APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

1913. September 16 and 19.

ADITYAM IYER (FIRST DEFENDANT), APPELLANT,

v.

RAMA KRISHNA IYER AND THREE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 TO 4), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 92—Registered sale-deed—Price specified in the sale-deed—Recital as to amount of price, essential term of contract of sale—Oral agreement as to higher price in discharge of a mortgage—Evidence inadmissible.

The amount of the price agreed to be paid is an essential term of a contract of sale; and consequently no evidence of an oral agreement at variance with the provisions of a registered sale-deed as to the amount of the price fixed for the sale, is admissible under section 92 of the Indian Evidence Act.

Cowasji Ruttonji Limboowalla v. *Burjorji Rustomji Limboowalla* (1888) I.L.R., 12 Bom., 335, followed.

Vasudeva v. *Narasamma* (1882) I.L.R., 5 Mad. 6; *Kumara* v. *Srinivasa* (1888) I.L.R., 11 Mad., 213, *Hukumchand* v. *Hiralal* (1879) I.L.R., 3 Bom., 159 and *Gopal Singh* v. *Laloo Lall* (1909) 10 C.L.J., 27, explained.

Ram Bakhsh v. *Durjan* (1887) I.L.R., 9 All., 392, *Indarjit* v. *Lal Chand* (1896) I.L.R., 18 All., 168, *Balkishen Das* v. *Legge* (1900) I.L.R., 22 All., 149 (P.C.), *Selamba Goundan* v. *Palani Goundan* (1913) M.W.N., 650 and *Probat Chandra Gangapadhya* v. *Chirag Ali* (1906) I.L.R., 33 Calc., 607, referred to.

SECOND APPEAL against the decree of E. L. THORNTON, the District Judge of Trichinopoly, in Appeal Suit No. 101 of 1911, preferred against the decree of A. RAMASWAMI SASTRIYAR, the Temporary Subordinate Judge of Trichinopoly, in Original Suit No. 37 of 1910.

The facts of the case appear from the judgment.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellant.

The Honourable Mr. *T. V. Seshagiri Ayyar* and *T. V. Muthukrishna Ayyar* for the first respondent.

AYLING AND TYABJI, JJ.

JUDGMENT.—The suit out of which this Second Appeal arises was brought by the first respondent (plaintiff) on the hypothecation bond for Rs. 1,000 (Exhibit III) executed in his favour by the appellant (first defendant) on the 27th September 1905.

* Second Appeal No. 1385 of 1912.

The defence set up was discharge. It was contended that the discharge of the suit bond was part consideration for the sale of certain other lands by the appellant to the first respondent on the 4th September 1907, which is evidenced by two registered sale-deeds (Exhibits I and II) for Rs. 29,000 and Rs. 6,000, respectively. The discharge of Exhibit III is not mentioned in Exhibits I and II, but it is stated that there was a contemporaneous oral agreement that the sale price was to be Rs. 36,000 and not Rs. 35,000 as stated therein, the difference being found in the discharge of Exhibit III. This is how the first defendant himself expresses it in his statement:—

"The bond (Exhibit III) has been discharged. I have executed to this very plaintiff, a sale-deed for Rs. 36,000. On one and the same date, I executed a sale-deed for Rs. 29,000 and another sale-deed for Rs. 6,000. I executed on 4th September 1907. Without including the amount of the plaint bond, I executed for Rs. 35,000. In the aforesaid sale-deeds the plaint Rs. 1,000 debt was not included. Settling Rs. 36,000 (as price) the sale-deeds were executed for Rs. 35,000. Even at the time of the execution of these two sale-deeds, the understanding was that this amount of Rs. 1,000 should not be included, and that subsequent to his coming into possession of the lands sold, endorsement of payment of this sum of Rs. 1,000 should be made in the plaint bond—and (the bond) should be returned to me." Both the Lower Courts have held that evidence of this oral agreement regarding the discharge of Exhibit III is excluded by section 92 of the Indian Evidence Act. The only question for disposal is whether they are right.

In our opinion, the agreement set up cannot be brought under any of the provisos to section 92 of the Indian Evidence Act. At a late stage of the argument, the learned vakil for the appellant suggested that it might be covered by proviso 2: but a careful consideration of the appellant's own statement above quoted will show that this cannot be so. The appellant admits that the alleged agreement was one affecting the sale price of the lands. It provided that the price should be fixed at Rs. 36,000, although only Rs. 35,000 was to be shown in the sale-deeds. Therefore the separate oral agreement was not "as to a matter on which the document was silent," but as to the sale price which is specifically provided for in the document. It

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is also clearly inconsistent with the provisions in the document regarding the sale price.

The main contention, however, which Mr. T. R. Ramachandra Ayyar argued at great length, is that the case does not fall within the scope of section 92 of the Indian Evidence Act. His argument really amounts to this—that the sale price is not one of the terms of a sale-deed, and that there is nothing in section 92 to exclude oral evidence to show that the price really agreed upon was higher or lower than is stated therein. This is a somewhat startling proposition and one which we should not accept without the strongest and most convincing authority. *Primâ facie*, it would seem that if anything is an essential term of a sale, it is the price agreed to be paid. We are, of course, not concerned with sales for a price not determined which stand on a different footing altogether.

The first case relied on in the appellant's favour is that of *Vasudeva* v. *Narasamma*(1). The plaintiff in that case sued on a sale-deed reciting cash consideration :—The defendants pleaded that no cash was paid, but that the document was originally executed in consideration of the plaintiff's acting as guardian to his minor son (defendant's grandson). This boy died, the defendant subsequently registered the document on the plaintiff's promise to marry another daughter of the defendant—which promise he apparently failed to keep. The defendant's plea in effect was "want or failure of consideration," though the learned Judges speak of it as a plea "that the consideration was of a kind other than that stated in the deed of sale." The first proviso to the section specifically enacts that "want or failure of consideration" may be proved. It is doubtful, therefore, whether their Lordships intended to lay down any rule of law other than that contained in the proviso, although the appellant's vakil is no doubt entitled to lay stress on the passage in which they say :—

"The provisions of the Evidence Act, section 92, to which the District Judge refers, do 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."

(1) (1882) I.L.R., 5 Mad., 6.

The ruling that the vendor may prove not only failure of consideration, but also that the consideration was of a kind other than (or something different to) that alleged in the sale-deed has no doubt been followed in a later case of this Court, *Kumara* v. *Srinivasa*(1), and a similar view is expressed in *Hukumchand* v. *Hiralal*(2), and *Gopal Singh* v. *Laloo Lall*(3). In neither of the latter two cases was there any attempt to vary the amount of the consideration set forth in the document. In the Bombay case the learned Judges distinctly stated that they found no real variance between the statement in the deed and the statement of the plaintiff. It was merely sought to prove that, as is customary in this country, the statement in the deed that the full consideration passed in cash was incorrect and that part of the consideration was the discharge of an antecedent debt. In the Calcutta case, the only variance was as to whether a portion of the sale price was left with the vendor as recited in the conveyance deed, or was taken by a creditor.

None of these cases is any authority for the proposition that evidence may be admitted to vary the provisions of a sale-deed as to the amount of consideration fixed for the sale. Nor can it be said in the present case that the addition of Rs. 1,000 in the shape of discharge of another antecedent debt constitutes the consideration of another kind from, or something different to, that set forth in the deed within the meaning of the learned Judges in the first Madras case. Two other cases quoted [*Ram Bakhsh* v. *Durjan*(4), and *Indarjit* v. *Lal Chand*(5)], have no bearing whatever, inasmuch as they deal simply with arrangements as to mode of payment, without any attempt to vary the terms of the contract as to the consideration itself.

The only Indian case to which we need refer is that of *Probat Chandra Gangapadhya* v. *Chirag Ali*(6), which is relied on by the appellant's vakil in consequence of the single passage in the judgment—"The consideration of the contract is different from the terms of the contract itself." That was a case of a kabuliyat executed by a tenant agreeing to pay an enhanced rent; and it was simply held that the consideration for enhancement was not a term of the kabuliyat. It is a very different

(1) (1882) I.L.R., 11 Mad., 213.
(2) (1879) I.L.R., 3 Bom., 159.
(3) (1909) 10 C.L.J., 27.
(4) (1887) I.L.R., 9 All., 342.
(5) (1896) I.L.R., 18 All., 168.
(6) (1906) I.L.R., 33 Calc., 607 at p. 611.

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case from that of a sale-deed and the sale price; and we see no reason to suppose that the learned Judges would have taken the same view in the latter. That the recital in a sale-deed as to the amount of the sale price is a term of the contract is clearly laid down in one of the very cases relied on in the appellant's favour [*Indarjit* v. *Lal Chand*(1)]; and we may add that to hold otherwise would go far to nullify the provisions of section 92 altogether.

We need not refer to the English cases quoted by the learned vakil for the appellant in view of the opinion expressed by their Lordships of the Privy Council as to their inapplicability in *Balkrishen Das* v. *Legge*(2).

In support of our view we may refer to the judgment of SCOTT, J., in *Cowasji Ruttonji Limboowalla* v. *Burjorji Rustomji Limboowalla*(3), and for a general view of the scope of section 92 of the Indian Evidence Act to a recent judgment of this Court in *Selamba Goundan* v. *Palani Goundan*(4).

We are of opinion that the evidence of the oral contract was rightly excluded; and we dismiss this appeal with costs.

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(1) (1896) I.L.R., 18 All., 168 at p. 171.
(2) (1900) I.L.R., 22 All., 149.
(3) (1888) I.L.R., 12 Bom., 335.
(4) (1913) M.W.N., 650.