# APPELLATE CIVIL.

*Before Mr. Justice Mitter and Mr. Justice Trevelyan.*

1885
*March* 17.

LALA HIMMAT SAHAI SINGH (PLAINTIFF) *v.* LLEWHELLEN (DEFENDANT.)*

*Evidence—Admissibility of parol evidence to vary a written contract—Oral evidence when admissible to prove that consideration money stated in contract to have been paid, has not been paid but has been applied in a way agreed on between the parties—Evidence Act (I of* 1872*)*, s. 92.

A deed of *putowa* contained a recital of the payment of the sum of Rs. 2,000 as bonus to the plaintiff by the defendant, the mode of payment being stated to be in cash in one lump sum. The plaintiff sued to recover the sum of Rs. 1,850, alleging that only Rs. 150 had been paid and not Rs. 2,000 as recited in the *putowa*. The defendant admitted that Rs. 850 was due, and as to the remaining Rs. 1,000 alleged that, at the time of the transaction, it was agreed that the sum of Rs. 1,000 was to be retained by him on account of a debt due by one of the plaintiff's relation to him. The plaintiff objected that the evidence to the agreement set up by the defendant was inadmissible.

*Held*, that, inasmuch as it was open to the plaintiff under proviso 1 of s. 92 of the Evidence Act to prove by oral evidence that the whole of the consideration money had not been paid, it was equally competent to the defendant, in answer to such case, to adduce evidence to prove the true nature of the contract, and that the consideration was different from that stated in the contract.

*Held*, also, that the plea of the defendant substantially was that, although the consideration was fixed at Rs. 2,000, there was a separate oral agreement to the effect that out of that sum the plaintiff was to refund Rs. 1,000 on account of the debt due from his relative, and that on this ground the oral evidence tendered was admissible under proviso 2 of s. 92 of the Act, the stipulation as to the refund of the Rs. 1,000 not being inconsistent with the recital as to the consideration in the contract.

IN this case the plaintiff was a part owner of certain mouzahs which had been let out to the defendant, an indigo planter, from 1281 to 1287F. inclusive. After the commencement of the year 1288, and on the 29th of April 1881, a *putowa pottah* or

* Appeal from Appellate Decree No. 2832 of 1883, against the decree of J. F. Stevens, Esq., Judge of Sarun, dated the 21st of August 1883, modifying the decree of Baboo Kali Prasanna Mukherji, First Subordinate Judge of that district, dated the 24th of July 1882.

lease was executed by the plaintiff in favour of the defendant, and a *kabuliat* in similar terms was executed by the defendant to the plaintiff. Both documents were registered on the day on which they were executed, and it appeared from them that the lease was to be for twenty years at a yearly rent of Rs. 354-12 and a bonus of Rs. 2,000. In each was a receipt clause to the effect that the plaintiff had received payment of the Rs. 2,000 from the defendant, Neither the *pottah* nor the *kabuliat* had been handed over; each remained with the person who executed it.

The plaint stated that the Rs. 2,000 had not been paid by the defendant to the plaintiff; that the plaintiff had received only Rs. 150 on the day of the execution of the documents; and he prayed judgment for the balance of Rs. 1,850 with interest and costs.

Tho defendant in his written statement admitted that the Rs. 2,000 had not been paid, and he disputed his liability to pay it on the following grounds: For some years previous to the execution of the lease and the *kabuliat*, one Mohadeo Lal, a cousin of the plaintiff, had been in the defendant's indigo factory. On examining the accounts of the factory it was found that a large sum of money had been misappropriated. A *panchayet* was called which decided that Mohadeo Lall should pay up Rs. 1,000. The latter was unable to do this when called upon, and he took the plaintiff to the defendant's factory, when, after some discussion, the plaintiff offered to grant the lease referred to above at a rent of Rs. 364-12-0, and a bonus of Rs. 2,000, agreeing at the same time to allow the defendant to retain out of the Rs. 2,000 the Rs. 1,000 due to the defendant by Mohadeo Lal. The defendant accepted this offer, and when the *pottah* and *kabuliat* where about to be written out, proposed that a clause to this effect should be inserted in each, but to this neither the plaintiff nor Mohadeo Lall would agree, because of the injury which might thereby be done to Mohadeo Lal's reputation. The *pottah* and *kabuliat* were then drawn up without any such clause and registered; and Rs. 150 paid by the defendant to the plaintiff, who promised that he would come to the factory in a few days, for the remaining Rs. 850, and give a receipt in full for the Rs. 2,000. He neglected to do this, however, and up to the institution of the

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suit the *pottah* remained with him, while the *kabuliat* remained with the defendant.

In the Court of first instance, the Subordinate Judge fixed the following issues: "(1) Whether there was a contract between the parties that the sum of Rs. 1,000 due to the defendant by Mohadeo Lal should be set off against the amount of Rs. 2,000, which the defendant had to pay to the plaintiff in respect of the *putowa*? Was Mohadeo Lal a relative of the plaintiff? (2) Can the defendant be made liable for interest? (3) What amount is recoverable by the plaintiff from the defendant?" The Subordinate Judge found all the issues in the plaintiff's favour, and gave him a decree for the amount claimed by him. This decree was reversed on appeal by the District Judge, who overruled an objection taken by the plaintiff, that the defendant was precluded by s. 92 of the Evidence Act from giving in evidence the arrangement relied on by him. The plaintiff appealed to the High Court.

Mr. *Gregory* (Baboo *Hari Mohun Chuckerbutty* with him) for the appellant.—The agreement relied on by the defendant is no defence to the suit, as it was an agreement, the object of which was to stifle a criminal prosecution, and, therefore, against public policy. [MITTER, J.,—No. The agreement regarded the payment of a debt which the *panchayet* found was due from Mahadeo Lal to the defendant.] At all events, evidence of that agreement should not have been received. The defendant in his written statement admitted that only Rs. 150 out of the Rs. 2,000 had been paid. It was on that footing the parties went to trial; and it was not competent to the defendant to seek to absolve himself from the consequences of his own admission by setting up an oral agreement contemporaneous with the written one contained in the *pottah* and *kabuliat*.

Mr. *O'Kinealy* for the respondent.—The only written contract between the parties is that contained in the *pottah* and *kabuliat*, and that contract states that the Rs. 2,000 has been paid to the plaintiff. If, therefore, no evidence of the oral agreement is to be admitted, which is the contention on the other side, it would be a sufficient answer to the plaintiff's suit to have produced and put in evidence the

*pottah* executed by the plaintiff which states that the consideration has been paid, and this has been done. Either the suit is one which should be decided on the written documents alone, in which case the question is one of construction merely, and the plaintiff is out of Court, or it is one in which oral evidence should be admitted; and, in the latter case, it would be a gross fraud on us were we to be prevented from showing the true nature of the oral agreement. See *Hem Chunder Soor* v. *Kally Churn Das* (1).

Mr. *Gregory* in reply.

The judgment of the Court was delivered by

MITTER, J.—This appeal arises out of a suit which was brought to recover the balance with interest of the consideration money due to the plaintiff under a deed of *putowa* executed by him in favour of the defendant. The *putowa* recites that the bonus fixed was Rs. 2,000, and it further recites that that amount had been paid to the plaintiff in cash in one lump sum. The plaintiff's case is that, although there is this recital, the whole of the consideration money was not actually paid but only Rs. 150, and the present suit is brought for the balance. The defence was that the plaintiff was not entitled to recover Rs. 1,850 but only Rs. 850, it having been agreed between the parties that the remaining Rs. 1,000 were to be set off against the debt due to the defendant from one Mohadeo Lal, a relation of the plaintiff.

The lower Courts have allowed oral evidence to be adduced to prove the allegation made in the written statement of the defendant. The Subordinate Judge upon that evidence came to the conclusion that the defendant's case was not made out. The District Judge upon the same evidence has come to the opposite conclusion. He is of opinion that the allegation in the written statement upon this point was substantiated. He has accordingly awarded a decree in favor of the plaintiff for only Rs. 850.

One of the questions raised before the lower Appellate Court was, whether, having regard to the provisions of s. 92 of the

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Evidence Act, the defendant was competent to adduce oral evidence to vary the terms of the written contract between the parties. The District Judge with reference to this point says: "Something has been said by the respondent's pleader as to the operation of s. 92 of the Evidence Act of 1872 in excluding oral evidence. If the stipulation as to payment in the deed had been that the amount of the consideration was to be paid in cash, I am disposed to think that oral evidence as to the contemporaneous contract for a set-off would have been inadmissible. The fact is, however, that the plaintiff has followed the prevailing custom of untruly reciting in the deed, with some emphasis of diction, that he has already received the consideration in full, and that nothing whatever remains due. In these circumstances he can scarcely, with advantage to himself, in suing for a portion of the consideration, insist on the Court confining itself within the *four corners* of the document."

The same objection has been taken before us, and that is the only question for decision in this second appeal. We agree with the District Judge that oral evidence was admissible to prove the defendant's allegation regarding the consideration money.

It seems to us that the plaintiff was allowed under proviso I of s. 92 to prove by oral evidence that the whole of the consideration money had not been paid, although it was recited in the *putowa pottah* that it had been paid. Under this proviso a party to a contract may prove a fact such as "want or failure of consideration; but then if a party to a contract under that proviso be allowed to prove want or failure of consideration, it seems to us that his opponent would not be bound by the recital in the contract, but would be competent, in answer to the case made by the other side, to adduce evidence in order to prove that the "consideration" was different from that recited in the contract. This principle is laid down in *Shah Makhanlal* v. *Srikrishna Sing* (1). The passage to which we refer is to be found at page 48. That was a suit for redemption of a mortgage, and the rate of interest fixed in the mortgage deed was 9 per cent. per annum. The mortgagor insisted that an account should be taken upon the footing of 9 per cent. being

(1) 2 B. L. R. (P. C.) 44.

the stipulated interest. The mortgagee, on the other hand, claimed 12 per cent. interest, and in support of that claim relied upon other transactions between the parties which he contended were part of the original mortgage transaction. The Sadr Dewani Adalat allowed interest only at the rate of 9 per cent. per annum, that is to say, the rate fixed in the contract. Their Lordships of the Judicial Committee, with reference to this point, say: "The rules of evidence and the law of estoppel forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own statutory protection, one of which is, when one party for the advancement of justice is permitted to remove the blind which hides the real transaction, as, for instance, of fraud, illegality, and redemption, in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary."

Applying this principle to this case, it is quite clear that the plaintiff appellant cannot affirm that the recital in the contract is not correct; and at the same time prevent the defendant from showing the real character of the consideration that was fixed between the parties. If the plaintiff be allowed to show that notwithstanding the recital in the contract the consideration money had not been actually paid in, it would be open to the defendant, in answer to that case, to show that it was not paid, because the other side refused to abide by the real contract between them, which was that out of Rs. 2,000 the amount fixed in the contract, Rs. 1,000 were to be set off against the debt due to the defendant from one Mohadeo Lal, a relation of the plaintiff.

The District Judge has overruled this objection virtually upon this ground, and we think that his decision upon this point is correct.

There is also another ground upon which we think that oral evidence in this case was admissible. What the defendant substantially stated was, yes; the consideration money was fixed at Rs. 2,000, and it was to be paid in cash; but there was another separate oral agreement to the effect that out of Rs. 2,000 con-

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sideration money to be paid in cash, the plaintiff should refund to him, the defendant, Rs. 1,000, being the amount of a debt due from Mohadeo Lal, a relation of the plaintiff. If that was substantially the agreement set up by the defendant, it seems to us that it comes within proviso 2 to s. 92 of the Evidence Act, which is to the following effect:—

"The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved." In this case the agreement would not be inconsistent with the terms of the written contract. The stipulation that out of Rs. 2,000 paid in cash the plaintiff was to refund Rs. 1,000 in liquidation of a debt from one Mahadeo Lal, is not in our opinion inconsistent with the recital as to the consideration in this contract.

Upon both these grounds, we are of opinion that the District Judge was right in overruling the objection taken before him by the plaintiff as to the inadmissibility of oral evidence to vary the terms of a written contract upon which the suit was brought. The appeal is dismissed with costs.

*Appeal dismissed.*

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*Before Mr. Justice Pigot and Mr. Justice O'Kinealy.*

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BRINDA CHOWDHRAIN (PETITIONER) v. RADHICA CHOWDHRAIN (OPPOSITE PARTY).*

*Hindu Widow—Probate—Interest—Revocation of Probate—Locus standi—Probate and Administration Act—Act V of* 1881, *s.* 50.

Where a will has been proved summarily, proof in solemn form *per testes* will not, as a rule, be required on the application of a person who had had notice, or had been aware of the previous proceedings before the grant of probate issued, and had then abstained from coming forward.

The widow of a Hindu testator who has died leaving sons has sufficient *interest* to call upon the executor to prove the will in solemn form *per testes.*

THIS was an appeal from an order of the Judge of the 24-Pergunnahs rejecting an application for revocation of probate The order was as follows: "This is an application for revo-

* Appeal from Order No. 325 of 1884 against the order of H. Beveridge Esq., Officiating Judge of 24-Pergunnahs, dated the 13th of September 1884.