theft punishable under chap. 23 (s. 511). Hence I think the sentence of ten years' transportation, passed by the Sessions Judge, cannot be sustained. The view, which Mr. Justice Kemball and I have adopted of the inapplicability of s. 75 of the Penal Code to such a case as the present, seems to have been taken by Bittlestone in *Reg* v. *Mooneswamy*, mentioned by Mr. Mayne in his note on s. 511 at p. 420 of the ninth edition of his commentaries on the Indian Penal Code.

In accordance with this opinion the Division Bench reduced the sentence to eighteen months' rigorous imprisonment.

---

5 B. 143.

[143] ORIGINAL CIVIL.

Before Mr. Justice West.

BURJORJI CURSETJI PANTHAKI (*Plaintiff*) *v.* MUNCHERJI KUVERJI, (*Defendant.*)* [10th, 13th, 14th, 15th, 17th and 24th, January 1880].

Registration Act III of 1877, *cls. (b) and (h) of s.* 17—*Document creating a right to obtain another document—Pleading—Admission—Effect of admission in pleading of execution of contract—Evidence to prove an admitted document not necessary—Evidence.*

By an agreement, dated 2nd August 1880 the defendant agreed to sell to the plaintiff a certain piece of land with a dwelling-house for Rs. 1,900. At the time of the execution of this agreement the plaintiff paid the defendant Rs. 100 earnest-money, and the agreement provided that the remaining Rs. 1,800 should be paid within a month from the date of the agreement when the deed of conveyance of the property should be executed. The material part of the agreement was as follows:—

"I have received from you Rs. 100, namely, rupees one hundred, as earnest (*i. e.*, at the time of the execution of this bargain-paper. And as to the remaining Rs. 1,800, namely, one thousand and eight hundred, the same are duly to be paid to me within one month from this day, when you will get the deed (or) document made in your favour. And all the expenditure in respect of the deed (or) documents and transferring (the property) to your name you are duly to make on your account * * * On these terms this informal bargain-paper having been written, is agreed to and delivered."

The plaintiff sued for specific performance, and tendered the agreement in evidence, although unregistered.

* Suit No. 450 of 1880.

1880
JAN. 24.

ORIGINAL CIVIL.

5 B. 143.

Held that the document, although unregistered, was admissible in evidence under cl. (*h*) of s. 17 of the Registration Act III of 1877. Being unregistered it could not create or assign the interest intended by the parties to be transferred, and being thus incapable of carrying out the primary intention of the parties, the agreement became one "merely creating a right to obtain another document which would, when executed," effect the desired purpose if the execution were accompanied with registration. The right given by the agreement was merely a right *in personam*, and the agreement was admissible in evidence to show the contract entered into for another conveyance, though not as a conveyance itself.

Where in a suit for specific performance of an agreement the defendant admitted in his written statement the terms of the agreement and its execution.

Held that the plaintiff was not called upon to prove the execution of the agreement, or to put it in evidence.

[F., 7 B. 310; 36 B. 500 (503)=14 Bom. L.R. 390=15 Ind. Cas. 830 (831); 24 C. 20 (25); R., 21 B. 704 (707); 22 B. 788 (792); 39 C. 284 (295)=14 C.L.J. 411=16 C.W.N. 55 (63)=12 Ind. Cas. 723; 12 M. 505; 13 M. 308 (312); 12 C.L.J. 25=6 Ind. Cas. 346, (349); 13 C.W.N. 326=4 Ind. Cas. 85=6 M.L.T. 368; 14 C.W.N. 874 (876)=6 Ind. Cas. 445; 10 C.P.L.R. 107; 1 N.L.R. 147 (148); 3 N.L.R. 72 (77); U. B. R. (1897—1901), 379; D., 20 B. 553.]

SUIT for specific performance. The plaint alleged that by an agreement duly signed and attested, and dated the 2nd August 1880, the defendant agreed to sell to the plaintiff a certain piece [144] of land, with a dwelling-house, for the price of Rs. 1,900; that, at the time the said agreement was executed, the plaintiff paid the defendant Rs. 100 earnest-money—the agreement providing that the remaining Rs. 1,800 should be paid within a month from the date of the agreement when the deed of conveyance of the property should be executed. The plaint further alleged that repeated applications had been made, without success, to the defendant to carry out the agreement and for the conveyance of the property, and it prayed that the defendant should be decreed specifically to perform the said agreement and to execute to the plaintiff a proper conveyance of the said property on being paid the said sum of Rs. 1,800.

In his written statement the defendant admitted the execution of the agreement of the 2nd August 1880, and the acceptance of the Rs. 100 earnest-money, but he pleaded (1) that the said agreement had been executed by him under coercion and undue influence; (2) that the agreement had been made subject to the condition of its being ratified and approved by his wife, who had refused to ratify and approve of the same.

At the hearing the following issues were raised:—

1. Whether the defendant was induced to enter into the contract of the 2nd August 1880 by the coercion or undue influence exercised by the plaintiff.

2. Whether the contract was not subject to a condition that the same should be approved by his wife.

3. Whether the plaintiff was entitled to specific performance of the contract, as in the plaint sought, or to any other or to what relief.

A copy of the agreement of the 2nd August 1880 was annexed to the plaint, and was in the following terms:—

"To Andhiaru (priest) Burjorji Cursetji Panthaki. Written by Muncherji Kuverji. To wit: This day (I have sold) to you my one house and a wood store and the ground appertaining to the same, in which (house) I live, and which is probably (registered) in my name in the books of the Collector. On the east side thereof there is the house of Manekji Beramji, and on the west there is [145] the house of Rustomji Merwanji Daruvala, and in the front and at the rear

1880
JAN. 24.
ORIGINAL
CIVIL.
5 B. 143.

there are Government roads. That house I have sold to you for Rs. 1,900, namely, rupees one thousand nine hundred, and on account thereof I have received from you Rs. 100, namely, rupees one hundred, as earnest (*i.e.*) at the time of execution of this bargain-paper. And as to the remaining Rs. 1,800, namely, one thousand eight hundred, the same are duly to be paid to me within one month from this day, when you will get the deed (or) document made in your favour. And all the expenditure in respect of deed (or) documents and transferring (the property) to your name you are duly to make on your account. With regard to these premises, there is now a dispute (on the part) of Manekji Beramji: you are duly to get the same settled. Besides that, if there should be any other dispute, I am to get the same cleared off. The risk in respect thereof is on my head. On these terms this informal (*kucha*) bargain-paper having been written, is agreed to and delivered. And if you or I should swerve from this agreement, then Rs. 300, namely, rupees three hundred, are duly to be paid as a penalty."

The defendant was called upon to begin, and he was examined as to the circumstances under which the alleged agreement was executed by him. During his cross-examination, counsel for the plaintiff tendered the agreement of the 2nd August 1880 in evidence.

Starling (*Kirkpatrick* with him) objected to its admission.—This document is not registered. It gives an immediate interest in land. It does more than "merely create a right to obtain another document," and, therefore, it does not fall within cl. (*h*) of s. 17 of the Registration Act III of 1877. It also acknowledges receipt of earnest money. Counsel referred to *Valaji* v. *Thomas*(1); *Lewis* v. *Brass*(2); *Bonnewell* v. *Jenkins*, (3) *Rosseter* v. *Miller* (4); *Branton* v. *Griffiths* (5).

Latham (*Lang* with him) *contra*.—This document falls strictly within cl. (*h*) of s. 17. It is not a conveyance, and gives **[146]** no right or interest in the property. It creates an equitable interest in the plaintiff, but that is not such a right as is contemplated by the Registration Act. It gives a right against the defendant recognized and enforced in equity, but the ownership of the property remains unchanged until equity enforces a conveyance. The right given to the plaintiff by this document, which contemplates a further conveyance, is only a right *in personam* which by this suit the plaintiff is asserting. The conveyance, which we pray for, will give the interest in the property. Counsel referred to *Jusab Haji Jafar* v. *Haji Gul Mahomed* (6) and *Waman Ramchandra* v. *Dhondiba Krishnaji* (7).

Starling in reply.—The case of *Jusab Haji Jafar* v. *Haji Gul Mahomed* (6) is distinguishable. That was a suit by a vendor against a vendee upon an agreement by the vendee to take an estate when the vendor would give it. There was no estate conveyed, for the defendant had none to convey, and there was no acknowledgment, by the defendant, of any payment, for no payment was made to him. It was by him as purchaser that money was to be paid. The ground of the decision in *Waman* v. *Dhondiba*(7) is stated at pp. 136-7 of the report, and the statement shows that the decision is no authority upon the present case. *Valaji* v. *Thomas* (1) is directly in point.

WEST, J.—At present I am inclined to think that the agreement, which has been tendered, does declare an interest in the property, and is,

(1) 1 B. 190.
(2) 3 Q.B.D. 667.
(3) 8 Ch. Div. 70.
(4) L. R. 3 Ap. Ca. 1124.
(5) 2 C.P.D. 212 (214).
(6) 12 B.H. C. R. 175.
(7) 4 B. 126.

therefore, inadmissible, not being registered. It is conceded that there was a complete contract—*i.e.*, a concurrence of two persons—that property belonging to one of them should pass to the other. Unless there is some special law which requires the observance of some ceremony in order to effect the intended transfer such a concurrence of will appears to be sufficient. That is my present impression, and I must, therefore, refuse to admit the document in evidence; but I will consider the matter more carefully, and deal with it in giving my judgment in this case.

The document which contained the agreement between the plaintiff and the defendant being thus excluded, the question arose as to whether the [147] admission of the execution of the agreement, contained in the defendant's written statement, was sufficient, or whether the plaintiff was bound to prove the agreement in order to obtain a decree for specific performance.

Starling, for defendant.—The defendant, while no doubt admitting in his written statement the execution of the agreement mentioned in the plaint, submits to the Court whether he is bound by it. That is a very qualified admission. In India parties are not kept with strictness to the pleadings. Reference was made to *McGowan* v. *Smith* (1); Taylor on Evidence, para. 759; Civil Procedure Code; Act X of 1877, ss. 59, 63, 147.

Latham, *contra*, referred to *Lett* v. *Morris* (2), *Huddleston* v. *Briscoe* (3) *Shankar* v. *Vishnu* (4).

JUDGMENT.

WEST, J.—Two questions, which arose in the hearing of this case, are of such importance that it is desirable I should consider them before going on to dispose of the formal issues stated between the parties. The first is as to whether the document executed by the defendant Muncherji to the plaintiff Burjorji is one that requires registration under s. 17 of Act III of 1877 and what are the consequences of its non-registration. The second is, whether the document is sufficiently admitted by the defendant Muncherji to make its production in evidence unnecessary.

The language of s. 17, cl. (*b*) of Act III of 1877 is the same in its effect as that of the corresponding enactment in the previous Registration Acts, VIII of 1871 and XX of 1866. But by cl. (*h*) of that section it is provided that "nothing in cls. (*b*) and (*c*) of this section applies to any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest."

We have, therefore, to consider whether the document now in question, is of a kind included in cl. (*b*), and, if not, then what is the operation on it of cl. (*h*).

[148] It is contended by the learned counsel for the plaintiff that the document is meant to do, and is in its nature calculated to do, no more than create a right to obtain another document, which second document will, when executed, create or declare a right to the property specified. That a contract has been made is conceded. It is admitted that an equitable interest, so called, has been constituted by the transaction embodied in the paper signed by Muncherji; but this, it is said, is not a right or

(1) 26 L. J. Ch. 8. (2) 4 Sim. 607. (3) 11 Ves. 583. (4) 1 B. 67.

1880
JAN. 24.
ORIGINAL CIVIL.
5 B. 143.

interest of the kind intended. It is merely a right *in personam* against Muncherji. By the contract, Burjorji has acquired a secondary right of action to insist on Muncherji's making his engagement good by executing an effectual conveyance, but no more. The document stipulates for a formal conveyance, but is not itself a conveyance. The ownership remains vested in Muncherji until his specific performance of the existing obligation is sought by the plaintiff Burjorji by executing an actual and effectual conveyance whereby the ownership shall be transferred from the one to the other. The real right, as distinguished from the obligation, will then have passed, but not till then, nor then without a registration of the final instrument. The one now executed, giving a right to that, is of exactly the kind contemplated by s. 17, art. (*h*) of Act III of 1877.

The document in question, of which a copy is annexed to the plaint, engages Muncherji, at least by implication, to execute a further assurance.

"I have received from you Rs. 100, namely, rupees one hundred, as earnest (*i.e.*,) at the time of the execution of this bargain-paper. And as to the remaining Rs. 1,800, namely, one thousand and eight hundred, the same are duly to be paid to me within one month from this day, when you will get the deed (or) document made in your favour. And all the expenditure in respect of the deed (or) documents and transferring (the property) to your name you are duly to make on your account." And, again, "On these terms this informal bargain-paper having been written, is agreed to and delivered." It was plainly a term of the act or expression of will that Burjorji, paying the remainder of the purchase-money, should obtain execution by Muncherji of a more formal conveyance. [149] But in cases of contract if the parties intend to be bound forthwith, and say so, the fact that a more formal expression of their intention is to be drawn up afterwards does not deprive the mutual consent of its proper effect (1). It is only when the assent is suspended, being dependent, or conditional on the acceptance in a particular form, and the execution of a further document, that the obligation is not contracted (2). The principle applies generally to manifestations of volition. When the parties have agreed to commit their oral agreement to writing, a presumption was raised by the Roman law and is raised by the Prussian codes and other modern laws (3) that the right or obligation is dependent on an execution of the instrument; but this is only a presumption. Where the parties themselves had agreed upon certain formalities, it was requisite to seek in the contents of their agreement what had been their intention, for it was that which must serve as a guide (4). The presumption which reason at once recognizes of the merely tentative character of an oral declaration, meant to be superseded by a written one, hardly arises at all as between two writings. The earlier of these is capable of giving expression to the joint will in unmistakeable language and of excluding contradictions of memory. Except where a particular form is prescribed by law it may in such a case be said of the later and now formal instrument; *fiunt scripturæ ut quod actum est per eas facilius probari possit et sine his autem valet quod actum est si habeat probationem* (5).

(1) *Bonnewell* v. *Jenkins*, 8 Ch. D. 70; *Crossley* v. *Maycock*, L. R., 18 Eq. 180; *Rosseter* v. *Miller*, L. R. 3 Ap. Cas. 1124.

(2) See case already cited, and *Boyd* v. *Hind*, 25 L. J. Ex. 246; *Branton* v. *Griffiths*, 3 C.P.D. 212 (214).

(3) Part I, Ti. 4, S. 117.

(4) Gondsmit. Pand. 147.

(5) Di. Li. 22, T. 4, Lex. 4: see vi, *ad Inst. Emp ad Vend.* 10.

1880 JAN. 24. ORIGINAL CIVIL. 5 B. 143.

If, then, there has been an expression of will in itself effective, the effect is not defeated or suspended by a provision for a more formal declaration. That the act is unilateral in the sense of being onerous to but one of the parties, makes no difference; it is in every case his own desire and will that the declarant, even in a bilateral obligation, expresses, whether as dependant or as absolute and immediately operative.

[150] As it is a general characteristic of property that it may be transferred, so it is generally true that this may be accomplished by the volition, openly manifested, of the intending transferor and transferee. The relation of ownership of immoveable property has in most legal systems been deemed to affect the public so materially that various forms have been prescribed as essential to its transfer, but the necessity of feoffment with livery of seisin is not a part of the English law that obtained a place in India, through its suitableness to local circumstances; and even a provision of the Statute of Frauds, which required that a document relating to the sale of lands should be in writing, has been repealed by the Indian Contract Act. According to the Hindu law, a change of possession or something equivalent is necessary to the completion of a transfer, and it has been contended by some distinguished jurists that such a change ought, according to a sound philosophy of the law, to be made essential in every case (1). But the English law has not adopted such a theory, and, except by way of caution against fraud, there is no convincing reason why more should be required than a mutual assent for replacing one member of the community as an owner of property by another equally qualified for the functions of a proprietor. Thus, in the absence of any special law as to the forms to be observed, one Parsi may well transfer his ownership to another by a mere open assent of both to that effect. A real ownership may pass, though the public policy of the Registration Act may make the ownership subject to defeasance if it has not been secured by registration. But the same policy may impress the intended transfer with an original defect, and deprive it of all operation, unless authenticated in the way prescribed. Such appears to be the effect of s. 49 of the Registration Act III of 1877. "No document required by s. 17 to be registered shall affect any immoveable property comprised therein . . . . . unless it has been registered in accordance with the provisions of this Act." The property or ownership, in the cases contemplated cannot pass without a registration of the instrument, nor can an instrument unregistered be received as evidence of a transaction directly affecting the property comprised in it.

[151] In the present instance, then, the document in question cannot, as being unregistered, create or assign the intended interest. On its face it "declares" an interest, and what it declares is a matter of mere intention of the parties independent of any law. But at the same time a "declaration" so taken has no legal effect. What is intended is a declaration apt in itself to bind the parties and to constitute a particular right. As the instrument cannot affect the property to which it relates, the document, though certainly made, is purely abortive in a legal point of view.

Were the instrument itself capable of transferring the ownership, as under the Registration Act it is not, the further conveyance promised by it could do no more. In that case it could not properly be described as "merely creating a right to obtain another document." The right having passed, that second document would merely record the transaction in a

(1) See Maynz Dr. Rom. Purchase and Sale.

1880
JAN. 24.
ORIGINAL
CIVIL.
5 B. 143.

particular form. But the right to the further instrument is at least created, and this alone subsists where the primary expression of will as to immediate change of ownership fails. It was intended to be accessory, but it can subsist separately. The first document is thus reduced to one "merely creating a right to obtain another document, which will, when executed," effect the desired purpose if the execution be accompanied by registration. The right is a right *in personam*, and subsists as between the parties, though, as directly affecting the property and creating a real right, the document is quite ineffective.

Now what the plaintiff, in the present suit seeks, is, specific performance by the execution of the conveyance which will convert his contractual right into a right of ownership. I think that for such a purpose the document A is admissible to show the contract entered into for another conveyance, though not as a conveyance itself. It is, in terms, a conveyance, *i.e.*, an instrument translative of ownership, and on the argument that this was not its character, I thought it not admissible. I could not consider it as in its purport nothing more than an agreement to convey; it purports itself to convey. But that principal purpose failing, the secondary one becomes the principal, and the document might, I think, be used to ascertain what the formal and final conveyance ought to be.

[152] It is because it is made inoperative for its primary purpose, that it becomes admissible for the secondary purpose—admissible, not to prove a transaction itself changing ownership (1), but one giving a right to such a transaction by way of conveyance. In this way only, so far as I can see, can effect be given to s. 17, cl. (*h*); for an equitable interest being at once created by the contract, the contract, fails through its own completeness, unless the additional contract for a separate conveyance is allowed an independent effect. In one sense a contract to convey does convey, *i.e.*, transfer the intended interest; but this consequence was not, it is certain, intended to make the provision in s. 17, cl. (*h*), purely illusory

The second question is that of whether the proof of the document is superseded by its admission in the pleading. On this point the case of *McGowan* v. *Smith*(2) and the onus there referred to, seem conclusive. A Court, in general, has to try the questions on which the parties are at issue, not those on which they are agreed(3); and "admissions which have been deliberately made for the purposes of the suit, whether in the pleading or by agreement, will act as an estoppel to the admission of any evidence contradicting them. This includes.....any document that is by reference incorporated in the bill or answers (4).' The point is not in issue; and as to the counter-statements of the parties, "a plea or a special replication admits every point that it does not directly put in issue. The same rule applies to an answer when it assumes the form of a demurrer or plea by submitting a point of law or by introducing new facts. Thus a submission that the defendants would not be in anyway affected by the notice set forth in the bill, precluded them from disputing the validity of this notice" (5). Such rules are to be applied with discretion in this country, where a strict system of pleading is not followed; but here, as I suppose everywhere, the language of Lord Cairns holds true, "that the first object of pleading is to inform the persons, against whom the suit is directed, what the charge is [153] that is laid

(1) Act III of 1877, s. 49.
(2) 26 L. J. Ch. 8.
(3) Civil Procedure Code, Act X of 1877, S. 146.
(4) Gresley's Law of Evidence, 457.
(5) Op. Cit. p. 22.

1880
JAN. 24.
ORIGINAL CIVIL.
5 B. 153.

against them (1)." The principle is equally valid as applied to either party in the cause. The Court (2) is to frame the issues according to allegations made in the plaint or in the written statements tendered in the suit, which here contain a full assertion and admission of the execution of the document A by the defendant Muncherji. But the issues, as they stand, were suggested by the defendant's counsel. They waive controversy as to the actual execution of the document, assume it to have been executed, and raise questions only that depend for their pertinence on that assumption. Under such circumstances the plaintiff is not, I think, called on to prove the execution of the document or to put it in evidence. If the document being pronounced absolutely invalid for some purpose on considerations of public policy, it were sought to defeat the law through the effect usually given to an admission in pleading, such an attempt could not be allowed to succeed, but for its proposed purpose in this case it is not invalid. It may serve as a ground for claiming the conveyance it promises, though unregistered; while as unregistered it is not itself an operative conveyance. It is embodied by reference in the plaint and admitted in the answer. It remains to be seen whether the objections, raised on behalf of the defendant to the fulfilment of the contract thus ascertained, are supported by the evidence. [His Lordship then commented upon the evidence, and passed a decree for the plaintiff, with costs.]

Decree for the plaintiff.

Attorneys for the plaintiff.—Messrs. *Shapurji and Thakurdas.*
Attorneys for the defendant.—Messrs. *Payne and Gilbert.*

---

5 B. 154=5 Ind. Jur. 589.

[154] ORIGINAL CIVIL.

Before Mr. Justice West.

IN THE MATTER OF THE PETITION OF KAHANDAS NARRANDAS.

[20th December, 1880 and 11th January, 1881.]

Indian Trustee Act (XXVII of 1866), ss. 3, 35, 53—Equitable jurisdiction of High Court—Trusts—Appointment of new trustee—Letters Patent, 1823, Cls. 29, 33, 41.

The High Court may exercise the summary powers conferred upon it by the Indian Trustee Act (XXVII of 1866) in the case of Hindu trusts.

Section 3 of the Indian Trustee Act, which provides that the power and authority given, by the Act to the High Court shall be exercised only "in cases to which English law is applicable," cannot be intended to limit the operation of the Act only to cases to which, in their whole extent, the law prevailing in England applies without qualification or reserve, as this would virtually exclude the Act in any case on which an Act of the Indian Legislature has any bearing. The cases referred to in the section must be cases to which the English law is *in some measure* applicable, but in what measure is not indicated in the Act. English law must be regarded as applicable in the sense intended if the principles recognized by the English Equity Courts are applicable.

At the date of the grant of the charter to the Supreme Court of Bombay in the year 1823, English equity had become a system which would deal with a body of *quasi*, common law in a scientific manner and in obedience to known and uniform rules. When it applied its method to the determination or the constitution of a right, even based on the Hindu or Mahomedan law, it administered English law. In this sense "English law was applicable" at the

(1) *Brawne* v. *Mc Clintock*, 6 Eng. & Ir Ap. at p. 453.
(2) Civil Procedure Code, Act X of 1877, s. 147.