

local Act. This does not, as appears to have been held by the Judicial Commissioner, necessarily or by implication, lead to the conclusion that the Legislature never intended any case committed to the Court of Rangoon should not be tried in another Sessions division.

Strictly speaking, therefore, the answer we should give to the reference by the special Court should be that the local Government has no power under s. 178 of the Criminal Procedure Code to transfer for trial to the Court of the Commissioner a criminal case duly committed for trial by the Court of the Recorder of Rangoon, but that the local Government has the power to transfer a case from the district of Rangoon to the Sessions division of Pegu.

Attorney for both parties : ; The Government Solicitor, Mr. R. S. Upton.

APPELLATE CIVIL.

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

KASHI NATH CHUKERBATI (PLAINTIFF) v. BRINDABUN
CHUKERBATI (DEFENDANT.)*

Evidence of oral agreement—Fraud—Act I of 1872, s. 92, proviso 1—Contract—Unlawful consideration—Act IX of 1872, s. 23.

Plaintiff sued to recover rent under a *kabuliat*. The defendant admitted execution of the *kabuliat*, but asserted that he executed it in order to enable the plaintiff to sell the land at a high price, the plaintiff agreeing to make over to him Rs. 282 out of the purchase money, and to obtain for him from the purchaser a mourasi pottah of the land ; it never having been intended that any rent should be payable under the *kabuliat*.

Held, that evidence of the oral agreement was admissible for the purpose of proving the fraudulent character of the transaction between the parties.

This was a suit to recover rent from the defendant under a registered *kabuliat*.

The defendant denied that the plaintiff was the owner of the land, but admitted the *kabuliat*, contending that there was an oral agreement between himself and the plaintiff that no rent should be paid or received, and stated that the *kabuliat* was executed in order

* Appeal from Appellate Decree No. 2400 of 1882, against the decree of Baboo Uma Charan Kastogiri, First Subordinate Judge of Tipperah, dated 28th of September 1882, reversing the decree of Baboo Behari Lal Mookerji, Acting Munsiff of Ramraigan, dated the 11th of November 1881.

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to enable the plaintiff to sell the land (which was in the possession of the defendant) to some third person, the plaintiff giving the defendant out of the purchase money so to be obtained Rs. 282; and obtaining for him from the purchaser a mourasi pottah of the homestead lands.

The Munsiff, disbelieving the defendant's witnesses, decreed the suit in favor of the plaintiff.

The defendant appealed to the Subordinate Judge, who held that evidence of the oral agreement was admissible under the 2nd and 3rd provisoes to s. 92 of the Evidence Act; and believing the evidence of the defendant's witnesses as to the fictitious character of the *kabuliat*, dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Moulvi *Serajul Islam* for the appellant contended that evidence of the oral agreement was inadmissible, and that the defendant having admitted the *kabuliat*, the suit ought to have been decided in plaintiff's favor.

Baboo *Copinath Mookerji* for the respondent.

Judgment of the High Court was delivered by

GARTH, C.J. (BEVERLEY, J., concurring).—We think that the Subordinate Judge is substantially right in the conclusion at which he has arrived.

The suit was brought by the plaintiff for the rent of certain land upon a *kabuliat* given by the defendant, which fixed the rate of rent for two years at Rs. 16; and which *kabuliat* is admitted to have been given by the defendant to the plaintiff.

The defendant's answer, as alleged in his written statement, was this, that the plaintiff was not the owner of the land at all, and had nothing to do with it; and that the real owner was the defendant himself, who, as well as his father before him, had been in possession of it for many years; but that he, the defendant, had, in collusion with the plaintiff, given this *kabuliat* to the plaintiff in order that the plaintiff might sell it to some third person for a high price, paying the defendant Rs. 282 out of the price, and obtaining also for him from the purchaser a mourasi pottah for the homestead land.

The Munsiff did not believe this story of the defendant, but the Subordinate Judge found that it was true. There was some

contradictory evidence, but he found as a fact that the *kabuliat* was executed in order to enable the plaintiff to sell the land, which really belonged to, and was in the possession of, the defendant, for a large price, and to give the defendant out of the purchase money Rs. 282 besides securing him the homestead under a mourasi pottah. In other words, he found that this agreement was not a *bond fide* lease, but a fraudulent and collusive transaction entered between the parties, for the purpose of enabling the plaintiff to cheat some third person; and that there never was any intention that rent should be paid by the defendant.

The word "fraudulent," it is true, is not used by the Subordinate Judge. He merely deals with the question, whether evidence ought to have been admitted for the purpose of contradicting the plain language of the *kabuliat*. But there is no doubt, we think, what he intends to find; and there is no doubt, if the plaintiff's story is true, that the transaction was a gross fraud.

That being so, any evidence given for the purpose of proving the fraud would be admissible. Section 23 of the contract says, that where the consideration or object of an agreement is forbidden by law, or is fraudulent, the consideration or object of it is said to be unlawful and the agreement itself is void, so that neither of the parties can enforce it against the other.

Then the section of the Evidence Act which shows that under these circumstances evidence was admissible to prove fraud, is s. 92, which, after stating that "no evidence of any oral agreement or statement shall be admitted as between the parties to any instrument in writing for the purpose of contradicting, varying, adding to, or subtracting from its terms," enacts in the first proviso that any fact "may be proved for the purpose of invalidating any document on the ground of fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party," and so on.

It is clear, therefore, that the transaction, which is found by the Subordinate Judge to have been entered into, is a fraudulent transaction, and that evidence of the fraud was admissible.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

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