APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1892. March 29. April 12.

RAKKEN AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

ALAGAPPUDAYAN (PLAINTIFF), RESPONDENT.*

Evidence Act—Act I of 1872, s. 92—Sale-deed—Contemporaneous oral agreement for reconveyance—Mortgage.

In a suit to recover possession of land on the footing of a sale-deed executed by the defendants to the plaintiff's vendor, the defendants set up a contemporaneous oral agreement for the reconveyance of the land to them on the repayment of a sum of money then borrowed by them from the vendee, and alleged that they had retained possession of and held the patta for the land throughout:

Held, that the defendants were entitled to prove by oral evidence that the transaction was a mortgage and not a sale, unless the plaintiff was an innocent purchaser for value without notice of the mortgage.

Lincoln v. *Wright* (4 De G. & J., 16) followed.

Venkatratnam v. *Reddiah* (I.L.R., 13 Mad., 494) considered.

SECOND APPEAL against the decree of L. A. Campbell, District Judge of Salem, in appeal suit No. 102 of 1890, affirming the decree of V. T. Subramania Pillay, District Munsif of Namakal, in original suit No. 442 of 1889.

The plaintiff claimed certain land as purchaser from one to whom the land had been sold by defendant No. 1, who had bought it from the other defendants under a conveyance, dated 24th January 1876. The defendants alleged that they had borrowed money from defendant No. 1, of which Rs. 50 alone remained due, on the security of the land, that at the time of the execution of the conveyance, it was agreed that the land should be reconveyed to him when the debt was extinguished, and that they had retained possession of the land and held a patta for it throughout. The second issue related to the last-mentioned allegation.

The District Munsif passed a decree for the plaintiff, which was affirmed on appeal by the District Judge, who held that evidence of the alleged agreement contemporaneous with the conveyance was not admissible.

Defendants Nos. 2 and 3 preferred this second appeal.

* Second Appeal No. 1551 of 1891.

Parthasaradhi Ayyangar for appellants.

Subramanya Ayyar for respondent.

BEST, J.—The District Judge dismissed the appeal on the ground that the document executed by the appellants "must be taken to be what it purports to be—an outright deed of sale," and that they "cannot be permitted to plead a contemporaneous oral agreement or arrangement under which it was to be treated as a mortgage."

The question of the admissibility of oral evidence to prove that an apparent sale is, in fact, a mortgage has been considered very fully in *Baksu Lakshman* v. *Govinda Kanji*(1), and the rule "most consonant both to the statute law and to equity and justice" found to be that though a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement, yet "if it appears clearly and unmistakeably from the conduct of the parties that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage and not as a sale; and thereupon, if it be necessary to ascertain what were the terms of the mortgage, the Court will, for that purpose, allow parol evidence to be given of the original oral agreement."

The courts will not allow a rule, or even a statute, which was introduced with a view to suppressing fraud, to be used as a weapon or means of effecting a fraud (*Lincoln* v. *Wright*(2)).

The above decision of the Bombay High Court was approved and followed by Garth, C.J., and Mitter, J., in *Hem Chunder Soor* v. *Kally Churn Das*(3), and by this Court in *Venkatratnam* v. *Reddiah*(4).

The case of *Kashinath Dass* v. *Harrihur Mookerjee*(5) may also be referred to in support of the position that section 92 of the Evidence Act is not a bar to the admission of evidence of subsequent conduct and surrounding circumstances for the purpose of showing that what on the face of it is a conveyance is really a mortgage. As was observed, however, in the case last referred to, it must be recollected that the rule "turns on the fraud which is involved in the conduct of the person who is really a mortgagee,

(1) I.L.R., 4 Bom., 594. (2) 4 De G. & J., 16. (3) I.L.R., 9 Cal., 528.
(4) I.L.R., 13 Mad., 494. (5) I.L.R., 9 Cal., 898.

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and sets himself up as an absolute purchaser; and that the rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of the title-deeds and was the ostensible owner of the property."

The respondent (plaintiff) in the present case claims possession of the property as such innocent purchaser, whereas the appellants point out that he is a near relation of first defendant and contend that the sale of the land to him by the latter is merely collusive and intended to defraud them.

The District Judge has not recorded any finding on the second issue, but simply states that the appellants "may have been in enjoyment throughout." If so, this and the fact of their being "still the pattadars" are circumstances favorable to their contention that their property was merely mortgaged and not sold outright to first defendant.

The Lower Appellate Court's decree must be set aside and the case remanded for replacement on the file and disposal on merits. The costs incurred hitherto will abide the result, and be provided for in the decree to be passed by the Lower Court.

MUTTUSAMI AYYAR, J.—I come to the same conclusion. I desire, however, to rest my decision on the ground stated by Lord Justice Turner in *Lincoln* v. *Wright*(1). His Lordship said in that case "Without reference to the question of part performance on "which I do not think it necessary to give any opinion, I think "the parol evidence is admissible and is decisive upon the case. "The principle of this Court is that the Statute of Frauds was not "made to cover fraud. If the real agreement in this case was "that, as between the plaintiff and Wright, the transaction "should be a mortgage, it is in the eye of this Court a fraud to "insist on the conveyance as being absolute, and parol evidence "must be admissible to prove the fraud. Assuming the agreement "proved, the principle of the old cases as to mortgages seems to "me to be directly applicable. Here is an absolute conveyance "when it was agreed that there should be a mortgage and the "conveyance is insisted on in fraud of the agreement. The "question then, as I view it, is whether there was such an agree-

(1) 4 De G. & J., 16.

"ment as this bill alleges, and, upon the evidence, I am perfectly "satisfied that there was. Besides, the agreement for the "mortgage was only part of an entire transaction, and the appel- "lant cannot, as I conceive, adopt one part of the transaction and "repudiate the other." Thus the *ratio decidendi* was that the conveyance formed only part of the real agreement, and that the oral agreement which gave a claim to equitable relief formed another part of the same transaction. Again, the ground for departing from the ordinary rule of evidence was subsequent unconscionable conduct in taking advantage of that rule and thereby endeavouring to mislead the Court into the belief that what was only an apparent sale, but a real mortgage was a real sale and not a mortgage. The fraud referred to by the Lord Justice was not fraud practised at the time when the document was executed, but the advancement of a claim in fraud of the true intention or the real agreement of the parties. It seems to me that section 92 of the Evidence Act, as observed in *Venkatratnam* v. *Reddiah*(1), does not render evidence of the oral agreement inadmissible, for, if the real agreement were proved, it would invalidate the document as a deed of absolute sale within the meaning of the 1st proviso to section 92 of the Evidence Act and constitute a ground for a Court of equity and good conscience giving effect to it only as a mortgage. Nor do I see my way to adopting the rule that a party should not first start his case with proof of a contemporaneous oral agreement and then confirm it by evidence of subsequent acts and conduct of the parties, but that he should prove the latter first and then proceed to prove the former. The subsequent acts and conduct are only indications of the contemporaneous oral agreement, and it is such agreement that is the real ground of equitable relief. Such rule involves in it the anomaly that, while indirect evidence of the true agreement is admissible, notwithstanding section 92, direct evidence of the same is not admissible. I do not, however, desire to be understood as saying that it would be safe to rely on the uncorroborated oral evidence of the contemporaneous oral agreement at variance with the terms of a document, but I think the absence of corroborative evidence in the shape of subsequent possession and conduct and other circumstances is an objection that ought to go to the credit due to the parol

(1) I.L.R., 13 Mad., 495.

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evidence and *not* to its admissibility. In the case before us, there was such corroborative evidence though the weight due to it was a matter for the Judge to determine. I concur in the remarks made by my learned colleague about a *bonâ fide* purchaser for value without notice or knowledge of the real agreement of the parties and in the necessity for a distinct finding on the 2nd issue and in the order proposed by him.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1892. July 21, 27.

RAYAKKAL AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SUBBANNA (PLAINTIFF), RESPONDENT.*

Hindu law—Power of father over ancestral land—Gift to daughters.

A Hindu, during the infancy of his son, conveyed certain immovable ancestral property to his wife and married daughters by way of gift. After his death the son sued by his next friend to have these alienations set aside and to recover the property:

Held, that the alienations should be set aside altogether.

SECOND APPEAL by the defendants against the decree of D. Irvine, District Judge of Coimbatore, in appeal suit No. 124 of 1890, affirming the decree of V. Malhari Rao, District Munsif of Coimbatore, in original suit No. 604 of 1888.

The facts of the case are stated above sufficiently for the purposes of this report.

Seshagiri Ayyar for appellants.

Bhashyam Ayyangar for respondent.

JUDGMENT.—The plea that some of the items of plaint property were the self-acquisition of Palani Gounden does not appear to have been pressed before the District Judge and apparently there is no evidence in support of the contention.

The deeds of stridhanam executed to the two daughters were executed after their marriage, and without the consent of plain-

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* Second Appeal No. 1030 of 1891.