APPELLATE CIVIL.

Before Mukerji and Mallik JJ.

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Feb. 27 ;
Mar. 26.

RADHAKISSEN CHAMARIA

v.

DURGAPRASAD CHAMARIA.*

Evidence—Admissibility of oral evidence qualifying an agreement in a consent decree—Indian Evidence Act (I of 1872), s. 92, provisos (1) and (3), construction of.

The true meaning of the words " any obligation " in the third proviso to section 92 of the Indian Evidence Act is any obligation whatever under the contract and not some particular obligation which the contract may contain.

Jugtanund Misser v. *Nerghan Singh* (1), *Ramjibun Serowgy* v. *Oghore Nath Chatterjee* (2), *Vishnu Ramchandra Joshi* v. *Ganesh Krishna Sathe* (3) and *Mitchell* v. *Tennent* (4) referred to.

Under section 92 of the Indian Evidence Act, the parties to a written contract may not vary the same, but they may show that they never came to an agreement at all and that the signed paper was never intended to be record of the terms of the agreement ; or they may show that a written contract, which has no date, was not intended to operate from its delivery, but from a future uncertain period ; or they may show that the parties never intended the signed paper to be an agreement until a condition precedent was fulfilled.

Where upon the application for execution of a decree on compromise against three judgment-debtors, two of them objected to its execution on the ground of a separate oral agreement with the plaintiff that they (the objectors) were to be treated as sureties for the third judgment-debtor in spite of their joining in the petition of compromise resulting in the compromise decree, it was *held* that, under section 92 of the Indian Evidence Act, such separate oral agreement was inadmissible in evidence.

APPPEAL FROM ORIGINAL ORDER by the defendants, Radhakissen Chamaria and Matilal Chamaria.

The material facts will appear from the judgment.

Sushil Chandra Sen and *Santimay Majumdar* for the appellants.

*Appeal from Original Order, No. 68 of 1930, against the order of P. B. Banerji, Subordinate Judge of Hooghly, dated Jan. 13, 1930.

(1) (1880) I. L. R. 6 Calc. 433.
(2) (1897) I. L. R. 25 Calc. 401.
(3) (1921) I. L. R. 45 Bom. 1155.
(4) (1925) I. L. R. 52 Calc. 677.

S. N. Banerjee and *Kushiprashun Chatterji* for the respondent.

Cur. adv. vult.

MUKERJI AND MALLIK JJ. The parties concerned in this case are the widow and the three sons of the late Ray Bahadur Seth Hardutt Rai Chamaria. One of these sons, namely, Durgaprasad, sued his brothers Radhakissen and Matilal and their mother Anardeyi Sethani to compel them to execute a conveyance and for other reliefs. Into the details of this litigation it is not necessary to enter and it would be sufficient to say that it ended in a decree on a compromise, the relevant terms whereof, shortly put, were that the defendants would pay to the plaintiff the moneys, together with interest, which the latter had paid for purchase of the properties, as also the expenses actually incurred by him for the said purchase, and that it should be declared that the properties belonged to the mother Anardeyi Sethani. Of the amount so to be paid, rupees four lakhs and twenty-five thousand was paid at the time, and the remainder, that is to say, another four lakhs and odd together with the expenses aforesaid was to carry interest with yearly rests and was to be paid in monthly instalments on certain specified dates. It was further provided that, "In "default of payment of any instalment on the dates "aforesaid (*i.e.*, specified) or within seven days "thereafter, the balance then remaining unpaid under "the decree shall become forthwith payable."

The decree-holder applied for execution of this decree, alleging that there was default and that only rupees one lakh and five thousand had been paid out of the decretal dues. Some other instalments were in fact paid, but they were not certified within the time allowed by law; and on the objection of the decree-holder the executing court refused to take cognizance of the payments. Anardeyi Sethani then instituted a regular suit and obtained a decree for the sums paid together with interest. The court below has ordered

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that decree to be set off against the one under execution. As regards this matter there is no dispute.

There was a dispute as to what the expenses incurred by the decree-holder for his purchase actually amounted to, he having claimed Rs. 15,000 on that head, but the decree-holder has withdrawn his claim as regards that item.

The order complained of in this appeal, which has been preferred by two of the judgment-debtors, namely, Radhakissen and Matilal, is one by which the court below has overruled their objections to the execution of the decree.

Of these objections, the one that has been pressed with great force and ingenuity is that the court below has refused to allow them to prove an agreement which would have established that the decree was not executable as against the appellants. To appreciate this objection it is necessary to state a few facts. In the petition of objection, the agreement was set out in the following terms :—

> In accordance with the terms of compromise settled between the parties it was settled that the property in question should belong to the jugment-debtor, Sreemati Anardeyi Sethani, who would pay to the decree-holder the price thereof in the manner set forth in the petition of compromise filed in the said suit. The objectors did not acquire any right in the property concerned and were not therefore liable to pay the price thereof or any part of it to the decree-holder. The decree-holder, however, requested the objectors to join in the petition of compromise and gave them distinctly to understand that they would not be held liable for any part of the amount set forth in the petition of compromise as payable to the decree-holder.*** In the circumstances, the present execution case against the objectors cannot proceed. At any rate, in the circumstances stated above, the objectors can at best be regarded as sureties and execution cannot proceed against them unless the decree-holder has failed to realise his dues from the judgment-debtor Sreemati Anardeyi Sethani.

Read properly, it would seem that the objectors' case primarily was that there was an understanding between the parties that, although the objectors were to join in the petition of compromise and a decree was to be passed in accordance therewith, they would not be liable, and that, if having joined in the petition on an understanding to that effect they were not altogether absolved, their legal liability cannot amount to anything more than that of sureties only.

In the two letters which they wrote on the 15th November, 1929, they stated, "It was specifically "agreed that the decretal amount would be realised "from our mother, and neither I nor my brother would "be liable." From the wording of these letters also it would seem that the understanding was they would incur no liability by joining in the petition of compromise. The objection, however, was pressed in the court below in a somewhat different form. The Subordinate Judge has taken it to be the following: "The judgment-debtors Nos. 1 and 2 further contend "that the execution proceeding is incompetent so far "as they are concerned, as there was a "contemporaneous oral agreement that they would "be liable only as sureties or guarantors. It is urged "that opportunity should be given to them to prove this oral agreement." This agreement is obviously different from the understanding referred to above, but, as it was put forward before the Subordinate Judge and has been dealt with by him, it will have to be considered whether either the understanding or the agreement aforesaid can be proved. The appellants rely upon proviso (*3*) to section 92 of the Evidence Act for this purpose.

A good deal of reliance was placed on behalf of of the appellants upon the case of *Tennent* v. *Mitchel* (1) for the contention that the evidence which the appellants desired to adduce should have been allowed to be given before it could be decided as to whether it was admissible or not. In that case, the trial Judge had decided, on an application to strike out, that a certain matter was irrelevant. The court of appeal held that the averment in the defence was not clear enough to warrant a finding that it was irrelevant, and they held that " the court should not, as a rule, "decide an important point as to the relevancy of "matters on an application to strike out :" whether an oral agreement contemporaneous with a written document is admissible in evidence will depend to some extent as to how the case is presented at the trial.

(1) (1925) 29 C. W. N. 670, 673.

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This proposition for which there cannot be the least doubt is not of much use to the appellant now, because they have already set out in the objection what is the agreement they rely on and have also placed their version of it clearly before the Judge of the court below, and it is not suggested before us that it was anything else. It will be seen that before the order of retrial that was passed by the court of appeal in *Tennent* v. *Mitchel* (1), the suit was tried again and the agreement was then ruled out upon the view that proviso (*3*) to section 92 would not justify its admission. In *Jugtanund Misser* v. *Nerghan Singh* (2), *Ramjibun Serowgy* v. *Oghore Nath Chatterjee* (3), *Vishnu Ramchandra Joshi* v. *Ganesh Krishna Sathe* (4) and *Mitchell* v. *Tennent* (5) and other cases it has been laid down that the true meaning of the words "any obligation" in the 3rd proviso to section 92 is any obligation whatever under the contract, and not some particular obligation which the contract may contain. Provisos (*1*) and (*3*) in substance follow *Pym* v. *Campbell* (6) and *Davis* v. *Jones* (7). The parties may not vary a written statement, but they may show that they never came to an agreement at all and that the signed paper was never intended to be record of the terms of the agreement, for they never had agreeing minds; or they may show that a written contract, which has no date, was not intended to operate from its delivery, but from a future uncertain period; or they may show that the parties never intended the signed paper to be an agreement until a condition precedent was fulfilled. It has been argued that the terms of settlement in this case should be regarded as not one, but as consisting of several contracts, at least two, and that, so far as the appellants are concerned, it should be taken that the contract that was evidenced by the terms of settlement, as between the plaintiff on the one hand and the

(1) (1925) 29 C. W. N. 670.
(2) (1880) I. L. R. 6 Calc. 433.
(3) (1897) I. L. R. 25 Calc. 401.
(4) (1921) I. L. R. 45 Bom. 1155.
(5) (1925) I. L. R. 52 Calc. 677.
(6) (1856) 6 E. & B. 370; 119 E. R. 903.
(7) (1856) 17 C. B. 625; 139 E. R. 1222.

appellants on the other, should be regarded as one separate from the contract as between the plaintiff and Anerdeyi Sethani, and that it is open to the appellants, under proviso (*3*) to section 92, to show that, as regards the former contract, no obligation would attach to it until the plaintiff was unable to realize his dues from Anerdeyi Sethani. A division or splitting up of the contract in that way, in our opinion, is not what the proviso contemplates: to allow such splitting up would be to vary the contract taken as a whole. In our opinion, an understanding that no obligation would ever arise upon the contract or an agreement that the appellants would be liable only as sureties is not provable under the proviso. Nothing that has been said in *J.M. Maneckjee* v. *Maung Po Han* (1), or in any of the other cases cited on behalf of the appellants, in our opinion, militates against the view we take. On the other hand, that oral evidence to show that the liability of one of the executants of a bond could arise only in the event of the other executant not paying or in other words that he was to be regarded only as a surety is inadmissible in view of section 92 has been held in *Harek Chand Babu* v. *Bishun Chandra Banerjee* (2), *Maung Ko Gyi* v. *U. Kyaw* (3) and *Narasimma Murti Sastri* v. *Ramasami Chettiar* (4). On the main contention that has been urged in support of this appeal, namely, as regards the propriety of the refusal to let in evidence, we must hold against the appellant.

Another contention, though of minor importance, was also urged in the appeal. It was said that the decree-holders never told the appellants clearly what the expenses actually incurred by him for the purchase were, and that this fact should be taken into consideration in deciding whether he is entitled to the full amount of the interest he has claimed. This contention, however, ought not to be allowed to prevail, because in answer to the letter, Ext. 1, the decree-holder's solicitors, in their letter, Ext. 3,

(1) (1924) I. L. R. 2 Ran. 482.
(2) (1903) 8 C. W. N. 101.
(3) (1927) I. L. R. 5 Ran. 168.
(4) (1922) 45 Mad. L. J. 91.

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referred the appellants to the plaint, which we are told specified the amount as Rs. 15,000. There was, therefore, nothing which could stand in the way of the payment and nothing surely as regards the rest of the dues in any event if the appellants had a mind to pay.

The result is that, in our opinion, the order complained of is right. The appeal, accordingly, must be dismissed with costs. Hearing fee 10 gold mohurs.

Appeal dismissed.

A. K. D.