

APPELLATE CIVIL.

Before Guha and R. C. Mitter JJ.

KUNJA BIHAREE DAS

v.

RAMAN BIHAREE DAS.*

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May 27, 28.

Evidence—Admissibility—Oral agreement for satisfaction of mortgage debt—Indian Evidence Act (I of 1872), s. 92, provs. (2), (4).

A mortgage deed was silent regarding the mode of repayment of the debt and the mortgagee's claim for principal and interest was adjusted by an oral agreement by which the mortgagee agreed to accept a conveyance of the mortgaged premises in entire satisfaction of the debt.

Held that the oral agreement was admissible in evidence under proviso (2) of s. 92 of the Indian Evidence Act and a suit on the mortgage was not maintainable.

Nagendra Nandini Dassi v. Bholanath Khanaru (1) followed.

Malappa v. Matum Nagu Chetty (2) dissented from.

Kattika Bapanamma v. Kattika Kristamma (3) distinguished.

Karampalli Unni Kurup v. Thekku Vittil Muthorakutti (4); *Mohim Chandra Dey v. Ramdayal Dutta* (5); *Ram Ranjan Roy v. Jayanti Lal Patra* (6) and *Ramchandra Sau v. Kailashchandra Patra* (7) referred to.

APPEAL by the plaintiff.

The material facts of the case and arguments in the appeal are sufficiently set out in the judgment of Guha J.

Gunada Charan Sen, Priya Nath Datta, Himangshu Chandra Chaudhuri, Amiya Kumar Shome and Gobinda Charan Datta for the appellant.

Naresh Chandra Sen Gupta, Krishna Kishore Basak and Bishwanath Ray for the respondents.

Amiruddin Ahmad for the Deputy Registrar.

*Appeal from Original Decree No. 123 of 1935 against the decree of Satya Charan Guha, Additional Subordinate Judge, Sylhet, dated Jan. 31, 1935.

(1) (1937) 41 C. W. N. 734.

(4) (1902) I. L. R. 26 Mad. 195.

(2) (1918) I. L. R. 42 Mad. 41.

(5) (1925) 30 C. W. N. 371.

(3) (1906) I. L. R. 30 Mad. 231.

(6) (1926) 30 C. W. N. 710.

(7) (1930) I. L. R. 58 Cal. 532.

GUHA J. This appeal has arisen out of a suit for enforcement of a mortgage. On February 19, 1926, one Nabin Chandra Das executed a mortgage bond for Rs. 2,500 in favour of the plaintiff, appellant in this Court. The plaintiff's claim in suit is based on the aforesaid mortgage. The plaintiff wanted to realise from the legal representatives of the deceased mortgagor, Nabin Chandra Das, the amount due on the mortgage executed by Nabin Chandra Das on February 19, 1926. It was mentioned in the plaint that besides the amount due on the mortgage in suit, there were other amounts due to the plaintiff on a handnote from Nabin Chandra Das, debtor, the defendants Nos. 1 and 2 and Mathura Nath Das and on a mortgage bond in the name of defendants Nos. 1 and 2 and Mathura Nath Das and on another bond which was not a mortgage bond executed by the defendants Nos. 1 and 2, executors under the will of the late Nabin Chandra Das, by Braja Nath Das and Mathura Nath Das and others.

The claim in suit was resisted by the defendants Nos. 1 and 2. In their written statement filed in Court, the contesting defendants admitted execution of the mortgage bond on the basis of which the plaintiff's claim in suit was made. The contesting defendants also admitted liability for the amount which the plaintiff mentioned in the plaint. It was pleaded, however, in defence that there was an amicable settlement between the plaintiff and the answering defendants and that the plaintiff had instituted the suit in contravention of the said settlement. It was asserted by the defendants in their written statement that the suit as instituted by the plaintiff was not legally maintainable. The arrangement of the amicable settlement, as mentioned in the written statement of the contesting defendants, was of this description, that the plaintiff at the earnest request of the defendants and other respectable gentlemen agreed that by taking the lands mortgaged to him he would give up in favour of the defendants

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his claim for the entire amount due for principal and interest from these defendants and from their brother the late Mathura Nath Das, from their uncle the late Nabin Chandra Das and from their cousin (uncle's son) the late Braja Nath Das, on different bonds, of which mention was made by the plaintiff in the plaint filed in Court.

On the pleadings of the parties, a number of issues were raised for determination in the case. Issue No. 2 was relating to the question whether the suit was maintainable in its present form. Issue No. 7 related to the maintainability of the same in law. The issue raised on the merits of the case was Issue No. 8:—

Is the contract alleged by the defendants to have been entered with the plaintiff true, and is the plaintiff bound by it ?

The learned Additional Subordinate Judge of Sylhet, who tried the suit, gave his decision in favour of the defendants, after having come to the conclusion that the claim on the mortgage as made by the plaintiff in the suit was satisfied on a *rafâ* (adjustment). The trial Court dismissed the plaintiff's suit; and it was directed that the defendants must execute a *kabâlâ* for the mortgaged lands in favour of the plaintiff within a fortnight, and deliver the same to the plaintiff either amicably or in a registered cover addressed to him, and the plaintiff would be in possession of the property thereby. The further direction contained in the decree passed by the trial Court was that, in default, the plaintiff will enforce the contract in due course. The plaintiff appealed to this Court from the decision and decree passed by the trial Court, to which reference has been made above.

The first question argued in support of the appeal, which was not indicated by any of the issues in the case and which was not raised in the trial Court, was that the trial Court should have held that the alleged

oral agreement to accept a conveyance in satisfaction of the mortgage was not admissible in evidence at all. I do not propose to deal with the question thus raised in any detail, as I am in entire agreement with the judgment which my learned brother Mitter J. will deliver dealing with the same exhaustively. The only observation that I want to make in this connection is that the oral agreement set up by the contesting defendants in the suit in the case before us, to accept a conveyance in satisfaction of the mortgage in suit, was admissible in evidence, regard being had to the terms of the mortgage on which the plaintiff's claim in suit was based, and to the nature of the arrangement which was sought to be proved by oral evidence. The oral evidence sought to be adduced on behalf of the contesting defendants in the suit was admissible under s. 92, prov. (2) of the Indian Evidence Act.

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The question raised in the case, so far as the merits of the same are concerned, as indicated by issue No. 8, was whether the contract alleged by the defendants to have been entered with the plaintiff was true, and whether the plaintiff was bound by it.

[His Lordship then considered the evidence.]

We have no hesitation in holding that by the arrangement between the plaintiff and the defendants the debts were satisfied.

Reference has been made to a previous part of the judgment with regard to the nature of the decree passed by the trial Court. The learned advocate appearing for the plaintiff appellant, Mr. Sen, took exception to the direction contained in the decree as passed by the trial Court. In our judgment, for the purpose of preventing further litigation, the direction contained in the decree of the lower Court should not be interfered with, although we are not satisfied that the directions are quite in order, in view of the scope of the suit in which this appeal has arisen. It

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has to be mentioned that the direction contained in the decree to the effect that, in default, the plaintiff would enforce the contract in due course, cannot be allowed to stand and it has not been supported by Dr. Sen Gupta appearing for the defendants respondents in this appeal. In supersession of the aforesaid direction contained in the decree of the lower Court, we direct that, in default, the Court will execute a conveyance in favour of the plaintiff on behalf of the defendants in the suit. It goes without saying that before the execution of the conveyance, the parties will be heard in connection with the title sought to be conveyed to the plaintiff by the defendants in the suit.

The result is that the decision and the decree of the trial Court are affirmed with the variation mentioned above, and the appeal is dismissed, subject to the said modification. The plaintiff appellant is to pay the costs of this appeal to the defendants respondents. Hearing fee in this Court is assessed at five gold mohurs.

MITTER J. I agree with my learned brother and desire to deal with one point in some detail. That point, though not raised in the Court of first instance, is one which involves a pure question of law and has been argued at some length before us.

The question is whether the evidence relating to the oral agreement recited in detail in the judgment which has been delivered by my learned brother is admissible. This involves the consideration of provs. (2) and (4) to s. 92 of the Indian Evidence Act. If the said oral agreement has the effect of modifying any of the terms of the mortgage instrument, it would come within prov. (4) to that section; and, inasmuch as the mortgage instrument is required by law to be in writing and has been registered, the evidence relating to the said oral agreement, which is a subsequent agreement, would be inadmissible. The scope of the

first para. of s. 92 of the Evidence Act as well as of prov. (2) has been the subject matter of an exhaustive examination by my learned brother in the judgment pronounced in the case of *Nagendra Nandini Dassi v. Bholanath Khamaru* (1), to which Bartley J. concurred. The principle which has been laid down in that case and which would determine the question as to the applicability of the said proviso is set out at p. 736 of the report. It is that if a separate oral agreement sought to be established was on a distinct and collateral matter, although it might have been a part of the same transaction, the agreement would be one which would come within prov. (2), if the original instrument is silent on the point which is the subject matter of the agreement. In support of this proposition, my learned brother relied upon the cases noticed there and in particular, on the observation of Erle C.J. and Byles J. in the case of *Lindley v. Lacey* (2). With the principle laid down by my learned brother in that case, I respectfully agree. The question, therefore, before us is whether the oral agreement, which is pleaded in the case before us, is on a distinct matter which is not provided for in the mortgage instrument. This question must be determined in each case on its own facts. For the purpose, therefore, of deciding the question about the admissibility of the evidence relating to the oral agreement pleaded in the case before us, we must, in the first instance, look to the terms of the mortgage instrument. The material term on which Mr. Sen relied and which, according to him is sought to be varied by the oral agreement, runs as follows:—

I shall pay off the entire amount including principal and interest within a period of one year stipulated herein. If I fail to do that, interest will run at the rate mentioned in the bond till realization.

This clause in the mortgage instrument provides for two distinct matters; the first, for the payment of the entire amount including principal and interest at the stipulated rate within a year of the date of the

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(2) (1864) 34 L. J. (C. P.) 7.

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bond, and, secondly, if there is a failure in this respect, then interest would run at the rate mentioned in the bond, *i.e.*, at the rate of 18 per cent. per annum till the mortgage monies are realised. In my judgment, by the first part of this clause the parties only intended to define the time for redemption, and by the second part of that clause, they only provided for the contingency about payment of interest, after expiry of the year mentioned in the bond. This clause does not, in my judgment, deal either with the *mode* of payment or satisfaction of the debt due under the bond. The oral agreement which is pleaded in the case before us deals with the mode of satisfaction of the debt which, on my reading of the mortgage instrument, has not been dealt with therein at all. It is a matter on which the mortgage instrument is silent and is, in terms of the judgment of my learned brother, a distinct and collateral matter, although it has relation to the mortgage transaction. In this view of the matter, I am clearly of opinion that the case comes within prov. (2) to s. 92 of the Indian Evidence Act: and the evidence relating to the oral agreement is, as my learned brother has already observed, admissible in evidence.

Against this view, Mr. Sen has cited before us a number of cases. They are *Mohammad Niaz v. Nanhe Lal* (1); *Malappa v. Matum Nagu Chetty* (2); *Kattika Bapanamma v. Kattika Kristnamma* (3) and *Karampalli Unni Kurup v. Thekku Vittil Muthorakutti* (4). It is necessary to examine these cases in some detail. In *Mohammad Niaz v. Nanhe Lal* (1), the suit was brought by the mortgagee to enforce his security by sale of the mortgaged premises. The defence that was raised was that subsequent to the mortgage, there was an oral agreement between the mortgagor and the mortgagee, by which the mortgagee agreed to take a conveyance of some shops and certain payment in cash in entire satisfaction of his

(1) [1929] A. I. R. (All.) 615.

(2) (1918) I. L. R. 42 Mad. 41.

(3) (1906) I. L. R. 30 Mad. 231.

(4) (1902) I. L. R. 26 Mad. 195.

mortgage. The question raised and decided in that case was whether the evidence of this oral agreement was admissible in evidence or not. As the mortgage instrument was in writing and registered, the learned Judges held that the said agreement was hit by prov. (4) to s. 92 to the Evidence Act. Mr. Sen says that this case is exactly on all fours with that case, and, on the authority of the same, the evidence relating to the oral agreement in the case before us ought to be excluded from evidence. I would observe in the first instance, that the terms of the mortgage instrument are not set out in that judgment. It is a very short one; and the only thing the learned Judges say is that they give their decision in that way because they agree with what was held in the case of *Malappa v. Matum Nagu Chetty* (1). It is, therefore, necessary to examine the last mentioned case. In that case a suit was brought on a mortgage. The defence was that some common friends intervened and an oral agreement was arrived at between the mortgagor and the mortgagee, by which the mortgagee agreed to receive Rs. 1,000 to be paid immediately and Rs. 400 to be paid within three months and agreed to give up the balance of his dues. There was another minor term which it is not necessary for me to notice for the purpose of the question we have to decide here. The sums of Rs. 1,000 and Rs. 400 were duly paid by the mortgagor to the mortgagee in time; and the question was whether this agreement was a complete defence to the mortgage suit. The question was raised whether this subsequent oral agreement could be proved, in view of the provisions of s. 92 of the Indian Evidence Act. Mr. Justice Seshagiri Ayyar on whose judgment reliance is placed by Mr. Sen held that the agreement was not admissible in evidence. The material portion of his judgment runs as follows :—

The cases he (the mortgagor's advocate) drew our attention to all relate to actual payments under documents, which discharged the liability

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thereunder. An agreement which in future will have the effect of putting an end to the liability must be regarded as a subsequent agreement *modifying* the original contract. I am in entire agreement with the view enunciated by Mr. Justice Boddam in *Goseti Subha Row v. Varigonda Narasimham* (1). The learned Judge says referring to prov. (4) to s. 92 of the Indian Evidence Act:—"The words of the proviso are perfectly clear and in my opinion apply to any agreement, whether executory or executed." I am unable to see any justification in principle for not applying the proviso to all cases other than those in which there has been a perfected discharge by payment.

The effect of this judgment is that if a mortgagee orally agrees to release either the whole or a part of his claim due under the mortgage, the evidence relating to the said agreement would be hit by prov. (4) to s. 92 of the Indian Evidence Act. This view militates against the view of a series of cases decided by this Court, where it was held that evidence relating to such oral agreement, by which the mortgagee promised to receive a part of his dues only and release the mortgagor from the rest, is admissible in evidence, and is not hit by prov. (4) to s. 92 of the Indian Evidence Act. I may only mention in this connection the cases of *Mohim Chandra Dey v. Ramdayal Dutta* (2); *Ram Ranjan Roy v. Jayanti Lal Patra* (3) and *Ramchandra Sau v. Kailashchandra Patra* (4), to which my learned brother was a party.

Mr. Sen makes an attempt to reconcile the cases of this Court with the view taken in the Allahabad Court and in the Madras Court in the cases cited above, by placing reliance upon the decision of Bhashyam Ayyangar J. sitting singly in the case of *Karampalli Unni Kurup v. Thekku Vittil Muthorakutti* (5). There a suit was instituted for arrears of rent and the claim in the plaint was laid at the rate of Rs. 50-2-6ps. per annum on the basis of a registered lease. A payment of Rs. 35-2-6ps. per year for the years in suit was admitted. The defendant's case was that the rent suit ought to be dismissed, because

(1) (1903) I. L. R. 27 Mad. 368.

(2) (1925) 30 C. W. N. 371.

(4) (1930) I. L. R. 58 Cal. 532.

(3) (1926) 30 C. W. N. 710.

(5) (1902) I. L. R. 26 Mad. 195.

the plaintiff had orally agreed to reduce rent by Rs. 15 a year and that accordingly Rs. 35-2-6ps. was paid each year for the years in suit and that that was accordingly a full satisfaction of the claim in suit. Mr. Justice Ayyangar held that the oral agreement to alter the rent payable under the registered lease from Rs. 50-2-6ps. a year to Rs. 35-2-6ps. a year was inadmissible, because it had the effect of varying one of the essential terms of the lease. This view, in my judgment, is quite correct and is supported by a Full Bench decision of this Court in the case of *Lalit Mohan Ghosh v. Gopali Chuck Coal Company, Ltd.* (1). Then Mr. Justice Ayyangar held that although the said oral agreement could not be proved in view of the terms of s. 92 of the Indian Evidence Act, the plaintiff's suit must be dismissed on the ground that he gave a discharge for the years in suit on receiving annually a sum of Rs. 35-2-6ps. This passage in the judgment has some bearing on the question before us. It is as follows:—

Under s. 63 of the Contract Act a promisee may remit in whole or in part the performance of the promise made to him or may accept instead of it any satisfaction which he thinks fit. The fact that he did so in pursuance of an alleged prior oral agreement is immaterial and the discharge as such will take effect under s. 63 independently of the prior oral agreement which certainly is not illegal, though it cannot be proved under s. 92 of the Indian Evidence Act.

It is rather difficult to follow the last part of this passage. But if it means that the agreement pleaded could be regarded as an agreement releasing the plaintiff's claim to the balance for the years in suit, the case certainly does not support Mr. Sen, but lends considerable support to the cases of our Court which I have already noticed above, the last being *Ramchandra Sau v. Kailashchandra Patra* (2).

The case of *Kattika Bapanamma v. Kattika Kristnamma* (3) cited before us is of a different character. There the written agreement was to pay

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(1) (1911) I. L. R. 39 Cal. 284.

(2) (1930) I. L. R. 58 Cal. 532.

(3) (1906) I. L. R. 30 Mad. 231.

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a certain sum of money every month as maintenance and the oral agreement that was pleaded was that that agreement had been superseded and in lieu of that the maintenance holder had agreed to take some land. That clearly comes within prov. (4), which also speaks of subsequent oral agreement which has the effect of rescinding the written agreement. There the agreement pleaded was an agreement which had the effect of rescinding the entire written contract and there cannot be any doubt that prov. (4) would be applicable to such a case.

As cases on the question raised before us have been cited, and which as I have already stated would not be generally of great help, inasmuch as the question which has been raised can only be answered with regard to the particular terms of the written instrument which is in question and the particular nature of the oral agreement set up, I may refer to a case which has been decided in this Court, namely, the case of *Sasi Bushan Das v. Ram Chandra Das* (1). There, in the mortgage instrument, there was a term which is almost similar, if not exactly similar, to the term of the mortgage bond which we have before us and which I have noticed in the earlier part of my judgment, namely, a term providing for payment of the mortgage money within a certain date and payment of interest after the said date, if the money be not paid within the specified date. Subsequent to the execution of the mortgage deed, there was an oral agreement between the mortgagor and the mortgagee, by which the mortgagee agreed to take payment in instalments. It was contended before this Court that the evidence relating to the said oral agreement was not admissible in evidence, because it had the effect of modifying the terms of the mortgage instrument. That contention was over-ruled by Suhrawardy and Graham JJ. they holding that the case came within prov. (2) to s. 92 of the Indian Evidence Act.

(1) (1931) 35 C. W. N. 861.

It only remains for me to add that, although the agreement pleaded by the defendant in the case of *Mohammad Niaz v. Nanhe Lal* (1) was of a similar nature to the agreement pleaded before us, that case is of no help for determining the question, because we do not know the terms of the mortgage instrument involved in that case which the oral agreement set up was said to have modified. No reasons have been given in the judgment; it only followed the case of *Malappa v. Matum Nagu Chetty* (2), the view taken in which, as I have pointed out, is inconsistent with the view taken in a series of cases of this Court. I would accordingly hold in agreement with my learned brother that the evidence relating to the oral agreement set up in this case is admissible in evidence, coming as it does within prov. (2) to s. 92 of the Indian Evidence Act.

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Appeal dismissed.

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(1) [1929] A. I. R. (All.) 615.

(2) (1918) I. L. R. 42 Mad. 41.