APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Moore.

PATHAMMAL (PLAINTIFF), APPELLANT,

v.

SYED KALAI RAVUTHAR (DEFENDANT), RESPONDENT.*

1903. April 29. October 30.

Evidence Act—I of 1872, s. 92—"Contradicting, varying, adding to or subtracting from"—Admissibility of oral evidence when question not as between parties to the instrument or their privies.

Plaintiff sued defendant for a piece of land, alleging that it had been given to her by a relation. The defence was that the property had been purchased by the defendant from M. A document was filed which purported to be a sale of the land to plaintiff, but defendant contended that the document had been executed in plaintiff's name *benami* for him :

Held, that oral evidence was admissible in support of the contention that there had been a gift of the land to plaintiff, the question not arising as between the parties to an instrument or their privies, so as to bring it within the purview of section 92 of the Evidence Act. Though plaintiff and defendant claimed through one and the same person, yet they could not be treated as parties contracting with each other, nor would oral evidence be evidence to vary the terms of any written agreement between them.

Rahiman v. *Elahi Baksh*, (I.L.R., 28 Calc., 70), commented upon.

SUIT for land. Plaintiff was the minor daughter of defendant, whom she sued by her mother as next friend. A deed (filed as exhibit A) had been executed by one Usiyammal, the maternal aunt of plaintiff's mother, in favour of plaintiff, by which Usiyammal purported to sell certain land to plaintiff. Plaintiff's case was that the transaction evidenced by exhibit A was really a gift in her favour, and she claimed the land on that ground. Defendant contended that the transaction was really a sale, as exhibit A purported to be, and that the document had been executed in plaintiff's favour *benami* for himself. The Subordinate Judge found that the land was the property of the plaintiff, and gave judgment in her favour. Defendant appealed to the District Judge, who said :—

"Plaintiff's case (as set out in paragraph 3 of the plaint) is that exhibit A is not a sale deed but a deed of gift. The learned

* Second Appeal No. 1643 of 1901 presented against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 194 of 1901 presented against the decree of T. M. Ranga Chariar, Subordinate Judge of Madura (West), in Original Suit No. 44 of 1899.

PATHAMMAL v. SYED KALAI RAVUTHAR.

Subordinate Judge has allowed plaintiff to adduce evidence on this point and he has practically found that exhibit A was intended to be a deed of gift. The learned Subordinate Judge has evidently overlooked the provisions of section 92 of the Indian Evidence Act. Exhibit A is on its face a deed of sale, and no oral evidence is admissible to show that a deed of sale was really meant to be a deed of gift (*Rahiman* v. *Elahi Baksh*(1)). Plaintiff, contends that section 92 of the Indian Evidence Act does not prohibit the disproof of a recital in a contract as to the consideration that has passed, by showing that the actual consideration was something different to that alleged and she relies on *Vasudeva Bhatlu* v. *Narasamma*(2). That was a case between vendee and vendor and it is clearly distinguishable from the present one. In that case it was decided that a vendee may prove that a sale deed is supported by consideration other than that set out in the deed of sale; it is certainly no authority for the proposition that oral evidence may be adduced to show that a document, which on its face is a deed of sale, is not a deed of sale, but a deed of gift."

He reversed the decree and dismissed the suit.

Plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *A. Nilakanta Ayyar* for appellant.

P. R. Sundara Ayyar and *K. N. Ayyar* for respondent.

JUDGMENT.—The ptaintiff, who is the defendant's daughter and a minor, sues through her mother as next friend to recover possession of the plaint-mentioned lands alleging that the properties were given in gift to her on the 16th September 1888 by Usiyammal, the next friend's paternal aunt. The defence was that the property was purchased by the defendant from the said Usiyammal, the sale deed, however, being executed in the name of the plaintiff *benami* for him. The Subordinate Judge who tried the case in the first instance gave a decree in favour of the plaintiff; but on appeal it was reversed, the District Judge being of opinion that the oral evidence adduced by the plaintiff in support of the gift set up was inadmissible and that the purchase must be taken to have been by the defendant.

We are unable to agree in the view taken by the District Judge as to the admissibility of the evidence. It is scarcely

(1) I.L.R., 28 Calc., 70. (2) I.L.R., 5 Mad., 6.

necessary to point out that this question does not arise as between parties to an instrument or their privies—so as to bring it within the purview of section 92 of the Indian Evidence Act; for though the plaintiff and defendant claim through one and the same person yet so far as the present matter is concerned they cannot be treated as parties contracting with each other, or the oral evidence adduced treated as having been let in to vary the terms of any written agreement *between them*.

The District Judge was therefore in error in treating the case as one falling within the said section 92. He has, however, in support of his view cited the case of *Rahiman* v. *Elahi Baksh*(1). The report of the case is by no means clear and if the learned Judges intended to decide that section 92 would govern cases like the present or that even otherwise evidence such as that in question would be inadmissible between parties in the position of the present plaintiff and defendant, we must with all deference say we cannot accept their conclusion, as both principle and the weight of authority are, in our opinion, clearly against such a view.

The learned Vakil for the respondent drew our attention to section 99 of the Evidence Act as supporting the above decision. We are unable to see any force in this argument. No doubt in section 99 the word "varying" only is used while in section 92 the words are "contradicting, varying, adding to or subtracting from." But it is difficult to see that in using the expression "varying" only anything less could have been meant than what is conveyed by the several expressions in section 92 and as every "contradicting," "adding to" or "subtracting from" would necessarily be a "varying" of the instrument, the legislature apparently use that expression as sufficient to convey all that is denoted by the other different expressions occurring in the earlier section. Even otherwise, section 99, being merely an enabling provision, could not be held to prohibit the reception of evidence as to a fact in issue or a relevant fact admissible independently thereof.

Clearly therefore the evidence adduced in support of the alleged gift should not have been ignored by the lower Appellate Court.

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(1) I.L.R., 28 Calc., 70.

PATHAMMAL v. SYED KALAI RAVUTHAR.

We must therefore call upon the District Judge to consider the whole evidence and submit revised findings on the questions raised.

The District Judge in due course returned a finding that plaintiff was not the owner of the land sued for.

The case came on for final hearing, when the Court accepted the finding and dismissed the appeal.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1903. August 7, 10 and 14.

SREE SANKARACHARI SWAMIAR (PLAINTIFF), PETITIONER,

v.

VARADA PILLAI (DEFENDANT), RESPONDENT.*

Landlord and tenant—Suit for rent—Objections to patta—"Indefiniteness"—Estoppel by conduct of tenant.

A clause in a patta providing that, in the event of the tenant raising wet cultivation on dry land with Sircar water, he should pay increased rent according to the rent of the neighbouring wet lands, is not bad for indefiniteness.

There is a material distinction between the power of the Court in dealing, in suits under section 8 or section 9 of the Rent Recovery Act, with questions which have not been settled by contract or specifically provided for by law and its power when dealing with a litigation arising out of a contract constituted by an accepted patta. In determining objections founded on the alleged uncertainty of a term in a contract, the test is not whether the term is in itself certain but whether it is capable of being made certain.

A provision in a patta that the customary fees payable by the tenant for the services of the village accountant and other public servants of the village would be summarily recovered and charged with interest if in arrear, is not an improper term.

Semble, that a tenant may be estopped from objecting to the terms of a patta where he has accepted pattas containing similar terms for a series of years previously in respect of the same holding and has by his conduct led the landlord to suppose that the patta would not be objected to.

SUIT for rent. Prior to suit, patta had been tendered, but was not accepted. At the trial, defendant contended that he was

* Civil Revision Petition No. 459 of 1902 presented under section 25 of Act IX of 1887 praying the High Court to revise the decree of V. Swaminatha Ayyar, District Munsif of Poonamallee, in Small Cause Suit No. 323 of 1902.