LETTERS PATENT APPEAL.

Before Jenkins C.J., and Mookerjee J.

1913
July 8.

PRATAP CHANDRA SHAHA

v.

MAHOMED ALI SARKAR.*

Interest—Arrears of rent—Rate of interest—Evidence, if admissible, to explain kabuliyat.

Where a document recites that interest is to be paid by the tenant upon rent in arrears at the rate of one anna per rupee but does not expressly state whether interest at this rate is payable monthly or annually, evidence is not admissable to show what was really intended.

Monmotha Nath Chaudhury v. *Nabin Chandra Sanyal* (1) discussed.

Mahomed Sumsooddeen v. *Moonshee Abdool Huq* (2) not followed.

Evidence to construe the terms of a contract is not inadmissible in certain cases.

LETTERS PATENT APPEAL by Pratap Chandra Shaha, the plaintiff, from the judgment of Coxe J.

This appeal arose out of a suit for rent and interest based on a *kabuliyat*. The plaintiff claimed interest at Rs. 6-4 per cent. per mensem besides rent and cesses. Defendants denied execution of the *kabuliyat* and contended, *inter alia*, that there was no agreement to pay interest at the rate claimed and that the plaintiff was not entitled to get interest at that rate. The original *kabuliyat* could not be obtained and secondary evidence was given of it.

The Munsif decreed the suit fully with costs. On appeal by the defendants, the Subordinate Judge held

* Letters Patent Appeal No. 40 of 1912, in Appeal from Appellate Decree, No. 89 of 1910.

(1) (1910) 14 C. W. N. 1100. (2) (1864) W. R. 379.

that evidence on the intention of parties as to rate of interest was inadmissible and modified the decree and awarded damages at 25 per cent. and no interest. The landlord appealed. Coxe J., hearing the appeal singly, remanded the case to the Subordinate Judge for a finding on the evidence adduced in the case as regards the intention of the parties with reference to the rate of interest payable by the tenant. The plaintiff appealed against the order of remand under section 15 of the Letters Patent.

Dr. Sarat Chandra Basak, for the appellant. It is a case of patent ambiguity and external evidence is not admissible. *Monmotha Nath Chaudhury* v. *Nabin Chandra Sanyal* (1) is not good law.

Babu Kritanta Kumar Bose, for the respondent, was not called upon, as he had admitted that he also was not satisfied with the judgment in appeal.

Cur. adv. vult.

MOOKERJEE J. This is an appeal by the plaintiff landlord under clause 15 of the Letters Patent against the judgment of Mr. Justice Coxe in a suit for rent. The substantial question in controversy between the parties is as to the rate at which interest is payable upon the amount of rent in arrears. The contract between the parties is embodied in a *kabuliyat* executed on the 20th of June 1872. This document recites that interest would be paid by the tenant upon rent in arrears at the rate of one anna per rupee. The document does not expressly state whether interest at this rate was payable monthly or annually.

The Court of first instance allowed evidence to be given as to what was intended, and came to the conclusion that the interest intended to be payable was

(1) (1910) 14 C.W.N. 1100.

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at the rate of one anna per rupee per month, that is, 75 per cent. per annum. A decree was made accordingly in favour of the landlord. Upon appeal, the Subordinate Judge held that the document was ambiguous, and that evidence could not be admitted to show what was really intended, in view of the provisions of section 93 of the Indian Evidence Act. In this view, the Subordinate Judge allowed damages at the rate of 25 per cent. upon the amount in arrears. The landlord then appealed to this Court, and upon his appeal, Mr. Justice Coxe has set aside the judgment of the Subordinate Judge and remanded the case for reconsideration upon the evidence. The learned Judge has held, upon the authority of the decision in *Monmotha Nath Chaudhury* v. *Nabin Chandra Sanyal* (1), that evidence is admissible to show that the words used in the contract of tenancy were intended to provide that interest at the prescribed rate should be calculated monthly. The plaintiff is not satisfied with the order of remand which has been made in his favour and has preferred this appeal under the Letters Patent. His contention is that upon a true construction of the contract of tenancy, interest ought to be decreed in his favour at the rate of 75 per cent. per annum. He has convinced us that the order of remand is erroneous, but he has failed to satisfy us that the interpretation he puts upon the contract is correct.

In view of the provisions of sections 92 and 93 of the Indian Evidence Act, it is plain that oral evidence was not admissible to show what was intended by the parties; the intention must be gathered from the language used by them in the instrument. The case of *Monmotha Nath Chaudhury* v. *Nabin Chandra Sanyal* (1) is really of no assistance. The learned

(1) (1910) 14 C.W.N. 1100.

Judges who decided that case did not specify the evidence which would be admissible to interpret the instrument ; they relied merely upon the decision in *Mahomed Sumsooddeen* v. *Moonshee Abdool Huq* (1), which was decided before the Indian Evidence Act was placed on the Statute Book. In that case, Mr. Justice Campbell held that where money had been advanced on an agreement to pay interest at 5 per cent., evidence was admissible to show, on the basis of a previous transaction between the parties and the custom of the country, that what was intended was that interest at 5 per cent. was payable per month and not per annum. It is not necessary for our present purpose to determine whether evidence of this description would be admissible under the provisions of the Indian Evidence Act. It may be pointed out, however, that evidence of previous transactions between the parties or of the custom of the country may be admissible for a limited purpose. Thus, to take one illustration, it has been held that evidence may be allowed to be given in anticipation of some obvious defence, for instance, evidence of prior transactions between the parties, to construe a term in a contract, in rebuttal of a possible customary meaning: *Bourne* v. *Gatliffe*(2). Similarly, in *Robinson* v. *Mollett*(3), it was held that though a writing is conclusive as to the terms of the contract expressed thereby, and though what is not in the writing cannot be part of the terms, yet evidence may be given of customs of trade tacitly incorporated in the contract, provided that the express terms of the writing are not so inconsistent with the custom as to exclude it. In the case of *Cumming* v. *Shand* (4),

(1) (1864) W. R. 379.
(2) (1844) 11 Cl. & Fin. 45 ; 44 R. R. 723.
(3) (1875) L. R. 7 H. L. 802.
(4) (1860) 5 H. & N. 95 ; 120 R. R. 498.

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evidence was allowed to be given of course of dealing between a person and his Bank, to prove that the Bank had agreed to honour the customers' cheques drawn against the cash part of his account, notwithstanding that the balance of account of cash and goods was against him. To the same effect is *Garnett* v. *M'Kewan* (1), where it was assumed that evidence of usage or course of dealing would be admissible to show that when a person has accounts at two branches of a Bank, the bankers had undertaken to cash cheques at one branch, though the whole account showed that the customer had no sufficient balance. Again in *Rowcliffe* v. *Leigh* (2), evidence of custom as also of previous transactions between the parties was allowed to be given for a limited purpose. In the case before us, however, no such consideration arises, because the only evidence upon which the plaintiff relies is direct oral evidence to the effect that at the time the parties entered into this contract of tenancy they agreed that interest would be payable at the rate of one anna per rupee per month, although in the contract itself all that was inserted was that interest would be payable at the rate of one anna per rupee. In our opinion, evidence of this description is clearly not admissible under the provisions of the Indian Evidence Act. This view is fortified by illustration (*b*) to section 93 of the Indian Evidence Act which is to the following effect: "A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled." If, for instance, in this particular case the contract had said that interest would be payable at the rate of one anna per rupee, and there was a blank, it would not be permissible to the parties to show whether the word intended to be inserted in the blank space was

(1) (1872) L. R. 8 Ex. 10, 4.

(2) (1877) 6 Ch. D. 256.

"*year*" or "*month*". We are therefore clearly of opinion that the order of remand ought not to have been made by the learned Judge.

The result is that this appeal is allowed the order of Mr. Justice Coxe set aside, and the decree of the Subordinate Judge restored.

We are not in a position to consider the propriety of the judgment of the Subordinate Judge, because there is no appeal by the defendant against that judgment.

There will be no order for costs of this appeal.

JENKINS C.J. concurred.

S. M. *Appeal allowed.*

LETTERS PATENT APPEAL.

Before Jenkins C.J., and Mookerjee J.

AMEER ALI

v.

YAKUB ALI KHAN.*

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July 11.

Rent—Oral evidence, admissibility of—Evidence Act (I of 1872), s. 92—Tenancy—Lease.

Where a *kabuliyat* was executed, but was not registered and never came into operation, oral evidence is admissible to prove the rent agreed upon by the parties.

A tenancy can be proved without proving the lease, if there be any.

Banka Behary Christian v. *Raj Chandra Pal*(1) and *De Medina* v. *Polson*(2) referred to.

LETTERS PATENT APPEAL by the defendant, Ameer Ali, from the judgment of Coxe J.

* Letters Patent Appeal No. 12 of 1912, in Appeal from Appellate Decree No. 1192 of 1909.

(1) (1909) 14 C.W.N. 141. (2) (1815) Holt N. P. 47.