

1883 · not appear to us upon what ground that part of the decree is based. That part of the decree must, therefore, be set aside. Although we set aside that part of the decree of the lower Court, having regard to the unjustified opposition on the part of the appellants, we think that they ought to be made liable for the costs of the plaintiffs. The plaintiffs' suit will, therefore, be decreed in the manner stated above against all the defendants with costs in both Courts.

SITANATH  
KOER  
v.  
LAND  
MORTGAGE  
BANK OF  
INDIA.

*Appeal allowed.*

*Before Mr. Justice Cunningham and Mr. Justice Maclean.*

1883  
*April 10.*

KASHI NATH DASS AND ANOTHER (DEFENDANTS) v. HURRIHUR MOOKERJEE (PLAINTIFF).\*

*Evidence Act (I of 1872), s. 92.—Evidence contradicting Document—Mortgage—Conditional Sale.*

It does not necessarily follow from s. 92 of the Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mortgage. This rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute purchaser, and 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 title deeds and was the ostensible owner of the property.

THIS was a suit to establish the plaintiff's right to certain land. The plaintiff alleged that the defendant Kashi Nath Dass had conveyed the land in question to the second defendant Jadu Nath Dass, from whom the plaintiff purchased. The defendant Kashi Nath Dass pleaded that the deed executed by him in favour of Jadu Nath Dass, though it purported to be a *kobala*, was in fact a deed of conditional sale. At the hearing the Munsiff refused to admit evidence to show that the transaction between Kashi Nath and Jadu Nath was really a mortgage

Appeal from Appellate Decree No. 2280 of 1881, against the decree of Baboo Radha Kishna Sen, Additional Sub-Judge of Hooghly, dated the 5th September 1881, affirming the decree of P. M. Bannerjee, Munsiff of Howrah, dated the 30th September 1880.

and not a sale, considering that such evidence was inadmissible under s. 92 of the Evidence Act, and gave the plaintiff a decree. The Subordinate Judge took the same view and confirmed the Munsiff's judgment.

1888  
KASHI NATH  
DASS  
v.  
HURRIHUR  
MOOKERJEE

The defendants appealed to the High Court.

Baboo *Rash Behary Ghose* and Baboo *Jogesh Chunder Banerjee* for the appellants.

Baboo *Gopal Lall Mitter* for the respondent.

The judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

CUNNINGHAM, J.—The point raised in this appeal is that the Court below was in error in holding that the defendant was not entitled to plead, nor was the evidence tendered by him admissible to show that the document mentioned in the plaint as a deed of purchase was only a security for money. There has been some wavering of opinion at different periods among the Courts in this country as to the law of evidence on this point. The law for some periods was laid down, so far as concerned this Court, by the Full Bench Ruling in *Kashi Nath Chatterjee v. Chandi Charan Banerjee* (1), in which it was held that, though evidence of a contemporaneous oral agreement was inadmissible to show that a document purporting to be an absolute conveyance was only a mortgage, yet that evidence might be given of the facts of the case, and of the subsequent conduct of the parties in order to show that this was the case.

After the passing of the Evidence Act it was held by some learned Judges of this Court that the Full Bench Ruling was no longer a correct exposition of the law. That view, however, was called in question in a decision of the Bombay High Court, *Baksu Lakshman v. Govinda Kanji* (2), in which case the learned Judges held, with reference to the doctrine prevalent in the English Courts as to fraud, that on this ground it was open to the parties to a document, and those who claimed under them, to show by subsequent conduct and by various circumstances of the case that the

(1) B. L. R. Sup. Vol., 333: 5 W. R., 68.

(2) I. L. R., 4 Bom., 524.

1883  
 KASHI NATH  
 DASS  
 v.  
 HURRIHUR  
 MOOKERJEE.

document was not a conveyance but was a mortgage. This view has subsequently been accepted by the Chief Justice of this Court and Mitter, J., in *Hem Chunder Soor v. Kally Churn Das* (1), in which case the Chief Justice laid down the same doctrine as was affirmed in the Full Bench Ruling in *Kashi Nath Chatterjee v. Chandî Charan Banerjee* (2) as being still the correct exposition of the law, and in which he expressed his general concurrence in the views of the Bombay High Court, as expressed in *Baksu Lakshman v. Govinda Kanji* (3).

We think, therefore, that the decision of the Court below in this case must be set aside; and that it does not necessarily follow from s. 92 of the Indian Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mortgage.

In applying this doctrine, however, 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, and who 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.

We must, therefore, set aside the decision of the lower Appellate Court and remand the case to the learned Judge for trial with reference to the above observations and the ruling of this Court and the Bombay High Court on the subject.

Costs to abide the result.

*Appeal allowed and Case remanded.*

(1) *Ante* p. 528.

(2) B. L. R. Sup. Vol., 383: 6 W. R., 68.

(3) I. L. R., 4 Bom., 594.