Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tanjore Ramachendra Row and others v. *Vellayanadan Ponnusami and others, from the High Court of Judicature at Madras; delivered* 31*st January* 1891.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

This is a suit between two undivided Hindu families, who may be conveniently described as the "Plaintiffs" and the "Defendants," because, whilst some of the transactions to which it relates are denied, it is not disputed that the individual members who are alleged to have entered into those transactions had authority which would have enabled them to bind their respective families. As originally framed, the plaint concluded for repayment of specific advances with interest; but, before the adjustment of issues, it was amended, so as to cover a claim for a partnership accounting in regard to all abkary contracts taken up by them and the Defendants during the period of three years commencing from 9th March 1878.

The Plaintiffs, who are the present Appellants, complain of a judgment of the High Court of Madras, reversing an order passed by Sir Charles Turner, C. J., in the exercise of the original civil

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jurisdiction of the Court, in so far only as the reversal concerns (1) the rate of interest payable by the Defendants upon an admitted loan of Rs. 55,000, (2) the right of the Plaintiffs to participate in certain akbary contracts effected in their own name by the Defendants, and (3) the validity and effect of a writing bearing date the 16th September 1880, signed by the managing member of the Plaintiffs' family. The argument at the bar has been confined to these points, which will be noticed in the order in which they have have been stated.

On the 23rd of April 1877, the Plaintiffs advanced in loan to the Defendants the sum of Rs. 55,000, in Government bonds bearing 4½ per cent. interest, and received from them, of same date, a promissory note for the amount, payable on demand, with interest at 4½ per cent. per annum. The loan was not called up, and on the 19th April 1880, the triennial period of limitation being about to expire, the Plaintiffs wrote to the 1st Defendant suggesting that, if they had no mind to renew the note, they should send a letter undertaking to pay the principal and interest within two months. The Defendant replied by a letter dated the 20th April 1880, admitting their liability under the promissory note, stating that the interest due upon the unpaid principal of Rs. 55,000 until the 22nd of the month was Rs. 7,425, and containing these obligatory words,—"With regard to these "Rs. 62,425, I will settle the accounts, and "pay the amount which may be due within "two months, though the note might be barred "by the Statute of Limitations." After the receipt of that letter, no demand for payment appears to have been made by the Plaintiffs until the present suit was brought in March 1881, when they claimed interest at the rate of 12 per cent. per annum.

The Plaintiffs now maintain that the undertaking given by the Defendants operated a complete novation of the debt: that it transmuted the loan of Rs. 55,000 bearing 4½ per cent. interest into a legal claim for the principal sum of Rs. 62,425, upon which, in the absence of any stipulated rate, interest became due *ex lege* from the time of payment. That construction of the letter of the 20th April appears to their Lordships to ignore the express obligation which it imposes upon the Defendants to "settle accounts," and to pay the amount "which may be due" within the two months allowed for payment. These expressions plainly import that the sum specified in the letter merely represented the amount of their liability calculated to the 22nd April, and did not represent the sum payable by them at the date of actual settlement, which was to be ascertained by taking accounts, or, in other words, by making a new calculation so as to include interest accruing up to that date. The letter was applied for, and was given solely with the view of eliding the Statute of Limitations; and, in the opinion of their Lordships, it had as little effect in altering the quality of the debt constituted by the promissory note as would have been produced by a notice of the same date from the Plaintiffs requiring payment within two months.

The next point taken by the Plaintiffs raises a question of fact. They allege that, on the 9th March 1878, one of their number entered into a verbal contract with a representative of the Defendant family, to the effect that all abkary contracts made by the Plaintiffs or Defendants within three years from that time, whether with or without previous consultation and arrangement, should be shared by both families, in the proportions of one quarter to the Plaintiffs and three quarters to the Defendants. The Defen-

dants do not dispute that certain abkary contracts, taken by the Plaintiffs in their own name during the period in question, were shared by the two families in these proportions; but they deny the existence of the antecedent general agreement alleged by the Plaintiffs, and maintain that the subsequent participation of the two families in these contracts was due to special arrangements made at the time with reference to each contract. It is matter of admission that, during the same period, the Defendants took up in their own name several abkary contracts which it is unnecessary to enumerate; and the Plaintiffs consider themselves aggrieved by the finding of the High Court that they are not entitled to claim a share of these contracts or of the profits arising from them. They have neither alleged nor attempted to prove that a special agreement was made in relation to each of these contracts, so that they cannot successfully impeach the decision of the Court below, unless they establish the general agreement of the 9th March 1878.

The direct evidence bearing upon that agreement, which is of the most meagre description, is to be found in the oral testimony on the one side of the 1st Defendant, Thavasimuttoo Nadan, and on the other of Tooljaram Row, the 4th Plaintiff, and of three other witnesses who, according to his evidence, were present at the time when it was concluded.

The evidence of the 4th Plaintiff is contained in these words,—"In 1878 a verbal agreement "was made that, in all abkary contracts taken "between March 1878 and 30th June 1881, by "me or by 1st or 2nd Defendants, I should "have a quarter share." That is contradicted by the 1st Defendant, who admits that "there may have been conversation" about sharing contracts taken during that period, but denies that any

general agreement was made with respect to such contracts at any time, and states that all agreements to share were specially made at the dates when the contract was taken and also that when made they were reduced to writing. The three witnesses who are said to have been present when a general agreement was concluded are intimately connected with the Plaintiffs. Viramuttu Mudaly, their partner in a printing firm, says, "I was present when 1st Defendant "agreed with Plaintiffs that contracts should "be taken in the names of 4th Plaintiff and De- "fendants 1 and 2, and that 4th Plaintiff should "be interested to the extent of one fourth." Lazarus Cashart, a clerk in the employment of the same firm, says,—"I was present when the "1st Defendant agreed with 4th Plaintiff that "he should obtain a quarter share in the "profits of any contract taken in the name of "the 1st Defendant, or 2nd Defendant, or 4th "Plaintiff, in any Taluk." The third of these witnesses, Vencatasami Iyer, who is a gomashta in the employment of the Plaintiffs, and had, according to the 4th Plaintiff, the same opportunity of hearing what passed, does not corroborate the Plaintiffs' case. He does not state, and was not invited by them to state, what passed on the occasion of the alleged agreement; but he was examined as to communications which took place between the parties in relation to abkary contracts for which the Defendants had tendered in the beginning of April 1878. If the case made by the Plaintiffs is true, they were bound to share as partners in these contracts; but according to this witness they declined to aid in making the deposit necessary in order to obtain them. He says, "there "had been a proposal to give Plaintiff a "fourth share;" and he adds,—"at that time

" no complete agreement was made that Plaintiffs " should have a share."

It appears to their Lordships as the result of that evidence to be highly probable, if not certain, that, in or about the month of March 1878, a conversation or conversations took place between the 4th Plaintiff and 1st Defendant with regard to their families becoming jointly interested in future contracts. Whether these communings were in such terms as to constitute a binding engagement to share in all contracts which either of them might choose to enter into, or merely amounted to a provisional arrangement that they would divide in the proportion of one quarter and three quarters such contracts taken by one or other of them as they might mutually approve of and agree to hold as partners, appears to be the real controversy which their Lordships have to determine. In that view, the evidence adduced by the Plaintiffs is vague and unsatisfactory. It is the plain duty of every litigant who endeavours to set up a verbal contract to lay before the Court, not the mere impressions of the witnesses who heard the communings, but in so far as possible the particulars of what was said or done, so as to enable the Court to form its own conclusions upon the question whether these did or did not import a binding agreement in the terms alleged. The Plaintiffs have carefully abstained from making any attempt to fulfil that duty, and have contented themselves with eliciting the conclusions derived by the witnesses from what they heard or supposed that they heard. It is not even clear that the witnesses are speaking of the same occasion, because the 4th Plaintiff fixes it on the 9th of March, whereas his partner Viramuttu says it was some time in the month of April 1878. Besides, the evidence of Viramuttu does not

fully bear out that of the 4th Plaintiff; it only implies that some contracts were to be taken in which the parties were to share, and tends rather to support than to exclude the inference that the selection of the particular contracts which were to come within the arrangement then made was to be matter of future agreement. The Plaintiffs' oral evidence, standing by itself, would form a very shadowy foundation for a contract; but it is directly contradicted by the 1st Defendant, and it is quite inconsistent with the testimony given by their own servant and witness, Venkatasamy Iyer, whose veracity they did not attempt to impugn.

Their Lordships have had no difficulty in coming to the conclusion that the parole proof which they have adduced fails to establish the partnership agreement which the Plaintiffs allege. There are in evidence written and also verbal communications between the parties with respect to abkary contracts, taken by the Plaintiffs during the currency of the alleged agreement, in which the Defendants had admittedly a quarter share. But none of these communications countenance the suggestion that the Defendants took their shares by virtue of an antecedent general agreement, or otherwise than by a specific agreement made with reference to each contract at the time when it was taken up by the Plaintiffs; and, save in one instance (to be noticed presently), no allusion is made in them to abkary contracts taken up by the Defendants. It is, in their Lordships' opinion, unnecessary to consider the arguments addressed to them for the Plaintiffs with regard to the probabilities of the Defendants having entered into the agreement of the 9th March 1878, which were nothing more than a series of speculations having no foundation in the evidence.

In their argument upon this appeal, the Plain-

tiffs, for the first time, maintained that, irrespective of the general agreement, there is evidence to show that they acquired right as partners to three quarters of an abkary contract for Salem taluk, which was obtained by the Defendants in June 1878, and that they ought accordingly to have an accounting for their share of profits. No such claim is made in their plaint; and it appears from a passage in the judgment of the High Court that it was repudiated by them, and that they only sought to use the evidence upon which it was preferred here as proof in aid of the existence of a general agreement of partnership. These facts would afford sufficient reason for refusing to entertain the claim now. But their Lordships think it right to observe that the 4th Plaintiff's letter of the 25th August 1878, and the 2nd Defendant's reply, dated the 27th August, when read together, do not necessarily imply that the Plaintiffs were partners in the Salem contract. That part of the correspondence in which mention is made of Salem has exclusive reference to management; it does show that the parties were arranging that a certain individual should reside in Salem and superintend several abkary contracts, but it does not *per se* show that these contracts were all joint. The letters contain a distinct acknowledgment by both parties of their partnership in contracts other than Salem, and that in terms which seem to negative the existence of any general agreement.

The last point submitted to us had reference to the validity, and also (assuming it to be valid) to the effect of a writing dated the 16th September 1880, signed by the 4th Plaintiff, which bears, *inter alia*, that he agreed, upon the conditions therein stated, to surrender the whole interest of the Plaintiffs in the joint abkary contracts standing in their name to the De-

fendants, who were to take over all profits and losses. The Plaintiffs pleaded that the document was not a completed contract, and was never acted upon. A complete answer to the first part of the plea is to be found in the evidence of the 4th Plaintiff, who states that it was written in his presence to the dictation of the Defendants, and was then signed by him and delivered to the Defendants; whilst the allegation that the writing was never acted upon is explained by the fact that the Plaintiffs subsequently refused to settle accounts in accordance with its provisions. The question raised as to the legal effect of the document has ceased to be of practical importance, in consequence of the failure of the Plaintiffs to prove any joint abkary contracts other than those standing in their own name. Their Lordships are of opinion that the Plaintiffs were right in maintaining that the document contains no stipulation referring to abkary contracts standing in the name of the Defendants; but that circumstance, coupled with the statement in the 4th Plaintiff's evidence, to the effect that he signed it because he was "anxious to get rid of the matter anyhow," appears to them to confirm their conclusion that there never was any general agreement binding the Defendants to give the Plaintiffs an interest in their contracts.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The Appellants must pay to the Respondents their costs of this appeal.