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DASSORATHY HURI CHUNDER MAHAPATRA v. RAMA KRISHNA JANA.

Mr. *Twidale* and Baboo *Obhoy Churn Bose* for the respondents.

The judgment of the Court (PRINSEP and PIGOT, JJ.) was delivered by

PRINSEP, J.—We think that the conclusion arrived at by the lower Appellate Court is correct.

Any acts of one or more of several joint tenants which possibly might operate as a forfeiture of tenancy, would not entitle the landlord to exact that penalty as against all the tenants; moreover the plaintiff zemindar's case has throughout been that the tenure cannot be split up by any arrangement among the tenants as between themselves, and that he is not bound to, and will not acknowledge the validity of, any such arrangement by which separate specific rights are created.

We cannot now allow him in second appeal to alter his case and to claim a forfeiture on any specific shares of the joint tenancy so as to entitle him to recover khas possession of those shares. The landlord's appeal must therefore be dismissed.

The appeal of the assignee of the rights of some of the sharers must also be dismissed, as it has been found on the authority of reported cases that the alienation of a tenure of this description (a *surborakari* tenure) in Cuttack, and *à fortiori* any portion of it, is invalid without the consent of the landlord.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter.

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February 27.

HEM CHUNDER SOOR (PLAINTIFF) *v.* KALLY CHURN DAS (DEFENDANT.)*

Evidence Act, (I of 1872), *s.* 92—*Mortgage—Sale—Conduct of Parties—Oral Evidence when admissible to prove that an apparent sale is a mortgage—Admissibility of Parol Evidence to vary a written Contract.*

The defendant, in answer to a suit by the plaintiff for possession of certain land alleged that the kobala, which purported to be an out-and-out sale in favor of the plaintiff, and on which the plaintiff based his title to the property, was intended by the parties to operate only as a mortgage; and to prove such allegations tendered evidence of the circumstances under

*Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Field, dated the 21st July 1882, in appeal from Appellate Decree No. 1953 of 1881.

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which the kobala was executed, and of the conduct of the parties to show that the document had all along been treated as a mortgage and intended to operate as such.

Held, that such evidence was admissible.

Held also that s. 92 of the Indian Evidence Act made no alteration in the law as laid down in *Kashi Nath Chatterjee* v *Chandi Charan Banerjee* (1), but is in accordance with what was decided in that case. *Baksu Lakshman* v. *Govinda Kanji* (2), followed; *Ram Doyal Bajpie* v. *Hera Lal Paray* (3); and *Daimoddee Paik* v. *Kaim Taridar* (4), dissented from.

THIS was an appeal under the provisions of s. 15 of the Letters Patent against the decree of Mr. Justice Field.

The plaintiff sued to recover possession of 2½ bighas of land under a kobala dated the 18th Aughran 1285, (3rd December 1878) executed in his favor by the defendant. The defendant, while admitting the execution of the kobala, pleaded that it was only a mortgage transaction, and that the mortgage debt had been paid. The only question for trial was whether the transaction was an out-and-out sale, or only a mortgage.

The document on the face of it purported to be an out-and-out sale, but at the hearing of the case before the Court of first instance the defendant offered to adduce evidence to prove that there was a contemporaneous verbal agreement that the property would be reconveyed on repayment of the consideration money. This was objected to under s. 92 of the Evidence Act.

The Munsiff held that, though evidence was not admissible to vary the terms of the kobala, still it was open to the plaintiff to show by the surrounding circumstances that the transaction, though called an absolute sale, had all along been treated by the parties as a conditional one; and he held that this view was supported by the Full Bench decision in *Kashi Nath Chatterjee* v. *Chandi Charan Banerjee* (1), and that the law had not been altered by s. 92 of the Evidence Act: *Ram Doyal Sen* v. *Radha*

(1) B. L. R. Sup. Vol., 383: S. C. 5 W. R., 62.
(2) I. L. R., 4 Bom., 594.
(3) 3 C. L. R., 386.
(4) I. L. R., 5 Calc., 800: S. C., 4 C. L. R., 419.

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Nath Sen (1). He therefore allowed the defendant to adduce evidence with regard to such circumstances, and found as a fact that the defendant had all along remained in possession of the land; that the value of the land was far in excess of the sum mentioned in the kobala which was only Rs. 18; that that amount had been tendered by the defendant to the plaintiff but had been refused, and that the defendant had accordingly deposited it in the Judge's Court within a few months of the date of the transaction; that the defendant's homestead lands were comprised in the kobala, and that there was no provision in the deed for his remaining in possession, and that shortly after the date of the transaction the defendant had erected a house, value Rs. 25, on the land. He further found that the custom of executing a kobala for a conditional sale was still in existence in the district. On these grounds he decided the issue in favor of the defendant, and dismissed the suit with costs.

The plaintiff then appealed against the decree on the ground that the Court below had erred in admitting the evidence objected to, and on appeal relied on the cases of *Ram Doyal Bajpie* v. *Hera Lal Paray* (2) and *Daimoddee Paik* v. *Kaim Taridar* (3) as showing that the Court below had erred in admitting the evidence alluded to. The Subordinate Judge, however, considered that s. 92 of the Evidence Act had made no difference in the law, and following the decision in *Baksu Lakshman* v. *Govinda Kanji* (4) held that the decision of the lower Court was correct, and accordingly dismissed the appeal with costs. The plaintiff then specially appealed to the High Court, and the appeal was heard by Mr. Justice Field who delivered the following judgment:—

The only ground of appeal urged in this case is that the Courts below have erred in law in admitting evidence of a contemporaneous oral agreement varying the terms of the kobala. I think it quite clear that the Courts below did not admit evidence of a contemporaneous oral agreement varying the terms of the kobala.

(1) 25 W. R., 167.
(2) 3 C. L. R., 386.
(3) I. L. R., 5, Calc., 300: S. C., 4 C. L. R., 419.
(4) I. L. R., 4 Bom., 594.

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What they did admit was evidence of conduct subsequent to the kobala, showing that the parties had waived the arrangement incorporated in the kobala, and had, by mutual agreement evidenced by conduct, treated the transaction as a mortgage. The very fact that the plaintiff did not get possession upon the execution of the kobala was pregnant evidence to show that the parties never treated the transaction as an out-and-out sale. The Munsiff says in his judgment: "Though evidence was not receivable to vary the terms of the kobala, I was of opinion that it was open to the defendant to show by surrounding circumstances that the transaction, though called an absolute sale, had all along been treated as a conditional one only." The Subordinate Judge, though not using equally precise language, has confirmed this judgment of the Munsiff. I see no reason to interfere, and I dismiss the appeal with costs.

The plaintiff then preferred this appeal under s. 15 of the Letters Patent.

Baboo *Saroda Churn Mitter* appeared on behalf of the appellant.

Baboo *Troilukhyo Nath Mitter* for the respondent.

The judgment of the Court (GARTH, C.J., and MITTER, J.) was as follows:—

GARTH, C.J.—In this case the plaintiff (appellant) sued for possession of 2¼ beegahs of land, which he claimed to have purchased absolutely from the respondent under a kobala, dated the 18th Aughran 1285 (3rd December 1878).

The respondent admitted the kobala, but contended that the transaction between the plaintiff and himself was a mortgage only.

In support of this view, the defendant relied partly upon oral evidence of the transaction, and partly upon the conduct of the parties, more especially the fact that the plaintiff had never taken possession, although the kobala was dated the 3rd December 1878, and this suit was not brought until the year 1880.

He also relied upon the further fact, that the sum of Rs. 18,

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which was admitted to be the consideration for the kobala, was scarcely one-fourth the value of the property.

The plaintiff all along objected to the reception of these facts in evidence upon the ground that the defendant was precluded by s. 92 of the Evidence Act from bringing forward any evidence to vary or contradict the terms of the kobala.

The lower Courts, however, have admitted the evidence, and have gone into all the circumstances of the case; both holding that, although parol evidence as a rule is not admissible to contradict or vary the terms of a written agreement, yet that, in a case of this kind, the Court is bound to look to the surrounding circumstances, and to the acts and conduct of the parties, for the purpose of ascertaining whether that which appears upon the face of the deed to be an absolute sale, had been treated by the parties and intended by them as a conditional sale only. In support of this position, both Courts relied upon the Full Bench case of *Kashi-Nath Chatterjee* v. *Chandi Charan Banerjee* (1).

The learned Judge in this Court, although putting the case upon a somewhat different ground, has confirmed the judgment of the lower Courts.

It has now been argued before us that, although the Full Bench case above referred to established the law in the year 1866, s. 92 of the Evidence Act, which was passed in 1872, must be considered as having overruled the Full Bench decision; and that the cases of *Ram Doyal Bajpie* v. *Hera Lal Paray* (2), and *Daimoddee Paik* v. *Kaim Taridar* (3), have decided that s. 92 of the Evidence Act has so altered the law.

If I could see any ground for supposing, that the Full Bench case is not law at the present day, or that s. 92 of the Evidence Act either made, or intended to make, any alteration in the rule of evidence which prevailed here before the Act was passed, and which was recognized as law in the Full Bench case, I should consider that our proper course was to refer the question to another Full Bench; but when I look to the language used by Sir Barnes

(1) B. L. R., Sup. Vol., 383; S. C., 5 W. R., 68.
(2) 3 C. L. R., 386.
(3) I. L. R., 5 Calc., 300; S. C. 4 C. L. R., 419.

Peacock in that case, it seems to me that s. 92 of the Evidence Act lays down in terms the same rule as Sir Barnes Peacock then stated to be the law.

And the principle upon which the judgment in the Full Bench case proceeded is one which, in my opinion, is perfectly consistent with that rule.

It is a principle which has constantly been acted upon by Courts of Equity in England, as well as by the Courts of this country; and notably by the Bombay High Court in the cases of *Hasha Khand* v. *Jesha Premaji* (unreported), and of *Baksu Lakshman* v. *Govinda Kanji* (1).

In the latter case there will be found an excellent judgment of Mr. Justice Melvill, in which he very clearly explains this principle of equity, and the mode and the circumstances under which it may be applied.

I quite agree with that learned Judge, that the true ground upon which the equitable jurisdiction of the Court proceeds generally in cases of this kind, is that of fraud, and this (as Mr. Justice Melvill observes) is very clearly stated by L. J. Turner in *Lincoln* v. *Wright* (2).

That was a case in its circumstances very similar to the present. Wright had brought an action of ejectment against Lincoln to recover certain land, which the latter had conveyed to him by a deed, which appeared on the face of it to be an absolute conveyance. Lincoln then brought a suit in equity to restrain the ejectment, on the ground that the transaction was in reality a mortgage; and he relied, in support of that contention, partly upon a parol agreement, and partly upon the acts and conduct of the parties. L. J. Turner says: "The principle of the 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 transaction, it is in the eyes of this Court a fraud to insist on the conveyance as being absolute; and parol evidence must be admissible to prove the fraud."

The main difference between that case and the present is, that there the question arose upon a bill filed in equity to restrain the

(1) I. L. R., 4 Bom., 594. (2) 4 De G. and Jones, 16.

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ejectment, whereas here it arises in the form of an equitable defence to the ejectment suit.

Another very ordinary form in which the same principle is recognized and acted upon, is in suits to alter or reform deeds of conveyance, upon the ground that they were not drawn up in accordance with the true intention of the parties. Suppose, for example, that the present defendant on hearing that the plaintiff was about to treat the kabala as an absolute sale, had brought a suit to have the deed reformed in accordance with what he contends to have been the true arrangement between the parties, the only way in which he could establish his claim in such a suit would be by showing what the real transaction was, and how the circumstances of the case and the conduct of the parties were in accordance with his view of the matter. The ground of such a suit would be fraud or mistake; and that fraud or mistake might be set up as well by way of defence to a suit like the present, as in a substantive suit to alter or reform the conveyance.

It is remarkable, that in the Full Bench case of *Kashi Nath Chatterjee* v. *Chandi Charan Banerjee* (1), already referred to, the two facts which were mainly relied upon as showing that the transaction was a mortgage instead of a sale, are the same which are relied upon in this case, namely: (1st) that possession was not given to the purchaser at the time of sale, and that he never sought to obtain possession until long afterwards; and (2nd) that the consideration mentioned in the deed was a very small sum, as compared with the selling value of the property.

I think, therefore, that we are bound by the authority of the Full Bench case to confirm the judgment of the Court below; and it seems to me that we are not constrained, by any of the authorities to which our attention has been called, to refer the question to a Full Bench.

As my learned brother agrees with me in this view, the appeal will be dismissed with costs.

Appeal dismissed.

(1) B. L. R. Sup. Vol. 383: S. C. 5 W. R., 68.