APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Stone.

MARAPPUREDDIGARI SAYAMMA AND ANOTHER (DEFENDANTS 1 AND 2), APPELLANTS,

v.

R. VENKATA REDDI AND FOUR OTHERS (PLAINTIFF AND DEFENDANTS 3 TO 6), RESPONDENTS.*

1931, March 4.

Indian Evidence Act (I of 1872), sec. 92, proviso (1)— Principles governing the application of.

Section 92, proviso (1) of the Indian Evidence Act (I of 1872) does not empower a plaintiff suing on an unreformed and unambiguous deed to lead evidence to shew that by a mistake a term has been omitted from the deed, unless the mistake is of such a nature as would found a claim for rectification or cancellation of the deed, and in such a case the evidence will be tested by the same standards and the claim will be open to the same defences as though the action claimed rectification or cancellation.

One test which equity applies in a suit for rectification is "Is the proof of error clear and conclusive?" One defence equity allows is laches. Equity will not relieve him who tarries on the way. One bias equity always shews in such matters, viz., a bias in favour of the evidence given by the other party to the instrument; that is to say the burden of proof lies heavily on the person seeking rectification.

APPEAL against the decree of the Court of the Subordinate Judge of Chittoor in Original Suit No. 54 of 1926.

A. Krishnaswami Ayyar (*Advocate-General*), with him *C. Rangaswami Ayyangar* for appellants.

V. Ramadoss for first respondent.

The JUDGMENT of the Court was delivered by

STONE J.—This appeal raises a short point, viz., whether the deed of mortgage, dated 4th January 1917, STONE J.

* Appeal No. 142 of 1929.

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in favour of one Chinnayya Chettigaru provides for interest on the capital sum of Rs. 6,500 at the rate of Rs. 2 per month on the Rs. 6,500 or at the rate of Rs. 2 per centum per month. The said mortgage was attached by the decree-holder in Execution Petition No. 2 of 1925 and the plaintiff in this present action is the receiver therein.

The plaint makes no claim for rectification of this instrument, and issue 2 expressly raises the question whether the plaintiff is entitled to recover under this deed interest at the rate of Rs. 2 per cent per month without rectification. Issue 1 appears to raise the question whether as a matter of construction this deed reserves to the mortgagee interest at the rate of Rs. 2 per cent per month or at the rate of Rs. 2 per month. Why the plaintiff declined to ask for rectification can only be a matter of speculation. In fact he did not, and proceeded to claim on the footing of an unrectified deed the same sum as would have been due had he claimed rectification and had succeeded in that claim.

It is not suggested that sections 95, 96, 97, or 98 of the Evidence Act apply. It is not therefore a case of construing a document contrary to its apparent meaning. If evidence can be given to vary this document it can only be because of the first proviso to section 92 of the Evidence Act. This proviso permits the proof of a mistake which would entitle the party to a decree or order relating to the document or which would invalidate the document.

Does section 92, proviso 1, apply? We conceive that it only applies if there be such mistake as would entitle the party alleging the mistake to a decree or order rectifying or cancelling the document. Proviso 1 thus, on this point, permits mistake to be proved, but when proved it has the same effect as in English law. What is that effect?

It is clear that unilateral mistake (not amounting to fraud, legal or equitable) is not a ground for rectification, and would, therefore, if proved, not entitle the party alleging it to a decree, or order rectifying, or cancelling the document; see *United States* v. *Motor Trucks, Ltd.*(1) and *May* v. *Platt*(2).

The common law is impatient even of mutual mistake save when the contract has not attached and the mistake shows absence of consensus.

Equity, however, relieves against mutual mistake upon equitable principles. But this is an equitable remedy or defence, and is available to a plaintiff where the equitable remedy of rectification or cancellation is sought, and to a defendant against whom an equitable remedy (e.g., specific performance) is sought. This is a distinction which exists in India as in England. It is borne of the fact that equitable remedies raise equitable defences and have equitable characteristics Thus it is a defence to a suit claiming an equitable remedy that the plaintiff has been guilty of laches. This defence is unknown in the common law. If, therefore, the remedy sought is equitable, it is open to equitable defences; if not, it is not so open.

It is apparent, therefore, that it is not being merely technical to enquire, is the remedy sought in fact rectification or not? Let it be conceded that in the same action the plaintiff can ask for rectification and consequential relief; is it a mere technicality that he should ask for rectification before he can get relief on the basis of a reformed deed? What is the date from which his remedy commences? Is it the date of the deed and of the mistake, or is it the date of the failure to meet some obligation under the deed and, if the latter, what obligation? Is it the obligation to be found in the

(1) [1924] A.C. 196, 200. (2) [1900] 1 Ch. 616, 623.

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reformed or the unreformed deed? To these questions we think there can only be one answer. Whether the pleadings and claim are viewed strictly or loosely, a plaintiff who claims more than the unreformed deed gives him is claiming on the footing of a rectified deed; and if the Court allows his claim, it allows it on that basis, that is, in effect, it rectifies the deed. It does not, nor can it, let in a parol variation.

If what is in essence sought is rectification, it is manifest that the same tests and the same defences should be applied as would be applied if the plaintiff did what strictly he should do, viz., claim rectification and consequential relief.

Reliance was placed upon *Mahadeva Aiyer* v. *Gopala Aiyar*(1), *Rangasami* v. *Souri*(2), *Chinna Mallayya* v. *Veeriah*(3) and *Baluswami Aiyar* v. *Lakshmana Aiyar*(4) as showing that evidence could be given to prove mistake although no rectification be sought. In *Rangasami* v. *Souri*(2) and *Baluswami Aiyar* v. *Lakshmana Aiyar* (4) the mistake was alleged by way of defence. *Mahadeva Aiyer* v. *Gopala Aiyar*(1) purports to follow *Karuppa Goundan* alias *Thoppala Goundan* v. *Periathambi Goundan*(5). *Karuppa Goundan* alias *Thoppala Goundan* v. *Periathambi Goundan*(5) was a case where the error was by way of misdescription. It is a case similar to *Alexander's Settlement, In re*(6), where PARKER J. (as he then was) treated the use of the word "male" in "tail male" as a misdescription. In *Karuppa Goundan* alias *Thoppala Goundan* v. *Periathambi Goundan*(5), the evidence was let in under the provisions of sections 95 and 97 of the Evidence Act. It is thus an entirely different case from this. It is a case where the deed cannot be related precisely to existing facts. *Chinna Mallayya* v. *Veeriah*(3)

(1) (1910) I.L.R. 34 Mad. 51.
(2) (1915) I.L.R. 39 Mad. 792.
(3) (1915) 3 L.W. 551.
(4) (1921) I.L.R. 44 Mad. 605 (F.B.).
(5) (1907) I.L.R. 30 Mad. 397.
(6) [1910] 2 Ch. 235, 238.

purports to follow *Mahadeva Aiyer* v. *Gopala Aiyar*(1), though a reference is there made to the first proviso to section 92. We are of the opinion that that proviso does not empower a plaintiff suing on an unreformed and registered and unambiguous deed to lead evidence to show that by a mistake a term has been omitted from the deed, unless the mistake is such a one as would found a claim for rectification or cancellation, and in such case the evidence will be tested by the same standards and the claim will be open to the same defences as though the action claimed rectification.

One test which equity applies in a suit for rectification is, "Is the proof of error clear and conclusive?" One defence equity allows is laches. Equity will not relieve him who tarries on the way. One bias equity always shows in such matters, viz., a bias in favour of the evidence given by the other party to the instrument; that is to say the burden of proof lies heavily on the person seeking rectification.

Keeping the above principles in mind, how does the matter on the evidence stand? The deed is dated 4th January 1917. The plaint is dated 29th October 1926. During all those years this mistake lay dormant though it relates to interest. The parties who are supposed to have agreed to something other than that expressed in the writing are C on the one side and M.S, M.M. on the other side. C does not give evidence. M.S. gives evidence to the effect that the interest agreed to was Rs. 2 per annum (not per month) on Rs. 6,500. She does not appear to have been asked a single question as to whether the Rs. 2 per month on the Rs. 6,500 was an error. The only answer having any bearing on this point in cross-examination is: "I did not offer to write for Rs. 2 per cent interest because the previous rate was

(1) (1910) I.L.R. 34 Mad. 51.

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Rs. 3-8-0 per cent." That obviously does not touch the point which the plaintiff had to establish, viz., that what had been agreed was Rs. 2 per cent and what was written was a mistake. The question of mistake was never put to the defendant. The terms of the alleged agreement were never put to her. The explanation given for not calling C was that he was ill on and off for four months. "He recovers and then falls ill." No reason is offered why this witness could not have been examined on commission as was another witness to this matter. Two witnesses remain to be considered, P.W. 1 and P.W. 3. P.W. 1 is the person who wrote Exhibit A. He says he left out the words "per cent" by oversight. He states there was a dispute as regards interest when Exhibit A was executed. C suggested one rate, M.S. offered another and this counter-offer was not accepted. That evidence, so far as it goes, is to the effect that the parties were never *ad idem*. This witness then elaborates how this deed came into being. There was, it seems, a draft. P.W. 3 read out the draft, C., M.S., and M.M. amongst others being present. P.W. 1 wrote down the deed from this dictation and having written it read it over, there being present *inter alia* C (a moneylender), M.S. and M.M. It is not suggested that anything was read out other than appears now in the deed. It is not explained, how a term that was not agreed, viz., the term as to interest, could be in the draft or could be read out of the draft without comment being made.

P.W. 3 prepared and read out the draft. Where is this draft? It is not produced. This witness says he asked C's son for this draft on 4th September 1928, i.e., on the day he first gave evidence; eleven years after the deed was prepared; nearly two years after the suit was instituted. This vital document had apparently never before been enquired about. When asked for, it was found to be missing. This witness eleven years

after the event pretends to remember the exact words he had written in the draft. A better example of the importance of excluding oral evidence to vary a written document can hardly be given than this witness's evidence at page 77. Never before this day on which he gave evidence, it appears, had this witness been asked what the correct rate was; but when asked he says, "I thought within myself that I had dictated according to the draft and the writer might have written wrongly." This, of course, amounts to nothing at all. The writer might have written wrongly or he might have written correctly.

There remain the circumstances that during the whole period sums were received from the mortgagor and credited in each case to capital; that no clear cut demand for the interest alleged, viz., Rs. 2 per cent was ever made in all the eleven years.

It is urged that the terms as they stand are so unusual as to show that the document cannot mean what it says. That is not in our opinion any ground for adding terms to an unambiguous deed. We do not even find the bargain to be either absurd or unlikely. These ladies were merely coming forward to offer a security for another's debt. These are, however, irrelevant considerations. It is obviously no ground for finding mutual mistake that the bargain evidenced is one-sided. At most that would show either unilateral mistake or fraud. Fraud is not suggested and unilateral mistake leads to no relief. The decree of the lower Court is modified in accordance with the above findings. Plaintiff will have from and pay to first and second defendants proportionate costs in both Courts. Time for redemption extended up to the last day before vacation of the lower Court.

G.R.