APPELLATE CIVIL.

Before Jack J.

1937

June 2.

PULIN BIHAREE DEB

v.

RAMA KANTA MAHATA KURMI.*

Admissibility—Oral evidence to vary agreement, if admissible—Indian Evidence Act (I of 1872), s. 92, prov. (1).

Under prov. (*1*) to s. 92 of the Indian Evidence Act, oral evidence is admissible to prove an agreement *ab initio* that a document was never intended to operate at all but was brought into existence solely for the purpose of creating evidence about some other matter, but oral evidence is not admissible to modify an agreement embodied in a document.

Where a *kabuliyat* provided that a tenant would hold two *hâls* of land at a certain rate, a separate oral agreement that one *hâl* thereof would be held rent free is not admissible in evidence.

Tyagararaja Mudaliyar v. *Vedathanni* (1); *Mottayappan* v. *Palani Goundan* (2) and *Satyendra Nath Roy Chowdhury* v. *Pramananda Haldar* (3) distinguished.

APPEAL FROM APPELLATE DECREE preferred by plaintiffs.

The material facts of the case and arguments in the appeal appear from the judgment.

Ramendra Chandra Ray and *Satyendra Kishore Ghosh* for the appellants.

Priya Nath Datta for the respondent.

JACK J. This appeal has arisen out of a suit for rent. Plaintiffs' case is that both the defendants, defendant No. 1 and his wife defendant No. 2,

*Appeal from Appellate Decree, No. 1225 of 1935, against the decree of S. K. Sen, Additional District Judge of Kachar, dated May 18, 1935, affirming the decree of M. H. Chaudhuri, Munsif of Silchar, dated Aug. 18, 1934.

(1) (1935) I. L. R. 59 Mad. 446; (2) (1913) I. L. R. 38 Mad. 226. L. R. 63 I. A. 126. (3) (1935) 39 C. W. N. 888.

took settlement of two *hâls* of land and that a *kabuliyat* was executed by defendant No. 2 for both the defendants. The defence is that defendant No. 1 did not take any settlement, that defendant No. 1 was indebted to the plaintiffs and other creditors, and that he transferred ten *hâls* of land in favour of the plaintiffs on condition that the plaintiffs would allow him two *hâls* of land free of rent and make a gift of one *hâl* out of these two *hâls* in favour of defendant No. 1's son. Defendant No. 1 has been occupying one *hâl* and his wife the other *hâl* under these conditions since the sale. Both Courts have found that out of the two *hâls* in the possession of the defendants one was held rent free and the other rent-paying at rate of Rs. 70-15-6p., namely, the rate stated in the *kabuliyat*.

This appeal by the plaintiffs is based on the argument that inasmuch as the land is held on the basis of the *kabuliyat*, evidence should not have been admitted to vary the terms of the *kabuliyat*. The finding of the lower appellate Court is that the tenancy is not based on the terms of the *kabuliyat* and that there was a separate contract which must be ascertained in order to give the proper relief to the plaintiffs. The learned Judge bases his finding on a separate contract as evidenced from the deposition of defendant's witness No. 2, Badhan. This witness stated that the plaintiffs promised to make a gift of one *hâl* of land in favour of the defendant's son and to allow defendant No. 1 to remain in possession of that land as before without charging any rent for the same, but he did not support the further allegation of defendant No. 1 that the plaintiffs also undertook to allow the defendant's wife to possess another *hâl* or another two *hâls* of land rent-free. It appears that the defendant No. 1 is in possession of two *hâls* of land and, according to the *kabuliyat*, settlement was made with his wife agreeing that she should hold these two *hâls* on payment of Rs. 70-15-6 per *hâl* and the claim of rent is

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accordingly Rs. 141-15 as. and Rs. 8-1 as compensation. It is difficult to bring this case under one of the exceptions to the provisions of s. 92 of the Indian Evidence Act by which oral evidence for the purpose of contradicting or varying the terms of a document is excluded. The cases which have been decided in support of the admission of such evidence appear either to come under the provisions of prov. (*1*) or to be cases in which there was an agreement *ab initio* that the document would not take effect. In the case of *Tyagararaja Mudaliyar* v. *Vedathanni* (1) it was held that oral evidence to show that a document was never intended to operate according to its terms, but was brought into existence solely for the purpose of creating evidence about some other matter, is admissible under prov. (*1*) to s. 92, on the ground that any fact may be proved which would invalidate a document. In expressing this opinion their Lordships referred to the case of *Mottayappan* v. *Palani Goundan* (2) and added that in their opinion even if there were no proviso to either s. 91 or s. 92 the result in that case would be the same, because there is nothing in either section to exclude oral evidence that there was no agreement between the parties and therefore no contract. The present case is not of that nature, because here it is admitted that there was an agreement between the parties and in fact the Courts have decreed the case by a modification of the agreement between the parties by which two *hâls* of land were settled with the defendants at the *kabuliyat* rate. The other case referred to on behalf of the respondent is the case of *Satyendra Nath Roy Chowdhury* v. *Pramananda Haldar* (3). In that case it was held that oral evidence is admissible to show that there was an agreement *ab inito* that the terms of which has been embodied in a written instrument were not intended to be acted upon. In that case the *kabuliyat* rate was Rs. 16-11-6p. but from the

(1) (1935) I. L. R. 59 Mad. 446; L. R. 63 I. A. 126.
(2) (1913) I. L. R. 38 Mad. 226.
(3) (1935) 39 C.W.N. 888.

beginning the rent realised had been at the rate of Rs. 12-15-10p. It was not a case where the rent had been varied by a subsequent agreement but the plea was that there was a distinct verbal agreement for payment at the lower rate. It was held that the evidence was admissible but not for the purpose of contradicting the contract as to the amount of rent payable but for the purpose of showing that the intention of the parties was from the first that the agreement was not to be acted upon. In this case it has been found that whereas the written agreement was to pay rent at the rate of Rs. 70-11-6p. for the two *hâls*, there was a separate oral agreement that one *hâl* would be given rent-free. The Courts have, accordingly, decided that one *hâl* should be rent-free and, as regards the remainder of the lands, the *kabuliyat* was to be acted upon. The witness whose oral evidence was accepted did not support the allegation of the defendants that the plaintiffs undertook to allow the defendant's wife to possess two *hâls* of land rent-free. The effect of the findings of the Courts below appears to be that the defendant No. 1 is held to be a tenant of the plaintiffs under the *kabuliyat* but only as regards one *hâl* instead of two *hâls* of land. Had it been found that the *kabuliyat* was not intended to be acted upon at all, prov. (*1*) of s. 92 would have applied, but the terms of the *kabuliyat* have been varied by the evidence that the plaintiffs promised to make a gift of one *hâl* in favour of defendant's son and to allow him to remain in possession of the land without charging rent.

This is a contravention of the provisions of s. 92 of the Evidence Act.

A point was also raised that the *kabuliyat* being in the name of the defendant No. 2 is not an agreement between the parties and therefore does not come under the terms of s. 92. But clearly the finding is that the *kabuliyat* was executed by defendant No. 2 on behalf of defendant No. 1 and that the parties were really the plaintiffs and defendant No. 1. So there is no substance in this point.

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This appeal is accordingly allowed. The plaintiffs are entitled to recover the rent as claimed, namely, Rs. 141-15 and compensation of Rs. 8-1.

The plaintiffs appellants are entitled to get half the costs throughout.

Appeal allowed.

A. C. R. C.