ORIGINAL CIVIL.

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

BURJORJEE DHUNJIBHOY CONTRACTOR, APPELLANT AND DEFENDANT, *v.* JAMSHED KHODARAM IRANI, RESPONDENT AND PLAINTIFF.* 1913. *January* 31.

Indian Contract Act (IX of 1872), section 55—Contract, when time of the essence of—Contract for the assignment of leasehold property, effect of the insertion of a definite date for completion and payment of the purchase money with conditions as to forfeiture of the earnest money and liberty for the vendor to re-sell—Certificate of lessor that conditions of lease have been complied with not necessary.

C. agreed to sell to I. his interest in a property, held on lease from the Secretary of State for India, on certain conditions as to improvement for cultivation, etc., and, as to not assigning or underletting the lands until these conditions had been carried out without the consent in writing of the Collector of Thana, for Rs. 85,000, of which Rs. 4,000 was paid on the execution of the agreement and it was agreed that Rs. 80,500 should be paid on the signing of the conveyance, which was to be prepared and received within 2 months from the date of the agreement, and Rs. 500 on the transfer of the land after the conveyance should have been registered. It was further provided that should I. not have paid the amount of the purchase money within the time fixed then he should forfeit his right to the earnest money and C. should be at liberty to re-sell the property.

Held, that under the agreement time was of the essence of the contract.

Held, further, that I. could not insist on C. procuring a certificate from the Collector of Thana that all the conditions of the lease from the Secretary of State for India had been complied with.

IN this suit the defendant appealed against a decree passed by Mr. Justice Macleod for the specific performance by the defendant of an agreement for the sale of certain property of the defendant.

The material facts of the case were as follows.

By a writing in Marathi, dated the 12th of September 1898, the Secretary of State for India granted a lease to one Motabhoy Bhicaji of a piece of land at Palghar in

* Appeal No. 43 of 1912 : Suit No. 55 of 1911.

1913.

BURJORJEE DHUNJIBHOY v. JAMSHED KHODARAM.

the Thana District, admeasuring 2,334 acres and 2 gunthas, for the term of 999 years from the 1st of August 1890 on certain terms, including a provision that the lessee should improve the land for cultivation within 10 years from the 1st of August 1890, which period was subsequently extended for a further period of 10 years, and that until the land was so improved the lessee should not transfer or sublet any portion of it without the previous consent in writing of the Collector of Thana and that in the event of a breach of any of the conditions contained therein the lease should be deemed to have determined and the lessor should be entitled to re-enter.

On the 18th of October 1908, Motabhoy Bhicaji sold his interest in the property to the defendant.

By an agreement in Gujarati dated the 8th of July 1911, the defendant agreed to sell his interest in the land at Palghar to the plaintiff and by clause 1 agreed *inter alia* to show a marketable title to the land from the title deeds.

The following clauses of the agreement are also material.

2. The Packa (formal) sale (conveyance) of this land is to be prepared and received within two months from this day. At the time of signing the document of sale, Rs. 80,500 are to be paid. And as to the balance of Rs. 500, the same is to be paid on the transfer of the land (after) the document shall have been registered.

5. On payment of Rs. 81,000 by the purchaser to the vendor as mentioned in the above clause 2, the document of sale (conveyance) is to be got executed by the vendor. But should I (meaning the purchaser) not pay the amount within the fixed period given (herein) then I shall have no right (or claim) to Rs. 4,000 paid this day to you under this bargain paper as earnest-money on account of (this) sale. And if I prefer (any) claim, the same is null (and void). And after this date the vendor of this property has authority in every way to sell the same to another.

7. The boundaries (limits) of the above property are to be shown and the (boundary) marks are duly to be made (? fixed) by the vendor at his expense

and are to be given to the purchaser. The grass (growing) on this land for the current monsoon has been given (sold) for Rs. 10,500. The vendor is duly to give credit for that amount to the purchaser.

There was also a subsidiary agreement made at the same time providing for sale of a property of the plaintiff at Elphinstone Road, Bombay, to the defendant for Rs. 30,000, which sum was to be retained by the purchaser out of the purchase money for the Palghar property.

After the said agreement had been made the plaintiff's attorneys commenced to investigate the defendant's title to the Palghar property. On the 21st of August 1911 they made requisitions of title *inter alia* calling on the defendant to prove the death of one Mangalji Ishwarbhai and also that Chimanlal Mangalji who purported to execute the deed of conveyance of the 28th of October 1908 was the only son and heir of the said Mangalji Ishwarbhai. In answer the defendant replied that he had no evidence of the matters referred to except the recitals contained in the deed of conveyance of the 28th of October 1908. The plaintiff's attorneys professed themselves not satisfied with this answer and there was further correspondence on the subject. On the 4th of October 1911 the defendant gave the plaintiff all the information within his knowledge on the question in dispute. On the 6th of October the plaintiff's attorneys informed the defendant's attorneys that they would submit the defendant's answers to counsel for advice and would abide by his decision.

By their requisitions the plaintiff's attorneys further inquired whether the defendant had obtained permission from the Collector of Thana for the transfer of his interest in the Palghar land to the plaintiff and whether the whole land had been reclaimed as provided for in the lease. In answer to the first inquiry the defendant stated that as the land was completely

1913.

BURJORJEE DHUNJIBHOY v. JAMSHED KHODARAM.

reclaimed and rendered cultivable the permission of the Collector was not necessary. In answer to the second inquiry the defendant referred the plaintiff to a letter dated the 13th of October 1906 from the Collector of Thana to the defendant in reply to an application made by the latter for the transfer of the Palghar land from the name of Motabhoy Bhicaji to the defendant's name, in which letter the Collector stated that the land could be transferred in accordance with the conditions of the lease as it was fit for cultivation "as batty and varkas land."

The defendant's attorneys also carried on a correspondence with the Collector of Thana on the question whether the conditions of the lease had been carried out but did not obtain any information on this point which they considered satisfactory before the cancellation of the agreement on the 6th of October 1911.

While this correspondence was going on the defendant's attorneys were pressing the plaintiff to complete the sale. On the 6th of September 1911 when the time fixed for completing the sale had not expired and the draft conveyance of the plaintiff's Elphinstone Road property which was to be prepared by the defendant's attorneys was not yet ready, the defendant's attorneys wrote to the plaintiff proposing that either party should deliver to the other possession of the property agreed to be sold by him, that the plaintiff should pay to the defendant the balance of the purchase money and that the deeds of sale might be executed when the same were ready. On the 7th of September the defendant's attorneys wrote to the plaintiff's attorneys stating that as the plaintiff had failed to carry out the contract, the contract was at an end and that the sum of Rs. 4,000 paid by the plaintiff to the defendant as earnest-money was forfeited to the defendant. On the 8th of September 1911, however, the defendant on the plaintiff's protest offered to extend

the time for completion till the 19th of September 1911, if the plaintiff would agree to pay interest on the balance of the purchase money at 9 per cent. per annum. On the 23rd of September 1911, the defendant offered to extend the time for completion by 4 days. On the 6th of October 1911, the defendant finally cancelled the agreement.

Subsequently the plaintiff received information which induced him to believe that he would run no serious risk if he then completed the transaction and by a letter of the 13th of October 1911, he offered to complete the same but the defendant did not answer his letter.

The plaintiff submitted that he was justified in making the inquiries he had made and that the delay in the completion of the transaction was inevitable under the circumstances. He submitted that the time fixed in the agreement for completion was not of the essence of the contract and that though time expired on the 8th of September 1911, the plaintiff's offer to complete made on the 13th of October 1911 was made within a reasonable time from the date of the agreement.

The defendant submitted that time was of the essence of the contract under the agreement or in the alternative was made so by the letter of the defendant's attorneys on the 13th of June 1911. The defendant stated that the plaintiff was reminded that time was of the essence of the contract in correspondence but that not having monies sufficient to pay the balance of the purchase money the plaintiff was in search of a mortgagee to lend him the monies and was guilty of great delay in investigating the defendant's title and in producing the deeds of the property which he had agreed to sell to the appellant. The plaintiff had further changed his attorneys from time to time during

1913.

BURJORJEE DHUNJIBHOY v. JAMSHED KHODARAM.

the correspondence concerning the defendant's title, the reason suggested by the defendant being that such attorneys were the attorneys of different prospective mortgagees from whom the plaintiff was trying to raise a loan to pay the purchase money. The defendant submitted that he was entitled to cancel the agreement.

The suit came on for trial before Mr. Justice Macleod on the 30th of July 1912 and was decided in favour of the plaintiff. As to the question of whether time was not of the essence of the contract under the agreement between the parties, the learned Judge held as follows :—

"The first issue is whether time was not of the essence of the contract under the original agreement of 8th of July 1911. The agreement is in Marathi, but its form is practically equivalent to the usual form of an English agreement for sale which contains a clause to the effect that the purchase shall be completed within a particular period, and if not completed within that period, the earnest money will be forfeited and the vendor will be at liberty to re-sell. That clause has never been considered by the Court as making time the essence of the contract. It is to be noted that there is no special provision as often appears in such an agreement that in this respect time is of the essence of the contract. Under section 55 of the Contract Act when a party to a contract promises to do a certain thing at or before a specified time, or, certain things at or before specified times and fails to do any such thing at or before the specified time the contract, or so much of it as has not been performed, becomes voidable, at the option of the promisee if the intention of the parties was that time should be of the essence of the contract. There is no express declaration in this contract that time should be of the essence of the contract, and even if those words did appear I do not think that a Court of Equity would construe them as being an express stipulation in the absence of particular circumstances. However, in this agreement (it must be read as it stands) there are no such words which make time of the essence of the contract. The agreement merely states that the purchase shall be completed within two months and that if it is not so completed the earnest money shall be forfeited, and the vendor will have the right to sell. No doubt after the agreement the defendant did write to the plaintiff making out that time was of the essence of the contract. But it is not so in the contract, and it cannot be so made after the contract within the time unless by an express consent of the parties. It was argued that some passages in the letters written by the plaintiff's solicitors show that plaintiff had agreed to the defendant's conten-

tion that time was of the essence of the contract but I do not read them in this way. That being the case, there being no express stipulation to make time of the essence of the contract, it follows that the usual rule applies, namely, that if the contract is not fulfilled within the stipulated time, the vendor can make time of the essence of the contract by giving notice to the purchaser; only the notice must give the purchaser reasonable time to complete the contract. The extension of time from the 8th to the 19th of September given by Messrs. Bicknell, Merwanji and Romer's letter of the 8th September was under the circumstances of this case clearly insufficient and equity would certainly relieve if the purchase was not completed by that date; but it appears from the correspondence that the plaintiff's delay was not unjustifiable, that the matter could not be pushed through in a hurry and that as regards the final approval of the draft assignment there was delay on both sides. It is quite true that if time has once been made of the essence of the contract, the further extension of time given by the vendor is not to be treated as a waiver of his rights. But as I am of opinion that time was never properly made of the essence of the contract, the further extensions granted by the vendor are not of much importance. In any event they were of so short a nature that the time provided by them was also insufficient. Therefore I come to the conclusion that the defendant had no right whatever to cancel the agreement on the 6th of October and that the plaintiff was entitled to specific performance of the contract."

The learned Judge also held :—

"It appears to me that the English cases cited on this question are not applicable to transfers of land in India by assignment of leases granted by the Secretary of State. Such a lease is very different from an ordinary lease of house property in England. It seems to me that the transferee is entitled to see before he accepts a transfer, that Government has agreed to the transfer and are satisfied that the transferor has not committed any breach of his covenants which could operate as a forfeiture."

The appellant appealed.

Raikes, with him *Inverarity*, *Taraporevala* and *Desai*, for the defendant-appellant :—

Refers to Halsbury's Laws of England, Vol. VII, pages 413 and 414; Fry on Specific Performance, paragraph 1075, page 527 and paragraph 1086, page 532; *Hudson* v. *Temple*[1]; *Nokes* v. *Kilmorey*[2]; *Tilley* v. *Thomas*[3].

(1) (1860) 29 Beav. 536. (2) (1847) 1 De G. & Sm. 444.

(3) (1867) L. R. 3 Ch 61 at pp. 66 and 67.

1913.

BURJORJEE DHUNJIBHOY v. JAMSHED KHODARAM.

As to express stipulation, refers to *Parkin* v. *Thorold*[1]; *Roberts* v. *Berry*[2]; *Webb* v. *Hughes*[3]; *Patrick* v. *Milner*[4]; *Hatten* v. *Russell*[5].

To find the intentions of the parties you can look into their declarations either at the time or subsequently but within a reasonable time: *Seton* v. *Slade*[6]; *Nokes* v. *Kilmorey*[7]; *Gedye* v. *The Duke of Montrose*[8].

Jinnah, with him *Stranyman* (Advocate General) and *Kanga* for the plaintiff-respondent.

Refers to *Green* v. *Sevin*[9].

Clause 5 of the contract is the usual clause and does not make time of the essence: see *Parkin* v. *Thorold*[1].

What authority is there for the reliance of the defendant on his solicitor's letters. The only passage in favour of this is in *Seton* v. *Slade*[6].

[Court refers to *Gedye* v. *The Duke of Montrose*[8].]

Refers to Leake on Contract (6th Edition) at pages 615 and 616.

There is not a single case of a forfeiture clause being construed as making time of the essence. The nearest case is *Parkin* v. *Thorold*[1].

[*Per curiam*: there need not be the words "Time shall be of the essence," see *Hudson* v. *Temple*[10].]

I conclude that there may be a paraphrase of the words. Refers to Dart, page 179.

(1) (1852) 16 Beav. 59 at p. 62.
(2) (1852) 16 Beav. 31.
(3) (1870) L. R 10 Eq. 281.
(4) (1877) 2 C. P. D. 342.
(5) (1888) 38 Ch. D. 334.
(6) (1802) 7 Ves. 265 at pp. 278 and 279.
(7) (1847) 1 De G. & Sm. 444.
(8) (1858) 26 Beav. 45.
(9) (1879) 13 Ch. D. 589 at p. 599
(10) (1860) 29 Beav. 536.

The express stipulation in *Hudson* v. *Temple*[1] is "right to annul." There is no such clause in the present case.

If time were of the essence of the contract you need not annul it. The contract is necessarily at an end if not completed in that time; Fry on Specific Performance, 5th Edition, page 532, paragraph 1086.

The presence of the clause *re* interest was not part of the *ratio decidendi* in *Parkin* v. *Thorold*[2].

Also refers to *In re Gloag and Miller's Contract*[3]; *In re Moody and Yates' Contract*[4]; Fry on Specific Performance, page 536; Dart pages 501 and 503; *Barclay* v. *Messenger*[5]; *Ringer* v. *Thompson*[6].

Raikes replies.

Refers to Dart, page 366; Sugden on Vendors and Purchasers, pages 439, 546 and 548; *Cutts* v. *Thodey*[7].

Jinnah, replies on cases cited.

Refers to *King* v. *Wilson*[8]; *Pegg* v. *Wisden*[9].

SCOTT, C. J.:—This is an appeal from a decree for specific performance passed by Mr. Justice Macleod at the instance of a purchaser of immoveable property.

The contract for sale was made on the 8th of July 1911 in the Gujarati language. The subject-matter was certain land situate at Kelva-Mahim belonging to the defendant which had been taken from Government on lease for 999 years under what are known as the Gujarat Rules, the lease commencing from the 1st of August 1890. The purchase-money was fixed at Rs. 81,000 which by the agreement now under consideration was to be

(1) (1860) 29 Beav. 536.
(2) (1852) 16 Beav. 59.
(3) (1883) 23 Ch. D. 320.
(4) (1885) 30 Ch. D. 344.
(5) (1874) 22 W. R. 522.
(6) (1881) 51 L. J. Ch. 42.
(7) (1842) 13 Sim. 206.
(8) (1843) 6 Beav. 124.
(9) (1852) 16 Beav. 239.

1913.

BURJORJEE DHUNJIBHOY v. JAMSHED KHODARAM.

paid as to Rs. 80,500 at the time of signing the document of sale and as to the balance on the transfer of the land after registration. The provision as to the payment of the consideration-money appears to have been varied by another agreement of even date under which in lieu of Rs. 30,000 part of the consideration the defendant agreed to take a property belonging to the plaintiff situate at Parbhadevi in Mahim within the Island of Bombay. The agreement for sale contained three clauses which are of special importance with reference to the questions arising in this case, *viz.*, clauses 2, 5 and 7.

2. The pakka (formal) sale (conveyance) of this land is to be prepared and received within two months from this day. And at the time of signing the document of sale, Rs. 80,500 are to be paid. And as to the balance of Rs. 500, the same is to be paid on the transfer of the land (after) the document shall have been registered.

5. On payment of Rs. 81,000 by the purchaser to the vendor as mentioned in the above clause 2, the document of sale (conveyance) is to be got executed by the vendor. But should I not pay the amount within the fixed period given (herein) then I shall have no right (or claim) to Rs. 4,000 paid this day to you under this bargain paper as earnest-money on account of (this) sale. And if I prefer (any) claim, the same is null (and void). And after this date the vendor of this property has authority in every way to sell the same to another.

7. The boundaries (limits) of the above property are to be shown and the (boundary) marks are duly to be made (? fixed) by the vendor at his expense and are to be given to the purchaser. The grass (growing) on this land for the current monsoon has been given (sold) for Rs. 10,500. The vendor is duly to give credit for that amount to the purchaser.

The agreement was entered into at the beginning of the monsoon and the price realised by the monsoon grass-crop, which would be reaped probably in September, was to be credited to the purchaser against his purchase-money, presumably on the assumption that he would have come into possession by the time the crop was reaped. After the conclusion of the agreement, the matter was taken in hand on behalf of the plaintiff

by Messrs. Little & Co. and on behalf of the defendant by Messrs. Bicknell, Merwanji and Romer. The correspondence between these firms of solicitors during the first two months after the execution of the agreement shows that both the parties believed completion within the time stated to be essential; and requisitions were made by the plaintiff's attorneys and answered by the defendant's attorneys upon that basis until the early part of September when the plaintiff changed his attorneys. A change of front then took place on the part of his advisers and it was for the first time denied that time was of the essence of the contract. Objections which had been dropped by Messrs. Little and Co. were revived by their successors Messrs. Mulla and Mulla, notwithstanding constant pressure by the vendor's solicitors and limited extensions of time until the defendant's patience being exhausted the contract was finally cancelled. Thereupon the objections which had been persisted in were waived and a suit was commenced for specific performance.

The questions arising are: Whether time was originally of the essence of the contract; if not, whether it was made so subsequently; and if it was for either reason of the essence of the contract, whether the non-completion within the time limited was due to the fault of the vendor or of the purchaser.

The learned Judge was of opinion that under the contract time was not of the essence. If, however, that is the correct conclusion, it is difficult to see with what object clause 5 can have been inserted, which provides that if the purchaser does not pay the amount within the fixed period of two months from the 8th of July he shall have no claim to the desposit-money, and no claim under the contract, and the vendor may sell as he pleases to anyone else. The law in India is contained in section 55 of the Contract Act under which in order

1913.

BURJORJEE DHUNJIBHOY v. JAMSHED KHODARAM.

to render a contract voidable on failure to perform a particular promise at or before a specified time it is necessary that an intention should be shown by the parties to make time of the essence of the contract. It is argued that clause 5 cannot be relied upon as a real indication of the intention of the parties having regard to the decisions of Lord Eldon in *Seton* v. *Slade*[1], and of Lord Romilly in *Parkin* v. *Thorold*[2]. The contract in each of those cases contained a clause for forfeiture and re-sale on non-performance of conditions, but that clause had no bearing upon the decision in either case as the rescinding party was the purchaser and the clause in question was directed merely to declaring the rights of the vendor arising upon the default of the purchaser. Where, however, the vendor has rescinded the contract, a clause providing for forfeiture of the deposit and re-sale or for annulment of the contract has had full effect given to it, the principle being that a contract both at law and in equity must have the same meaning. Equity only did not enforce a contract where there was certain conduct on the part of one party or the other which would make it unjust to enforce the contract according to its terms. According to the report of *Lloyd* v. *Collett*[3], Lord Eldon said : " It is one thing to say, the time is not so essential that, in no case in which the day has, by any means, been suffered to elapse, the Court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, etc. might induce the Court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all ; and that it is not in the power of the parties to contract that, if the agreement is not executed at a particular time, the parties shall be at liberty to rescind it." In *Seton* v. *Slade*[1] he said " there

(1) (1802) 7 Ves. 265. (2) (1852) 16 Beav. 59.
(3) (1793) 4 Bro. C. C. 469 at p. 471.

is no authority, that has not some reference to the conduct of the party in the meantime." The later cases of *Hudson* v. *Temple*[1] and *Barclay* v. *Messenger*[2] are authorities in favour of the contention that clause 5 of this contract ought to be given effect to according to its terms. I am not aware, and the Court has not been informed, where the learned Judge obtained his authority for the sweeping statement that a clause providing that upon non-completion within the fixed period the earnest-money will be forfeited and the vendor will be at liberty to re-sell has never been considered by the Courts as making time as of the essence of the contract.

Time, then, being in my opinion of the essence of the contract as it was originally framed, no waiver of that condition has been pleaded by the plaintiff. The question, therefore, is whether the negotiations following upon the contract with reference to the making out a marketable title by the defendant disclosed any conduct on his part which would render it inequitable for him to rescind the contract contrary to the wishes of the plaintiff. From the commencement of those negotiations there had been only two points upon which the purchaser's solicitors were not immediately satisfied.

The first arose upon the terms of the lease which had been granted by Government to Motabhai Bhikaji under which the vendor claimed title. That lease was a lease for reclamation of certain salt marsh lands under which the lessee covenanted to completely reclaim the lands so as not to allow tide or salt-water to enter upon them and to bring them under cultivation by a certain period and to maintain the reclamation for the residue of the term, and that he would not assign or underlet the lands, until the whole should have been completely reclaimed and rendered cultivable, without the previous consent in writing of the Thana Collector.

(1) (1860) 29 Beav. 536. (2) (1874) 43 L. J. Ch. 449.

1913.

BURJORJEE DHUNJIBHOY v. JAMSHED KHODARAM.

The agreement for sale to the plaintiff contained the following recital :—" The purchaser has seen this land and has received copies of the lease and of the Collector's reply and he has satisfied himself thereby ". It is common ground that the Collector's reply referred to in the recital was a letter addressed by the Collector of Thana to the vendor which was signed on the 13th November 1906 in answer to an application that the land held by Motabhai might be transferred to the vendor. It stated (as regards the lands the subject of this suit) that as the entry of salt-water had been stopped according to the terms of the lease and paddy grain and grass were grown thereon and the same were rendered cultivable, there was no objection to the transfer, and the applicant Motabhai might arrange with the Mamlatdar to have the transfer effected.

The lease itself bears an endorsement, dated the 29th of July 1908, signed by the Collector of Thana reciting the application of the vendor and that in accordance with the order of the 13th November 1906 the transfer had been effected to his name.

Notwithstanding these facts appearing on the title-deeds produced by the vendor, the purchaser's attorneys sent in a requisition that the permission of the Collector to the proposed assignment of the lease should be obtained. The vendor's attorneys contended this was unnecessary and in answer to another requisition produced receipted bills for the Government rent or assessment up to date. The purchaser's attorneys were satisfied by the 1st of September that the lands agreed to be sold were identical with those referred to in the Collector's sanction and in the rent-bills ; and as to the question of the Collector's permission to the proposed transfer by the vendor confined themselves to further communications with the Collector with the result that that officer informed them on the 11th of September

that he had no objection to the proposed assignment. At that time the defendant had for the convenience of the plaintiff but without prejudice extended the time for completion until the 19th of September.

In my opinion the purchaser was never in a position to contend that the sanction of the Collector was necessary and the attitude taken up after the change of attorneys that completion must be delayed until the Collector had certified that all conditions of the lease had been complied with had no justification in face of the proof produced of payment of rent up to date; see *Bridges* v. *Longman*[1]; *Attorney-General of Victoria* v. *Ettershank*[2]; and *Davenport* v. *The Queen*[3].

The only other point as to which the purchaser's attorneys were not immediately satisfied was with regard to the devolution of the interest of one Mangalji Ishwarbhai who had been a co-mortgagee with the defendant of the interest of Motabhai. Motabhai had mortgaged his interest under the lease to the defendant and three Hindus who contributed part of the mortgage-money on joint-account. The Hindus represented, as appears from the recitals in the title-deeds, the firms of Motichand Khetsey and Raochand Oojamchand. Mangalji Ishwarbhai and Hathibhai Ishwarbhai represented Motichand Khetsey, and Nagindas Lalloobhai, Raochand Oojamchand. Mangalji died in 1904 and a conveyance of the equity of redemption by the mortgagor, on the 28th of October 1908, had been taken by the defendant, by Nagindas Lalloobhai as representing his firm of Raochand Oojamchand and by Chimanlal Mangalji and Hathibhai Ishwarbhai as representing the firm of Motichand Khetsey.

In that document and in another document of even date, whereby the defendant became sole owner of the

(1) (1857) 24 Beav. 27. (2) (1875) L. R. 6 P. C. 354.
(3) (1877) 3 App. Cas. 115.

1913.

BURJORJEE DHUNJIBHOY v. JAMSHED KHODARAM.

property by buying out his co-owners, were recitals stating that Chimanlal was the only heir of Mangalji. With reference to these recitals the plaintiff's attorneys required evidence of the death of Mangalji and as to who were his next of kin and that his son Chimanlal had power and authority to sign the deed of the 28th October 1908 and give a good receipt for the consideration binding on all members of the family. The defendant's attorneys' reply on the 1st of September 1911 was that the vendor was well acquainted with the deceased and knew the recital to be correct but he could not produce any other evidence.

There the matter rested till the 16th of September when the plaintiff's new attorneys took up the requisition again. The defendant's attorneys adhered to their original position throughout in spite of frequent letters from the plaintiff's attorneys and finally when the latter realised that the defendant's patience was exhausted the requisition was dropped.

It appears to me that the attitude of the plaintiff's new attorneys was in this matter also quite unreasonable. The deeds of the 28th of October had been executed in Bombay by a constituted attorney of Chimanlal and Hathibhai who was a resident of Bombay and in the presence of a Bombay pleader. The recitals in the deeds indicated that the interest acquired and surrendered to the defendant by Chimanlal and Hathibhai was the interest of a firm of which one at least of the original partners, Hathibhai, was a party to the deeds.

There is nothing in the correspondence to show that inquiries in Bombay had suggested doubts as to the correctness of the recitals or of the defendant's assurances. After the 1st of September 1911 the subject was not again referred to by Little and Co. as long as they acted for the purchaser. On the 5th of September they wrote

that the assignment from the vendor was being prepared and when ready would be sent for approval, and on the 6th the vendor's attorneys wrote in reply, "We take it that your client accepts our client's title". This appears to me to be the correct conclusion, for the purchaser's attorneys had written to the Collector on the 1st September as follows :—

"From your silence we gather that the Government have no objection to the assignment from Mr. Burjorji Dhunjibhoy Contractor to our abovenamed client of the land under Survey Nos. 835, 836, 934 and 942 leased by the Secretary of State for India and referred to in the said letter of 26th July last and that sanction is not necessary. Upon that supposition our client will after the 7th instant complete the purchase, which please note."

And although the Collector had replied in a non-committal manner on the 4th as follows :—

"With reference to your letter No. 9037/11 of the 1st September 1911, on behalf of your client Mr. Jamshed Khodaram Irani regarding the assignment of leasehold lands in the Mahim Taluka, I have the honour to inform you that your previous applications are under enquiry and a reply will be given to you on receipt of the Mamlatdar's report. If in the meantime your client makes the assignment without the Collector's permission he does it at his own risk."

Messrs. Little & Co. put the assignment in hand.

The truth seems to me to be that the plaintiff had not even on the 19th of September money to complete the contract according to its terms.

Having arranged to make up the price as to Rs. 30,000 by the transfer of his Parbhadevi property to the defendant, he was still in want of money and suggested on the 22nd of September that for the balance the defendant should finance him by taking a mortgage upon certain terms. There are various other indications in the correspondence that the defendant's real difficulty was in finding money to complete his contract.

In my opinion the defendant was in no way to blame and was justified in putting an end to the contract under the circumstances.

1913.

BURJORJEE DHUNJIBHOY v. JAMSHED KHODARAM.

The defendant is entitled to retain the deposit of Rs. 4,000: see *Howe* v. *Smith*[1] and *Bishan Chand* v. *Radha Kishan Das*[2].

We reverse the decree of the lower Court and dismiss the suit with costs throughout.

Attorneys for the appellant: *Messrs. Bicknell, Merwanji, Romer & Co.*

Attorneys for the respondent: *Messrs. Mulla and Mulla.*

Decree reversed.

H. S. C.

(1) (1884) 27 Ch. D. 89. (2) (1897) 19 All. 489.

APPELLATE CIVIL.

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

1913. *July* 10.

MAHABLESHVAR KRISHNAPPA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* RAMCHANDRA MANGESH KULKARNI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), section 7, schedule I, article 44—Joint Hindu family consisting of minors and widows—Manager—Mukhtiarnama *executed by manager—Management by the* mukhtiar *during the life-time and after the death of the manager—Sale by the* mukhtiar *after the death of the manager—Binding effect—Minor—Limitation to set aside sale.*

K, the manager of a joint Hindu family consisting of minors and widows, executed a *mukhtiarnama* providing for the management of the family estate, including settlement of money debts and pecuniary claims both during his life-time and after his death until his eldest minor son attained majority. The *mukhtiar* was empowered to manage the estate as he thought fit including the power of sale and settle claims as K himself could have done during his life-time. In connection with the registration of the *mukhtiarnama*, the Sub-Registrar examined the widows in the family including the widow of K, the manager, who had died in the meanwhile, and the deed was registered as the widows admitted the same. Subsequently the *mukhtiar* sold *mulgeni*

* Second Appeals Nos. 160 and 161 of 1910.