PRIVY COUNCIL.

J.C.*
1935,
December 6.

TYAGARAJA MUDALIYAR AND ANOTHER,
APPELLANTS,

v.

VEDATHANNI, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Indian Evidence Act (I of 1872), ss. 91 and 92—Oral evidence that written agreement was not intended to be acted on—Whether admissible.

In a suit by V for maintenance, oral evidence was given to prove that a written agreement signed by her, providing, *inter alia*, for her maintenance, was not binding on her as she was induced to sign the document on the representation that it would not be acted upon, but was intended to be used solely as an admission of the joint status of the family.

Held, that the evidence was admissible.

Section 91 of the Indian Evidence Act only excludes oral evidence as to the terms of a written contract and does not preclude a party from giving oral evidence that the document was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence of some other matter. Section 92 only excludes oral evidence to vary the terms of a written contract and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document.

Pym v. *Campbell*, (1856) 6 EL. & BL. 370; 119 E.R. 903, *Mottayappan* v. *Palani Goundan*, (1913) I.L.R. 38 Mad. 226, and *Pertap Chunder Ghose* v. *Mohendranath Purkait*, (1889) L.R. 16 I.A. 233; I.L.R. 17 Cal. 291, referred to.

APPEAL (No. 13 of 1934) from a judgment of the High Court (March 17, 1932) which affirmed

* *Present*: Lord THANKERTON, Lord ALNESS and SIR JOHN WALLIS.

a judgment of the Subordinate Judge of Negapatam (February 14, 1929).

The facts are stated in the judgment of the Judicial Committee.

The material terms of the deed in question were as follows :

"Deed of release executed on 28th December 1912 by Somasundara Mudaliyar, son of Vadapathimangalam Tyagaraja Mudaliyar, and Vedathanni, widow of the deceased Ramalinga Mudaliyar, younger brother of the aforesaid person, both residing in Kumara Kovil Street, Tiruvarur.

Ramalinga Mudaliyar, younger brother of Somasundara Mudaliyar and husband of Vedathanni of us, had been living as a member of one and the same undivided family and died without issue on 23rd December of the current year, and in these circumstances yourself and myself made an arrangement amicably to the effect that the gold jewels, silver jewels, silver vessels, bureau, etc., *samans* (articles) which are in the possession of Vedathanni of us, which are of the value of Rs. 17,000 (rupees seventeen thousand) and which are described in Schedule A annexed hereto shall be taken by her from this day onward with powers to alienate them according to her will and pleasure and that, at the time when it is inconvenient for Vedathanni of us to live along with Somasundara Mudaliyar as a member of one and the same family, Vedathanni shall during her lifetime enjoy the income of the lands, item 1 described in Schedule B annexed hereto, and shall during her lifetime live in house item 2 of Schedule B ; and Vedathanni has agreed (to the

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terms) as stated by the said Somasundara Mudaliyar and accepted those terms ; and so Vedathanni of us has hereby relinquished in favour of Somasundara Mudaliyar her right to maintenance as against Somasundara Mudaliyar. The arrangement relating to the enjoyment of the aforesaid properties and house in Schedule B shall take effect at the time when it is inconvenient for Vedathanni to live along with Somasundara Mudaliyar as a member of one and the same family and when she is willing to go (and live) separately. To this effect is the deed of release executed by us, viz., (i) Somasundara Mudaliyar, aged 42, Muthanmiar, Saivite, miras, and (ii) Vedathanni, aged 25, of the said caste and sect, housewife, with consent."

De Gruyther K.C. and *Subba Row* for appellants.—Unless the evidence can be brought within the terms of the Indian Evidence Act, it is inadmissible. Resort may not be had to the English law, *Balkishen Das* v. *W. F. Legge*(1). The evidence does contradict, vary, add to and subtract from the deed. The case does not fall within either proviso 1 or 3 of section 92. The deed cannot be treated as non-existent. There is no real resemblance between *Pertap Chunder Ghose* v. *Mohendranath Purkait*(2) and the present case. Here the widow consented to sign the document knowing what the terms were. It was held in *Pertap Chunder Ghose* v. *Mohendranath Purkait*(2) that oral evidence cannot be given to show the document was not intended to be a mortgage. Direct evidence cannot be given to show the intention of the parties in regard to the terms of a document. *Baijnath Singh* v. *Hajee Vally Mahammed Hajee Abba*(3) does not support the contention that oral evidence as in the present case is admissible, for there was no question of oral evidence but correspondence relating to the document. *G. Ruthna* v. *K. Arumuga*(4), which is against me, was decided before the Evidence Act came into force. *Lachman Das* v. *Ram*

(1) (1899) L.R. 27 I.A. 58 ; I.L.R. 22 All. 149.
(2) (1889) L.R. 16 I.A. 233 ; I.L.R. 17 Cal. 291.
(3) (1924) I.L.R. 3 Rang. 106 (P.C.). (4) (1872) 7 M.H.C.R. 189.

Prasad(1), in which ASHWORTH J. disapproved of the dictum in Amir Ali's Commentary on the Evidence Act, is in my favour. Benami transactions stand on a different footing.

[Reference was made to the following cases: *Navalbai* v. *Sivubai*(2), *Appa Dhond* v. *Babaji Krishnaji* (3), *Mottayappan* v. *Palani Goundan*(4), *Tsang Chuen* v. *Li Po Kwai*(5) and *Jibun Nissa* v. *Asgar Ali* (6).]

Dunne K.C. and *Sidney Smith* for respondent.—On the decision of the Courts below it was established that, if the contents of a document are not intended to be operative at all, there is no contract and the case does not come within the purview of section 92 of the Evidence Act. It is difficult to establish that what is written was never intended to come into force, but, if it is established, the case does not fall under section 92. Here there are concurrent findings that the lady's statement is true that the document was not intended to be operative. There was no claim by her for jewels or maintenance. The document was brought to her. The reference in the document to jewels and maintenance was padding for the admission of status.

[In addition to the cases referred to by the appellant, reference was made to *Ranga Ayyar* v. *Srinivasa Ayyangar*(7).]

De Gruyther K.C. replied.

The JUDGMENT of their Lordships was delivered by SIR JOHN WALLIS.—The plaintiff Vedathanni, widow of the late Ramalinga Mudaliyar, who died without issue on 23rd December 1912, instituted this suit on 25th July 1925, in the Court of the Subordinate Judge of Negapatam, against the two widows of T. Somasundara Mudaliyar, her husband's brother, who had survived him, impleading also the minor third defendant who had been adopted by the junior widow on 1st July 1925, and defendants 4 and 5 who had been

(1) (1927) I.L.R. 49 All. 680.
(2) (1906) 8 Bom. L.R. 761.
(3) (1921) I.L.R. 46 Bom. 85.
(4) (1913) I.L.R. 38 Mad. 226.
(5) [1932] A.C. 715.
(6) (1890) I.L.R. 17 Cal. 937 (P.C.).
(7) (1897) I.L.R. 21 Mad. 56.

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appointed receivers of the family properties in the suit instituted by the first defendant disputing the adoption. The plaintiff claimed to recover arrears of maintenance from 1st January 1914, when she began to live separately from her husband's family, at the rate of Rs. 10,000 a year. It was stated in the plaint that the ante-adoption deed executed on behalf of the minor third defendant by his natural father on 21st June 1925 in favour of the adopting widow had made a provision for the plaintiff's maintenance which would work out at Rs. 10,000 a year, and in the interests of peace she was willing to accept this sum although it was much below what would be legitimately due to her.

It was alleged in the plaint that the two brothers, Somasundara and Ramalinga Mudaliyar, were members of an undivided Hindu family and owned extensive movable and immovable properties in the Tanjore District of the approximate value of about 50 lakhs (Rs. 50,00,000), but had been living separately and enjoying the said lands in separate portions; and that in consequence, on Ramalinga's death, Somasundara, the surviving brother, feeling nervous as to the possibility of his widow, the plaintiff, setting up the case that the brothers had separated and that the plaintiff was accordingly entitled to a widow's estate in one half of the family properties, was anxious that a document should be executed evidencing the undivided status of the family. With this object, a document was executed on 28th December 1912 by the plaintiff and by Somasundara affirming the undivided status of the family and purporting to make provision for the plaintiff's

maintenance. It was, however, distinctly understood that this document was not to be the final contract for the plaintiff's maintenance but was solely intended as a voucher establishing the joint undivided nature of the family, it being agreed that the plaintiff's claim for maintenance on a scale commensurate with the position and status of the family was to be left over for future settlement at leisure. Consequently the provision for maintenance in the deed was never given effect to or acted on by the parties, and Somasundara continued in possession and enjoyment of all the family properties until his death on 17th January 1925. The plaintiff had lived separately from her husband's family from the beginning of 1914 (being maintained, as appeared from the evidence, by her own family) and had repeatedly asked Somasundara to make due provision for her maintenance. He had repeatedly promised to do so but died without having made any such provision or paid her anything for her maintenance.

The first defendant did not file any written statement, and the second defendant, in a joint written statement filed on behalf of herself and the minor third defendant, put the plaintiff to the proof of the allegations in the plaint. She stated that she was informed and believed that for several years past the plaintiff had not received any income from the lands set apart for her maintenance, and was therefore entitled to the mesne profits in respect of past maintenance. As regards the future, she admitted the execution of the ante-adoption deed making provision for the plaintiff, and, as the matter concerned the estate

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of the minor third defendant, she left the Court to fix such maintenance as might be deemed reasonable.

The family admittedly owned 1,500 velis of wet and dry land of the approximate value of no less than fifty lakhs of rupees which they had apparently acquired in the course of their money-lending business by buying up the holdings of ryots with whom the land revenue had been temporarily settled under the ryotwari system prevailing in Tanjore. They also owned several lakhs of rupees invested in the money-lending business.

Some time before the death of the plaintiff's husband, the two brothers had divided their lands and begun to live separately, and according to the evidence the income from the lands in the husband's possession amounted to Rs. 70,000, all of which he spent. These facts were sufficient to raise a *prima facie* case of separation in which case his widow would be entitled for life to one-half of the family properties.

On his death in December 1912, his elder brother, Somasundara, took control, had the body removed to his own house for funeral rites, and locked up the other house in which there was a box containing jewels of which the widow had the key. The widow, who went to live with him, disclaimed any intention of setting up a case of separation ; but there was always the possibility that her relations might persuade her to change her mind ; and at his request she agreed to sign a document evidencing the undivided status of the family. He proceeded at once to have a deed of

settlement drawn up by which from that day onwards she was to have the jewels in her possession as set out in the schedule A with full powers of alienation ; and as soon as she decided to live apart from him, she was to enjoy for her life the income of the lands and to live in the house mentioned in schedule B. In consideration of this provision she relinquished her claims for maintenance. The annual income of the lands set apart for her was between Rs. 2,000 and Rs. 2,500 only, Rs. 200 a month ; and, as regards the house in Bazaar Street, Tiruvarur, the plaintiff stated in her evidence that people of her status and condition of life could not live there at all.

There are concurrent findings of the Courts below that when this document was presented to her three days after her husband's death, she refused to sign it, and was only induced to do so two days later by representations that it would not be acted on, and was only intended to provide evidence of the undivided status of the family. It was held by both Courts on these facts that there was no agreement and therefore no contract.

There can be little doubt that if a suit had been brought in time, this agreement might have been set aside on the ground of fraud or undue influence. What happened, however, was that the plaintiff retained the jewels which had all along been in her possession and that no effect was given to the provision for her maintenance. A year after her husband's death she went to live with her own people and has since been maintained by them. Somasundara died on 17th January 1925 ; and his junior widow, the second defendant,

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executed the ante-adoption deed in which provision was made for the plaintiff's maintenance on the following 6th June and adopted the minor third defendant on 7th July; and on 21st December the plaintiff filed the present suit to recover arrears of maintenance at the rate already mentioned from 1st January 1914, when she ceased to live with her husband's family. As the arrears were claimed for less than twelve years the suit was in time.

The main question arising in this appeal is whether, as contended by the appellants, under the provisions of sections 91 and 92 of the Indian Evidence Act, oral evidence was inadmissible to establish that it had been agreed that the provisions for the plaintiff's maintenance were not to be acted on, as the document was only intended to create evidence of the undivided status of the family. The Madras High Court, from which this appeal comes, has repeatedly held such evidence to be admissible, and decisions to the same effect of the High Courts at Calcutta, Patna and Rangoon have been cited. There is, however, one decision of the Allahabad High Court the other way. In support of the admissibility of this evidence, the respondents have also cited the decision of this Board in *Pertap Chunder Ghose* v. *Mohendranath Purkait*(1) which came before Lord WATSON, Sir BARNES PEACOCK and Sir RICHARD COUCH. That was a suit by a zamindar to eject tenants under a kabuliyat which they had executed; and their Lordships, in a judgment dismissing the appeal which was delivered by Sir RICHARD COUCH, observed that

(1) (1889) L.R. 16 I.A. 233; I.L.R. 17 Cal. 291.

"if there is any stipulation in the kabuliyat which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the kabuliyat is not the real agreement between the parties, and the plaintiff cannot sue upon it."

There was a finding that, when the defendants objected to signing the kabuliyat on account of the stipulation entitling the zamindar to take *khas* possession at any time, they were told that it would not be acted on; and, as the experienced Counsel for the appellants, who contended that the learned Judges of the High Court were not justified in holding on that finding that the contracting parties were not of one mind as to the agreement, had not submitted that the oral evidence on which the finding was based was inadmissible to show that there was no agreement between the parties, it was unnecessary to deal with this question in the judgment of the Board. It may, however, in their Lordships' opinion, be safely inferred that Sir RICHARD COUCH and Sir BARNES PEACOCK were well acquainted with the provisions of the Indian Evidence Act and saw no objection to the reception of oral evidence to show that there was no agreement and therefore no contract.

The two relevant sections are as follows, the exceptions and explanation in section 91 being omitted as having no bearing on the question:

"S. 91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

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"S. 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts."

There being no proviso in either section making oral evidence to show that there was no

agreement and therefore no contract inadmissible, their Lordships will consider, in the first place, whether there is anything in the sections themselves to render it inadmissible, and, secondly, whether the terms of proviso 1 to section 92 are not wide enough to make it admissible under that proviso.

When a contract has been reduced to the form of a document, section 91 excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself unless otherwise expressly provided in the Act, and section 92 excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from such terms. Section 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. The objection must therefore be based on section 91 which only excludes oral evidence as to the *terms* of a written contract. Clearly under that section, a defendant, sued, as in the present case, upon a written contract purporting to be signed by him, could not be precluded in disproof of such agreement from giving oral evidence that his signature was a forgery. In their Lordships' opinion oral evidence in disproof of the agreement that, as in *Pym* v. *Campbell*(1), the signed document was not to operate as an agreement until a specified condition was fulfilled, or that, as in the present case, the document was never intended to operate as an agreement but was brought into existence solely

(1) (1856) 6 EL. & BL. 370; 119 E.R. 903.

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for the purpose of creating evidence of some other matter, stands exactly on the same footing as evidence that the defendant's signature was forged.

In *Pym* v. *Campbell*(1) the defendants were sued upon a written contract to purchase an invention, and Lord CAMPBELL had ruled at the trial that on the plea denying the agreement, oral evidence was admissible that it had been agreed between the parties before they signed that there was to be no agreement until the invention was approved by A. In his judgment discharging the rule *nisi* for a new trial, Lord CAMPBELL said :

"It was proved in the most satisfactory manner that before the paper was signed, it was explained to the plaintiff that the defendants did not intend the paper to be an agreement till A had been consulted and found to approve of the invention ; and that the paper was signed before he was seen only because it was not convenient for the defendants to remain. The plaintiff assented to this, and received the writing on those terms. That being proved, there was no agreement."

ERLE J., who gave judgment first, had dealt more fully with this question.

"The point made is that there is a written agreement, absolute on the face of it, and that evidence was admitted to show that it was conditional: and if that had been so it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence . . . but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of

(1) (1856) 6 EL. & BL. 370; 119 E.R. 903.

an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

The Indian Legislature has thought well to give statutory effect to the decision in *Pym* v. *Campbell*(1) in proviso 3 to section 92 :

"The existence of any separate oral agreement (constituting a condition precedent to the attaching of any obligation under any such contract) . . . may be proved";

and in *Mottayappan* v. *Palani Goundan*(2) BENSON and SUNDARA AYYAR JJ. have expressed the opinion that oral evidence to show that a document was never intended to operate according to its terms, but was brought into existence, as in the present case, solely for the purpose of creating evidence about some other matter is admissible under proviso 1 to section 92, "any fact may be proved which would invalidate any document". This may well be so, but in their Lordships' opinion, even if there were no provisos to either section, the result in the present case would be the same, because there is nothing in either section to exclude oral evidence that there was no agreement between the parties and therefore no contract.

It was also contended that the case came within section 92, because of the provision recognising the widow's title to the jewels in her possession. The High Court have found that this provision was not intended to operate as an agreement, but was introduced to give verisimilitude to the document, it being usual to make such a provision in agreements for a widow's maintenance. Further, it was held by this Board in the passage already cited from the judgment in

(1) (1856) 6 EL. & BL. 370; 119 E.R. 903.
(2) (1913) I.L.R. 38 Mad. 226.

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Pertap Chunder Ghose v. *Mohendranath Purkait*(1) that if the defendants were told that any stipulation in the agreement would not be enforced, they could not be held to have assented to it. Consequently the document was not the real agreement between the parties, and the plaintiff could not sue upon it.

In their Lordships' opinion both the lower Courts were right in finding on the oral evidence in this case that there was no contract, and they will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitor for appellants.—*Harold Shephard.*

Solicitors for respondent.—*Hy. S. L. Polak & Co.*

C.S.S.

(1) (1889) L.R. 16 I.A. 233; I.L.R. 17 Cal. 291.