

This being so, the decree of the Court below was wrong, and the appellants should have obtained the relief they sought, not only against Mata Prasad, but against his deceased partner Durga Prasad. We set aside the decree of the Court below and decree the plaintiffs' claim and also this appeal with costs.

Appeal decreed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MULCHAND AND ANOTHER (DEFENDANTS) v. MADHO RAM (PLAINTIFF).*

Evidence—Exclusion of evidence of oral agreement—Act I of 1872 (Evidence Act), s. 92—"Between the parties."

The words in s. 92 of the Evidence Act (I of 1872) "between the parties to any such instrument" refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favor a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related.

M. conveyed certain houses and premises to plaintiff and defendant jointly by a sale-deed. Plaintiff sued defendant for ejection from the premises, alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the deed. *Held* that s. 92 of the Evidence Act will not preclude plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers.

THE facts of this case were as follow:—On the 13th March, 1877, a deed of sale of certain houses and other premises was executed by one Murlidhar, and purported to be in favour of two brothers, named Ganga Prasad and Mulchand, jointly, for Rs. 1,000. The deed was registered on the 14th March, 1877, and one of the endorsements made at the time of registration set forth that Murlidhar, the vendor, acknowledged that Rs. 200 had been previously paid, and that the balance of Rs. 800 had now been paid to him, before the Sub-Registrar, by both Ganga Prasad and Mulchand.

On the 6th January, 1886, the present suit was brought by Ganga Prasad against Mulchand, the plaintiff, praying in substance

* Second Appeal No. 2151 of 1886 from a decree of C. W. P. Watts, Esq., District Judge of Moradabad, dated the 6th August, 1886, confirming a decree of Maulvi Zain-ul-Abdin Khan, Subordinate Judge of Moradabad, dated the 23rd March, 1886.

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for a declaration that he alone was the real purchaser from Murli-dhar under the deed of the 13th March, 1877, and for the ejectment of Mulchand and his son Babu Ram from a portion of the premises of which they had some years previously obtained possession by his license, but to which they now asserted a proprietary title. The plaintiff alleged that although Mulchand's name also was entered in the deed, the whole of the purchase-money had come out of his (the plaintiff's) pocket; that he alone had for some time subsequent to the sale been in possession of the property in suit; that he had subsequently lent a sitting-room to the defendants, and that when he asked them to vacate it for the purpose of having certain part of the premises rebuilt, they refused to do so, and obstructed him in the rebuilding. In defence, the defendants pleaded that Mulchand was in fact, and not merely nominally, a purchaser under the deed of the 13th March, 1877, that he had paid Rs. 500 of the purchase-money out of his own pocket, and that he had been in proprietary possession of the premises in his occupation from the date of purchase. Pending the suit the plaintiff died, and his son Madho Ram was brought on the record in his place.

The Court of first instance (Subordinate Judge of Moradabad) found that the plaintiff's allegations were established by the evidence, and decreed the claim. On appeal, the District Judge of Moradabad affirmed the Subordinate Judge's decree, relying mainly if not wholly upon the fact, which he apparently held to be established, that the plaintiff had paid the whole amount of the consideration for the sale.

From the lower appellate Court's decree the defendants appealed to the High Court.

Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellants.

Babu Jogindro Nath Chaudhri, for the respondent.

BRODHURST and TYRRELL, JJ.—We had heard this appeal out on the merits on both sides, and were proceeding to remand some issues or questions of fact to the lower appellate Court, which had determined the single question of payment of the sale price only, when a legal plea in bar of the action was raised by the learned

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vakil for the defendants. It is based on the rule of s. 92 of the Indian Evidence Act, which excludes evidence of an oral agreement as between the parties to any instrument of the kind contemplated in that section, for the purpose of contradicting, varying, adding to, or subtracting from its terms. It was contended that the inquiries which we propose to make will involve the consideration of oral evidence, which may have the effect of varying the terms of the sale-deed under which the plaintiff and defendants jointly acquired the premises in suit. We heard argument and gave careful consideration to this proposition, and we have had the advantage of conferring with the learned Chief Justice and our brother Straight on the point. We are of opinion that the answer to the learned Pandit's contention is to be found in the proper interpretation of the phrase, "as between the parties to any such instruments," the words "the parties" being rightly read to imply the persons who on one side and on the other came together to make the contract. In the case before us, the "parties" in this sense would be the vendor on the one part and the two vendees on the other part. "As between" the vendor and themselves, neither of the vendees would be heard to plead, or would be allowed to offer, oral evidence to show that both were not parties to the buying of his house. Neither vendees could resist the vendor's claim for the price, or for any other relief properly arising to him out of the contract, on a plea intended to show that one of the two was a nominal party only to the contract. Similarly one of the several obligors of a bond or bill of exchange would not be allowed in answer to the obligee's action on the joint instrument to maintain a plea that he was a surety only; except of course in a case where a money-lender made advances on the security of a joint and separate note, being well aware at the time that one of its makers was a surety only. In such a case, notwithstanding the form of the note, the surety has been allowed to plead, as an equitable defence and prove that he was known by the lender to be a surety when the note was made, and that without his consent, the principal had had time given to him by the lender. (See the cases cited in note 6, para. 1054, p. 1004, Taylor on Evidence vol., ii, ed. 1872.) Such a case as this would fall probably under proviso 1 to s. 92. But on the other hand, we think that this section would not apply to

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questions; like that of the present case, raised by the parties on one side *inter se*, and not affecting the other party to the contract, touching their relations to each other in the transaction. The evidence in this respect would be offered not to vary, contradict, add to or subtract from the terms of the vendees' joint liability under the contract of purchase and sale from their vendor, but only to show *as between themselves*, the two vendees to wit, which was the real purchaser, or rather whether Mulchand was not the trustee only of his brother Ganga Prasad. Analogously in the case of the promisors of a joint note, it is competent to one of them, who has had to pay the entire debt, to show in variation of the terms of the note, as against a co-promisor, that the payer was a surety only, and proving this to get a decree for indemnification against his co-promisor. If we were to give to the terms of s. 92 a more extended interpretation, and to read them as excluding the admission of oral evidence to vary the terms of an instrument as between the parties *on one side only* thereto, as much and in the same way as the section certainly excludes the admission of such evidence as between the parties on both sides to the instrument, we should have, we fear, to close our Courts to many applications, no matter how justly founded, for equitable relief in cases such as we noticed passingly above: cases between co-promisors, co-obligors, co-debtors of accommodation bills, and the like, in which our Courts daily interfere to relieve parties in variation or even in contradiction of the written terms of an instrument of contract, to which they were parties on the one side together.

Taking this view, we over-rule the contention of the appellants on this point, and we must dispose of the appeal of Mulchand on the merits. The Court of first instance on a review of all the evidence found, that he was not a real but was a nominal party only to the purchase of the house property in question, and it gave the plaintiff a decree. The lower appellate Court confirming this decision, has left several important issues undetermined. It has decided in uncertain terms, and on somewhat inconclusive grounds, that the sale price, Rs. 800, was found by Ganga Prasad, no part of the fund having been contributed, at the time of the sale at least, by Mulchand. But obviously this finding does not conclude the question. The brothers were apparently joint purchasers,

with joint interests, and the payment by one may have been for both, or may have been open to subsequent adjustment *inter se*. To enable us to decide whether Mulchand was a substantial party to the purchase or nominal only, whether he stands in the sale-deed as a beneficial owner, or merely as a trustee for Ganga Prasad, we must have findings on certain other questions, namely :—

1. If Mulchand had no substantial interest in the contract, why was he associated with Ganga Prasad, in the making, execution, and registration thereof?

2. At the date of the contract, were Ganga Prasad and Mulchand associated as joint in any respect, in living, in estate, or in particular business?

3. When did Mulchand get possession of any part of the premises?

4. In what way did he enter?

(a) By right in the ordinary course of things as beneficially interested?

(b) By license of Ganga Prasad or by trespass?

Ten days will be allowed for objections.

Issues remitted.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

DAWAN SINGH (DEFENDANT) *v.* MAHIP SINGH (PLAINTIFF).*

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*Defamation—Personal insult—Cause of action—Verbal abuse—special damage—
Witness—Privilege.*

The plaintiff was cited as a witness by one S. in a suit instituted by him against defendant. After plaintiff's evidence had been concluded, in which he stated that there was no enmity between him and defendant; the defendant was examined by the Court, and stated that there was enmity between him and plaintiff, and on the Court inquiring to know what was the cause of enmity, defendant used words conveying the meaning that plaintiff's descent was illegitimate.

Held by Brodhurst, J., that, under the circumstances, the statement complained of was made by defendant while deposing in the witness-box, and therefore absolutely privileged.

* First Appeal No. 2 of 1888 from an order of Maulvi Mohamed Said Khan, Subordinate Judge of Jaunpur, dated the 13th December, 1887.