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 CURRUMBUK
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was determined on the authority of *Berkley v. Elderkin* (1) and *Austin v. Mills* (2); the learned Judges who decided the case holding that the reasons for the decisions of the Court of the Queen's Bench and the Court of Exchequer applied to a judgment of the Small Cause Court of the Presidency-towns of India equally as well as to a judgment of the County Court in England. The case is not reported because at that time there were no reports of the Supreme Court at Bombay in existence, but I was counsel in the case which arose upon demurrer, filed to an action on a judgment of the Small Cause Court at Bombay. I argued the demurrer, and the demurrer was allowed.

Since that date, as far as my experience goes, it has always been considered to be the law in Bombay that no action will lie on the judgment of a Small Cause Court.

Appeal dismissed.

Attorney for the appellant: *N. C. Bural.*

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice McDonell.

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 May 28.

DAIMODDEE PAIK (PLAINTIFF) v. KAIM TARIDAR AND ANOTHER
 (DEFENDANTS).*

Parol Evidence to vary Deed—Evidence of Conduct of Parties—Oral Stipulation at variance with a Written Document—Evidence Act (Act I of 1872), s. 92—Registration Act (Act III of 1877)—Construction of Acts.

Evidence cannot be admitted to prove a contemporaneous oral stipulation varying, adding to, or subtracting from the terms of a written contract. Evidence of the acts and conduct of the parties to a written contract is not admissible if tendered solely in support of an oral stipulation varying its terms.

THE plaintiff in this case claimed khas possession of certain lands, which he alleged to have been absolutely sold to him by

* Appeal from Appellate Decree, No. 2436 of 1878, against the decree of J. O'Kinealy, Esq., Judge of the 24-Parganas, dated the 19th of September 1878, reversing the decree of Baboo Moty Lall Singha, Second Munsif of Diamond Harbour, dated the 7th December 1877.

(1) 1 Q. B., 805.

(2) 9 Ex., 286.

the defendants in 1869, and which, after his purchase, he had re-let to them, taking from them a kabuliat in his favor for a term of one year. The defendants, he said, had, after the expiration of the first year, continued to hold possession of the lands and to pay him the stipulated rent until the year 1877, when, upon their failure to pay him the entire stipulated rent, he was compelled to institute a rent-suit against them, in which suit they filed an answer, asserting that the relation of landlord and tenant had never existed between them and the plaintiff; that they had never executed any kabuliat in favor of the plaintiff; and that, although they had in fact executed a deed of out-and-out sale in favor of the plaintiff, the real transaction was not a sale but a mortgage to secure a loan of Rs. 198, and that, since the execution of the deed mentioned, they had been paying the plaintiff not rent, but a yearly sum of Rs. 24 by way of interest on the loan. The plaintiff then stated that he had withdrawn the rent-suit.

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In the Court of first instance evidence was tendered and recorded, on behalf of the defendants, to show that, notwithstanding that they had executed a deed of absolute sale to the plaintiff, the parties had really treated the transaction as a mortgage, and that the defendants had made payments to the plaintiff by way of interest, and not of rent.

The Court of first instance disbelieved the evidence of the defendants, and also held that, under s. 92 of the Indian Evidence Act (I of 1872), it was not admissible even if it had been credible, and therefore gave a decree in favor of the plaintiff.

On appeal, the lower Appellate Court refused to disbelieve the defendants' evidence, and holding that s. 92 of the Indian Evidence Act, which was an Act to consolidate, define, and amend the law of evidence, made no change in the former rules of evidence, came to the conclusion that evidence of the acts and conduct of the parties was and had always been admissible to determine whether a document was or was not a mortgage, and accordingly dismissed the plaintiff's suit with costs.

From this decision the plaintiff appealed to the High Court.

Baboo *Doorga Mohun Dass* for the appellant.

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Baboo Byddo Nauth Dutt for the respondents.

The judgment of the Court (JACKSON, J., and McDONELL, J.) was delivered by

JACKSON, J.—The point raised in this special appeal is one which we have considered on more than one occasion previously. We have no doubt that the Judge is in error in thinking that the parties are at liberty to rely upon the evidence furnished by the conduct of parties for the purpose of varying, adding to, or subtracting from the terms of a written contract. The evidence so given can only be evidence of an agreement which, as it was not written, must have been oral; and that is in distinct violation of the terms of s. 92 of the Evidence Act. The case decided by the Full Bench was before the Evidence Act came into force, and moreover, I understand, in that case there was a written instrument relied upon, *viz.*, a *kabuliat*, and the evidence of conduct was adduced by the learned Chief Justice as giving support to that written instrument so as to make it probable that the parties had really intended a mortgage and not a sale out-and-out. I am referred to the case of *Madhub Chunder Roy v. Gungadhur Shamunt* (1) heard by Mr. Justice Markby and myself, in which we both separately expressed the same opinion, which the present Division Bench expressed only last week in another special appeal. I observed in that case—"I confess that I have some difficulty in comprehending the distinction between the admissibility of evidence of a verbal contract to vary a written instrument, and the admissibility of evidence showing the acts of the parties which after all are only indications of such unexpressed unwritten agreement between the parties;" and Mr. Justice Markby said:—"It seems to me very difficult to understand the distinction there drawn between evidence of a parol agreement contradicting the terms of a written contract being inadmissible, and evidence of the parties contradicting the terms of such a contract being admissible." Although we both accepted the ruling of the Full Bench, which, it is to be borne in mind, was a ruling of three Judges

(1) 11 W. R., 450.

against two, in regard to the particular case in which it was given, we think the judgment of the Munsif in this case, refusing to admit parol evidence, was right, and that the judgment of the lower Appellate Court must be reversed with costs.

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I would add also, that it appears to me very material to consider this section (92) of the Evidence Act with the provisions of the Registration Act. It is highly important, and clearly in accordance with the intention of the legislature in passing the Registration Act, that parties should be compelled to register the precise contract which they have made. It would be extremely inconvenient if parties should register as a bill-of-sale what afterwards turns out on the evidence of conduct to be merely a mortgage.

Another observation I would make in this case is this: it appears to me to be no answer to the direct provisions of a particular section of an enactment, to say that the enactment was described in terms as an enactment to consolidate, amend, and define the provisions of previously existing laws, and that the particular rule contended for is not to be found among the previously existing laws. It is sufficient if the provision relied upon is a part of the Act, whatever the description of the purposes of the Act may be.

Appeal allowed.

Before Mr. Justice Jackson and Mr. Justice McDonell.

PARBUTTINATH ROY AND OTHERS (PLAINTIFFS) v. TEJOMOY
 BANERJI AND OTHERS (DEFENDANTS).*

1879
 May 20.

Limitation.—Beng. Act VIII of 1869, s. 30—Act XV of 1877, s. 19—Suit on Bond—Parties.

A suit for an account against an agent, employed to collect rents, is barred under Beng. Act VIII of 1869, s. 30, after the expiration of one year from the time of his resigning or leaving his agency.

* Appeal from Appellate Decree, No. 15 of 1879, against the decree of J. O'Kinealy, Esq., Judge of the 24-Parganas, dated the 24th of September 1878, reversing the decree of Babou Krishna Mohun Mockerjee, Additional Subordinate Judge of the 24-Parganas, dated the 28th of February 1878.