

cies of the plaintiff required a grant of maintenance prior to the 1st of January 1906.

On behalf of the appellant-plaintiff reference has been made to the *dictum* of Sir Charles Sargent in *Girianna Murkundi Naik v. Honama*⁽¹⁾, where he states: "It is now well established that a Hindu widow is not bound to reside in her deceased husband's family house, and does not forfeit her right to maintenance by going to reside elsewhere, unless she leaves the house for an improper purpose." The answer to that argument is that Sir Charles Sargent was not there concerned with the question of the grant of arrears; and what sum will be granted for arrears, must depend, as stated by the Privy Council, on the wants and exigencies of the widow as proved in the particular case.

For these reasons we affirm the decree of the lower appellate Court and dismiss the appeals with costs.

Decree affirmed.

G. B. R.

(1) (1890) 15 Bom. 236.

PRIVY COUNCIL.*

[On Appeal from the High Court of Judicature at Bombay.]

VISSANJI SONS & Co. (PLAINTIFFS) v. SHAPURJI BURJORJI BHAROOCHA.

Guarantee—Contract, construction of—Whether contingent or unconditional agreement—Inadmissibility of evidence of what took place after the execution of the contract on question of its construction—Contract Act (IX of 1872), sections 32, 34, 56 and 65.

The question for determination in this appeal was the construction of the following letter dated 7th August 1909, which was signed by the defendant, and given to the plaintiffs as security for the repayment of the loan of Rs. 1½ lakhs mentioned therein. "In consideration of your having at my request acceded to the proposal of the Secretaries, Treasurers and

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* Present:—LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW,
SIR JOHN EDGE AND MR. AMEER ALI.

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Agents of the Tricumdas Mills Company, Limited, to advance to the Mills Rs. 1½ lakhs, I hereby bind myself to procure a loan within two weeks of Rs. 11 lakhs on the first mortgage of the Mills' block property, and to pay you thereout the said sum of Rs. 1½ lakhs agreed to be advanced by you to the Mills." In a suit for damages for breach of the contract contained in the letter, the Courts in India held in favour of the defendant that "all he had undertaken to do was to procure the lending of Rs. 11 lakhs if a first mortgage of the Mills was given, and to pay thereout Rs. 1½ lakhs to the plaintiffs."

Held (reversing that decision) that on its true construction the document amounted to a substantial undertaking by the defendant that a loan of Rs. 11 lakhs should be procured, and that out of that loan the sum of Rs. 1½ lakhs should be repaid to the plaintiffs.

Semble:—Evidence of what took place after the execution of the document was not admissible on the question of its construction.

APPEAL from a judgment and decree (23rd August 1910) of the High Court at Bombay in its Appellate Jurisdiction, which affirmed a judgment and decree (11th February 1910) of the same Court in its Original Civil Jurisdiction.

In the suit out of which this appeal arose the appellants claimed from the respondent damages for breach of an agreement contained in a letter dated 7th August 1909, and the main question in dispute was as to the proper construction to be placed on the agreement.

The facts which gave rise to the suit were that the business of the Tricumdas Mills Company was mainly carried on by one Dwarkadas Dharamsey, a well-known and influential merchant in Bombay, and a partner in the firm of Tricumdas Dwarkadas and Company, who acted as the Secretaries, Treasurers and Managers of the Tricumdas Mills Company. In August 1909 Dwarkadas Dharamsey, his firm, and the Tricumdas Mills Company were in financial difficulties, and on 7th August Dwarkadas applied to the appellants, also a well-known mercantile firm in Bombay, for a loan of Rs. 1,50,000 to be made to the Mills, but the appellants refused to make the loan. Dwarkadas then told the appellants that he was about to raise a loan of 11 lakhs of rupees on a first mortgage of the Mills through the respondent, who was a money and loan broker in Bombay doing an extensive business, and that the advance of Rs. 1,50,000 for which he asked would be repaid out of that

loan. Being doubtful whether the respondent would induce anyone to advance the sum of 11 lakhs on the mortgage of the Mills, and whether he had any substantial lender in view, the appellants asked Dwarkadas for an assurance in writing from the respondent that he could procure such a loan.

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Thereupon the appellants and Dwarkadas had a draft letter containing the proposed assurance prepared by their Solicitors which was to be put before the respondent for his signature, and on the same day (7th August) Dwarkadas called on the respondent, and informed him that the appellants required the assurance before they would make the advance, and requested him to sign the letter of assurance. Prior to the above date Dwarkadas had seen the respondent and had informed him of the fact that the Tricumdas Mills Company required a loan of 11 lakhs on a first mortgage of their property, that there was then a first mortgage thereon for a sum of 6 lakhs in favour of the firm of Shivlal Motilal of Bombay, that that firm were willing and prepared to have their mortgage paid off, though in fact the due date had not then arrived, and he had requested the respondent to procure him the loan of 11 lakhs before 7th August 1909.

The respondent had in fact at the time a large sum of money belonging to a principal of his available for investment and he agreed to procure the said loan which was to be secured upon a first mortgage of the Mills.

Accordingly on 7th August 1909 the respondent was requested to, and did, sign the following letter in terms of the draft produced by Dwarkadas Dharamsey.

EXHIBIT A.

"Tullockchund and Shapoorji.

51, Apollo Street,
Bombay, 7th August 1909.

Messrs. VISSANJI SONS & Co.

Dear Sirs,

In consideration of your having at my request acceded to the proposal of the Secretaries, Treasurers and Agents of the Tricumdas Mills Company, Limited, to advance to the Mills a sum of Rupees one lakh and fifty thousand, I hereby bind myself to you to procure a loan within two weeks of Rupees

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eleven lakhs on the first mortgage of the Mills' block properly and to pay to you thereout the said sum of Rupees one lakh and fifty thousand agreed to be advanced by you to the Mills.

Yours faithfully,
 S. B. BROCHA."

This letter was taken by Dwarkadas to the appellants who made an advance of Rs. 1,50,000 which was secured by a promissory note signed by the Tricumdas Mills Company, and the appellants' firm of Tricumdas Dwarkadas and Company; and to that firm and the Tricumdas Mills Company the advance was debited in the books of account of the appellants' firm.

On the 9th August Dwarkadas informed the respondent that he would not require the respondent to procure the loan of 11 lakhs, as the firm of Shival Motilal had agreed to lend the sum of 5 lakhs to the Mills on a further mortgage. The respondent immediately wrote and informed the appellants of the refusal by Dwarkadas to make the contract with him, and told them to look to Shival Motilal and Dwarkadas Dharamsey to reserve for them the Rs. 1,50,000 from the amount of the further loan. The respondent, however, received no reply to his letter until 24th August when the appellants wrote and demanded payment of the sum of Rs. 1,50,000. Meantime the appellants had been in negotiation with Shival Motilal and Dwarkadas Dharamsey with a view to securing their advance to the Mills, and they received an assurance from Dwarkadas that the advance would be repaid out of the money to be received from Shival Motilal.

On 25th August the respondent replied to the appellants' letter of demand and repudiated all liability, stating that he had been, and was then, in a position to procure and advance the loan of 11 lakhs on a first mortgage, and to carry through the transaction, but that Dwarkadas refused to mortgage the Mills to him. Shival Motilal gave a definite refusal to make any further advance to the Mills, and on 28th August Dwarkadas Dharamsey committed suicide. After some further correspondence between the parties the appellants on 11th October 1909, instituted the present suit against the respondent as defendant in the High Court at Bombay.

The plaintiff alleged that the defendant had committed a breach of contract in failing to keep his promise contained in the letter of 7th August 1909, and prayed for a decree for Rs. 1,50,000 with interest at 6 per cent. and costs.

In his written statement the defendant denied that he requested the plaintiffs to advance any money to the Mills, or that he promised to repay any such advance, and asserted that he received no consideration for the letter of 7th August 1909. He alleged that he was always ready and willing to perform what he had undertaken to do, and denied that there was any breach of contract on his part.

On the pleadings the following issues were settled:—

“1. Whether the plaintiffs advanced one and a half lakhs to the Tricumdas Mills on the faith of the letter of 7th August 1909?

“2. Whether the promise of the defendant to pay the plaintiff one and a half lakhs was not conditional upon the Tricumdas Mills granting a first mortgage of the Mills to the defendant's client for 11 lakhs?

“3. Whether the defendant was not always ready and willing to perform the promises made by him in the said letter?

“4. Whether, on the 9th August 1909, Dwarakadas Dharamsey as representing the Tricumdas Mills did not refuse to grant a first mortgage of the Mills to the defendant's client?

“5. Whether such refusal did not render it impossible for the defendant to perform his said promises?

“6. Whether if the said promises amounted to a contract such refusal did not render the contract void?

“7. Whether the plaintiff did not treat the defendant's letter of 9th August 1909 as terminating any contract between them with reference to the sum of one and a half lakhs?”

The Judge of the Court on its Original Civil Side (BEAMAN, J.) before whom the case came for hearing, after finding that the facts were practically undisputed, held that the defendant believed that the mortgagee Shivalal Motilal was willing to be

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paid off in full; that the defendant had the 11 lakhs available for the loan which he undertook to procure, and was ready and willing to advance the said sum on a first mortgage of the Mills; that the undertaking to pay the sum of Rs. 1,50,000 out of the mortgage money contained in the letter of 7th August 1909 was conditional and contingent on the transaction of mortgage being given effect to and carried out by the loan being taken, and was not a promise unfettered by that condition; that the contingency failed in consequence of the act of Dwarkadas Dharamsey; that the fulfilment of the undertaking thereby became impossible; and that there was no breach on the part of the defendant of his contract, nor any liability on his part in respect of the sum claimed. The suit was consequently dismissed with costs.

On appeal by the plaintiffs the High Court in its Appellate Jurisdiction (Sir BASIL SCOTT, C. J., and BATHURLOK, J.) upheld the lower Court's decision.

The material portion of their judgment (after stating the facts) was as follows:—

“The above facts are undisputed. There is evidence that after the 9th August plaintiff tried to arrange for repayment out of the monies to be advanced by Shivlal on further charge and that he made no claim on defendant till 24th August, the day of the meeting of the creditors of Dwarkadas Dharamsey, when Shivlal had finally decided not to advance the remaining 3 lakhs.

“In the view we take of the case however what happened after the 9th of August is of no importance for the purpose of our decision. The question which we have to decide is what requisition the plaintiff laid before the defendant by the draft and what the defendant undertook by the letter of the 7th August.

“The plaintiff's present case is that he insisted on a request from the defendant for an advance of Rs. 1½ lakhs to Dwarkadas Dharamsey and the defendant's promise that he would repay that amount. If this was what he wanted it is strange that he did not ask for a bare and absolute guarantee from the defendant instead of introducing an unnecessary reference to the first mortgage of the Tricumdas Mills.

“It appears to us that no reasonable businessman in the plaintiff's position can possibly have supposed that a loan broker however wealthy would promise to pay out of his client's money 1½ lakhs of rupees except upon condition of some security being obtained for the lender of the money. As between businessmen like plaintiff and defendant dealing with a tottering financier like Dwarkadas Dharamsey any arrangement for an unconditional guarantee such as the plaintiff now asserts is incredible.

It appears to us that the words 'I bind myself to you to procure a loan within two weeks of Rs. 11 lakhs on the first mortgage of the Mills and to pay you thereout' are correctly paraphrased in paragraph 5 of the defendant's written statement, where he says that all he had undertaken to do was to procure the lending of 11 lakhs if a first mortgage of the Mills was given and to pay thereout 1½ lakhs to the plaintiff.

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"It was suggested by the plaintiff's counsel that if defendants had offered a written guarantee in these terms the plaintiff would never have advanced the money. We do not think that this would have been the result, for the plaintiff had no doubt of Dwarkadas Dharamsey's ability or willingness to mortgage the Mills. His only doubt was (as he himself says) whether Dwarkadas Dharamsey could induce anyone to lend him the 11 lakhs he wanted on the Mills. On the other hand, looking at the case from the point of view of the defendant, if he had been asked to promise repayment of the plaintiff's money, mortgage or no mortgage, security or no security, we cannot doubt that he would have refused.

"For these reasons we affirm the decree of the lower Court and dismiss the appeal with costs."

DJP

Leave to appeal to His Majesty in Council was granted by the High Court on the ground that the question of the construction of the letter of 7th August 1909 was a "substantial question of law" following the decision of *Couch, C. J.*, in *Nowbut Singh v. Chutter Dharee Singh*⁽¹⁾.

On this appeal,

Sir A. Cripps, K. C., and *G. R. Lowndes* for the appellants contended that upon the true construction of the letter of 7th August 1909 the respondent promised unconditionally to repay to the appellants the sum of Rs. 1,50,000 out of a loan of 11 lakhs to be procured by the respondent; that the promise to procure the loan of 11 lakhs ought to be construed as a promise to procure it effectually for the purpose in contemplation between the appellants and the respondent, which was the payment of the money advanced by the appellants. It was not a "contingent contract," and therefore section 32 of the Contract Act (IX of 1872) had, it was submitted, no application to it. There were no circumstances giving rise to an implied condition that Dwarkadas Dharamsey would take up the loan. The appellants did not know, as the respondent did, of the mortgage to Shival Motilal.

(1) (1873) 19 W. R. 222.

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Sir R. Finlay, K. C., DeGruyther, K. C., and Arthur Grey for the respondent (called on to support the decisions appealed from) contended that the proper construction of the agreement contained in the letter of 7th August 1909 was that it was an agreement contingent on the respondent obtaining a first mortgage of the Mills as security for the loan of 11 lakhs, and in the events which had happened—the refusal of Dwarkadas Dharamsey to take the loan, and the discovery by the respondent that the property had already been mortgaged to Shival Motilal, who was not willing to have the mortgage redeemed, but proposed to exercise his option of increasing the amount of the mortgage he had on the Mills—the contract became, impossible of performance and void under sections 32 and 34 of the Contract Act. Reference was made to *Chandler v. Webster*⁽¹⁾; *Krell v. Henry*⁽²⁾; and *Taylor v. Caldwell*⁽³⁾. A contract made under one set of circumstances which has become impossible of performance cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made: *Jackson v. Union Marine Insurance Company*⁽⁴⁾. The respondent was always ready and willing to procure the loan (it was part of his business to procure loans) and so fulfil his part of the contract, but he had not by his letter bound himself to do so unless he obtained the mortgage stipulated for. The appellants, it was further submitted, had accepted the determination of the contract under the letter of 7th August, and had agreed with Dwarkadas Dharamsey to get their advance paid out of the loan which would be made by Shival Motilal on the further mortgage to him. The respondent, therefore, had committed no breach of contract, and was not liable, under the circumstances, to pay anything to the appellants.

The appellants were not called upon to reply.

1912, May 3rd:—The Judgment of their Lordships was delivered by—

(1) [1904] 1 K. B. 493.

(3) (1863) 32 L. J., Q. B. 164; 3 B. & S.

(2) [1903] 2 K. B. 740.

826.

(4) (1873) L. R. 8 C. P. 572 at p. 581.

LORD MACNAGHTEN:—The question in this case turns simply upon the construction of a very short document. It is addressed to the appellants, and is in these words:—"In consideration of your having at my request acceded to the proposal of the Secretaries, Treasurers and Agents of the Tricumdass Mills Company, Limited, to advance to the Mills a sum of Rupees one lakh and fifty thousand, I hereby bind myself to you to procure a loan within two weeks of Rupees eleven lakhs on the first mortgage of the Mills' block property, and to pay to you thereout the said sum of Rupees one lakh and fifty thousand agreed to be advanced by you to the Mills."

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Everybody is now agreed that, what took place after the execution of that document can have no bearing on the construction of it. All that the admitted evidence shows is that the appellants wanted some real and substantial security for their advance. They advanced the lakh and a half, and the only question is, what is the meaning of this guarantee? Does it mean that all that the respondent undertook was that he would find somebody willing to lend eleven lakhs on a first mortgage of the Mills and that he was to do nothing further except, if that arrangement was carried through, he would pay to the appellant out of the loan a lakh and a half?

Various constructions have been suggested. The one which Sir Robert Finlay, for the respondent, finally adopted is the one on which the Judges in the Appeal Court relied. They say they agree with the respondent when he says "that all he had undertaken to do was to procure the lending of eleven lakhs if a first mortgage of the Mills was given, and to pay thereout Rupees $1\frac{1}{2}$ lakhs to the plaintiff."

Their Lordships read the document not in that sense at all, but as a substantial undertaking that a loan should be procured, and that out of that loan this sum of Rs. 1,50,000 should be repaid.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and that a decree should be

1912 made in favour of the appellants. Of course the respondents will pay the costs of this appeal, and the costs below.

VISSANJI
SONS & Co. Solicitors for the appellants : *Messrs. Latteys & Hart.*

SHAPURJI
BURJORJI. Solicitors for the respondents : *Messrs. T. L. Wilson & Co.*

Appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911 MADONJI DEVCHAND AND OTHERS, APPELLANTS AND PLAINTIFFS, v.
August 22. TRIBHOWAN VIRCHAND AND ANOTHER, RESPONDENTS AND
DEFENDANTS.*

Indian Trusts Act (II of 1882), section 5—Trust declared outside British India—Proceedings in British Indian Courts—Redeemed mortgage retaining mortgaged share as trustee for mortgagor—Notice of assignment by mortgagor—Death of mortgagor before registration of transfer to assignee—Validity of trust—Completion of gift.

N, through her agent T, mortgaged a share in the Bank of Bombay with P. Later she directed T to redeem it and have it transferred by way of gift to her two nephews. It was redeemed and a transfer form was signed by P in favour of the nephews, but the Bank declined to register it on the ground that the transferees were minors. N thereupon directed that it should be transferred to the names of T and M jointly as trustees for the minors. A transfer was accordingly signed by P in favour of T and M, and this was duly registered by the Bank. The day before it was lodged with the Bank for registration, N died.

It was contended that the gift was imperfect and the trust in favour of the nephews invalid.

Held, that as the trust was set up in a British Indian Court the Indian Trusts Act applied, although both N and P were living and domiciled in Kathiawar (*i. e.*, outside British India) when N declared her wishes regarding the share.

Held, further, that N had an equitable interest in the share and that, the mortgage having been discharged, P, the registered proprietor, held the legal title as trustee and was bound to deal with it as T or his principal. N should direct.

Held, further, that the share had passed out of the control of N before her death, the certificate as well as the transfer being in the hands or under the control of T, to whom her desire to benefit the minors had been communicated, and that the legal holder P, having notice and having signed a transfer in favour of

* Appeal No. 3 of 1911; Suit No. 847 of 1907.