1896

MAHABIR PERSHAD v. ADHIKARI KOER.

judgment of the Court below. They think that the possession has been adverse since the year 1843, the date of Dipa Koer's death; and they will, therefore, humbly advise Her Majesty that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for the appellants: Mr. *J. F. Watkins.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

C. B.

P. C. *
1896
May 8.

ALI KHAN BAHADUR (DEFENDANT) *v.* INDAR PARSHAD AND ANOTHER (PLAINTIFFS).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Onus of Proof—Proof of consideration for a registered mortgage—Income-tax returns—Evidence Act (I of 1872), sections 76, 77.

The defendant in a suit for money secured by registered mortgage to be paid by him to the plaintiff denied the consideration of which he had, before the Registering Officer, acknowledged the receipt. The original Court, which dismissed the suit, would not have decided in favour of the defendant, but for its having been shown, on an inspection of copies, officially certified, of income-tax returns made by the plaintiff, that he had not stated the interest *accruing on the mortgage as part of his income. This judgment was reversed* in appeal. The Judicial Commissioner was of opinion that the certified copies should not have been admitted in evidence, in reference to sections 76 and 77 of the Indian Evidence Act, I of 1872; and also that, assuming the false statement of income to have been made, it still remained unproved by the defendant that the acknowledged consideration had not been paid.

The judgment of the Appellate Court was affirmed by their Lordships, who concurred in the opinion that the returns, if the plaintiff had wrongly omitted to make a full return of income, would not have had any weight in changing the *onus* which lay upon the defendant of showing that no consideration had passed for this mortgage.

APPEAL from a decree (2nd February 1892) of the Judicial Commissioner, reversing a decree (7th December 1889) of the District Judge of Lucknow.

The appellant, who had a *wasika* allowance of Rs. 400 a month, being a descendant of the former royal family of Oudh, was sued by Kanhaiya Lal, a shrof in Lucknow, on the 14th of January 1889, for Rs. 46,000 principal, and Rs. 3,540 interest, due on a mortgage

* *Present:* Lords HOBHOUSE, MACNAGHTEN, MORRIS, and JAMES of HEREFORD, and Sir R. COUCH.

bond, dated the 6th February 1883, with future interest till payment, at Rs. 1-2 per cent. a month.

The defendant, by his written statement, admitted the execution of the mortgage, but denied the receipt of consideration. His explanation was that, being pressed with litigation by his relations, he had by arrangement with the plaintiff, who was his *karinda*, or agent for drawing his *wasika* allowance, allowed the sums so drawn to remain in the plaintiff's hand, and had besides deposited with him two sums, one of Rs. 14,000, the other of Rs. 20,300; and had executed the mortgage, of which the alleged consideration was, in reality, his, the defendant's, own money, with the object of making himself appear to be in debt. The only issue was whether the transaction was fictitious, or consideration had been given by the plaintiff. The evidence showed that on the 14th April 1882 a bond for Rs. 4,000, with interest at Rs. 1-8 a month, was executed and registered by the defendant in favour of the plaintiff; that on the 1st June 1882 a mortgage bond for Rs. 28,000, with interest at Rs. 1-2 a month, was executed, and on the 4th November 1882 a mortgage bond for Rs. 4,000 with interest at Rs. 1-2 a month. The mortgage now sued on was made up of an additional sum of Rs. 21,089 in cash, the above amounts being carried into the new security, and the old documents given up. The plaintiff denied that he had ever been the defendant's *karinda*, and averred that, although he had collected the allowance under the defendant's written authority, that was for his own protection. That the plaintiff had not entered the interest payable on the mortgage of 6th February 1883 in his application for revision of income-tax assessment of 19th October 1886, or in any other statement of his income under Act II of 1886, was, in cross-examination, admitted.

The District Judge, in giving judgment, remarked upon the plaintiff's books not having been regularly kept in the course of business, as it appeared to him, the balances being only made up monthly, so that the accounts did not appear to him to be corroborative evidence under section 34 of the Indian Evidence Act I of 1872; and observed that the evidence for the defence would be "inconclusive" but for the plaintiff's omission to enter the income derived from the loan of 1883 to the defendant, in the

1896

ALI KHAN BAHADUR v. INDAR PARSHAD.

returns made by him for the purpose of his being assessed to income-tax.

Therein he gave his income on general loans as Rs. 1,110 and on a bond from another person at Rs. 3,480 for the year ending 31st March 1886. He admitted that the interest payable on the defendant's bond was not included in the Rs. 1,110-9.

The argument for the plaintiff that after all he was assessed on an income of Rs. 10,000, and that the interest on the defendant's bond in suit would make up the amount, was not regarded by the Judge as of any force. The Commissioner's order, recording a total of Rs. 5,000 as derived from all the sources stated in the return, doubled the amount, and assessed him on Rs. 10,000, because the Commissioner doubted if all the sources of income had been disclosed.

The Judge was led by this to the belief that, if the bond from the defendant had been an actual, and not a fictitious, transaction, the plaintiff would not have failed to include it in his return, as the bond was registered, and his return might have been tested by enquiries made and have been found to be incorrect.

The Judicial Commissioner, on an appeal by the plaintiff, reversed the above judgment. After referring to the evidence, he added :—

There is one other, not unimportant, matter to which allusion should be made. In the Court below several copies of income-tax-papers were put in for defendant, the object being to show that in his income-tax returns the plaintiff had not included the income he received as interest on this bond, the suggestion being that it was not included because the bond was fictitious. The learned District Judge attached considerable importance to these papers, and apparently they turned the scale in his mind against plaintiff. On appeal it is contended that those papers being inadmissible in evidence, the Court below ought to have paid no attention to them. Assuming for the moment that they are admissible, I am of opinion that they are of no weight either way. Admittedly the plaintiff's income from the interest accruing on this bond is not to be found in these returns. But to call on this Court to infer from that fact that therefore the bond is fictitious is rather a strong demand. Unfortunately my own long experience in this country has taught me that (no doubt with many honourable exceptions) true returns of income assessable to income-tax under Part IV of the second Schedule of Act II of 1886, are but seldom made. In the present case the return made by plaintiff was undoubtedly incorrect, and was so considered by the income-tax officials who assessed him on double the income he had returned. Defendant now asks

that we should accept (and act on) as true a return which officials who had to deal with it treated as false. I cannot accept that proposition. To accept it would have the effect of giving a discharge from their bond debts to debtors, the interest accruing from whose bonds was not shown in their creditor's income-tax returns, and might impose on a Court of Justice the duty of requiring from income-tax officials information respecting matters which they are by law forbidden to disclose.

I am, however, of opinion that under the provisions of sections 76 and 77 of the Evidence Act, and of Rule 16 of the Rules (Notification No. 593 of February 5th, 1886), made by the Government of India in pursuance of the power given by section 38 of Act II of 1886, these income-tax papers were inadmissible in evidence and should not have been taken into consideration by the Court below."

The judgment concluded thus :—

" I would, therefore, allow this appeal, and reversing the decree of the District Court I would give a decree in favour of plaintiff-appellant in the terms of the prayer contained in his plaint with costs of both Courts. The decree should be drawn up in the manner prescribed in section 88 of the Transfer of Property Act, allowing interest at Rs. 1-2-0 per mensem up to the date of our decree, and interest at the rate of 6 per cent. per annum from date of decree up to date of realization, and defendant should be allowed six months from to-day to pay up the amount found due on account taken under section 88."

From the Judicial Commissioner's decree the defendant appealed. On the 19th April 1895 the names of his sons, Indar Parshad and Jagmohun Das, were ordered to be substituted on the record for his name, he having died on the 27th August 1894.

Mr. *J. D. Mayne*, for the appellant, argued that the Judicial Commissioner's decision was against the weight of the evidence, and that he was wrong in his opinion that the papers relating to the income-tax assessment, to which no objection had been taken in the Court of first instance, were inadmissible in evidence. It was also submitted that they did support the inferences drawn in that Court in favour of the defendant.

Mr. *T. H. Cowie*, *Q.C.*, and Mr. *C. W. Arathoon*, for the respondents, were not called upon.

Their Lordships' judgment was delivered by

LORD MORRIS.—In this case the plaintiff, one Kanhaiya Lal (the father of the respondents), who appears to have been a banker or money-lender, brought an action against the appellant

1896

ALI KHAN BAHADUR v. INDAR PARSHAD.

to recover the amount due to him, as he alleges, under a mortgage deed of the 6th February 1883, which was to be payable three years from the date of execution. The consideration for the mortgage was a sum of Rs. 46,000 advanced to the defendant. That sum included the amount due upon two bonds and a mortgage, and a further advance made by the plaintiff to the defendant. There is a provision, apparently for the protection of the lender, the plaintiff, that he should be continued receiver *of the rents; somewhat as in an English mortgage deed the mort*gagee sometimes reserves the right to appoint the agent, so that he may have the whip-hand. By way of showing that the transaction was a *bonâ fide* one, and intended to be acted upon by the plaintiff, that deed is registered and the borrower makes a declaration that he has received the amount. It is valueless if it can be gone behind in every case by an assertion that that which was stated at the time before the Registrar was untrue. The *onus* in this case appears clearly to lie on the defendant. It is not easy to understand how the question came to be discussed. In this country he would probably have to institute a suit to set aside the deed as fraudulent before he could be listened to on a plea impeaching it. But, on the assumption that he must prove his case, what proof has he given that it is a fraudulent fictitious deed, given for no consideration? There is nothing except his own statement, which is contrary to the statement he made before the Registrar. The motive assigned is a fraudulent one, namely, that being involved in litigation, not with his general creditors as far as can be seen, but merely with his wife and step-mother, and other relations, and in order to lead them to the conclusion that he was an embarrassed man, he executed these deeds for the purpose apparently of diminishing his income by showing that he was very largely indebted to the plaintiff. That is not a very meritorious way in which to initiate a case which seeks to set aside a deed as having been itself executed fraudulently. The appellant has really given no evidence that would have called for any answer from the plaintiff.

The plaintiff's case is very simple. He says that all these three transactions which were summed up in this mortgage bond of the 6th of February 1883 were for loans, and he gave evidence that

he had sold what in this country would be called securities for the purpose of obtaining the money; in order to hand it over to the defendant. There was some cross-examination as to the character of the books produced, but he did produce a day book in which there were entries of the sales of property belonging to the plaintiff which realised the very amounts which the plaintiff alleged he gave to the defendant.

Upon that state of facts the District Judge arrives at the conclusion that the defence would be inconclusive, as he terms it, but for a new element which is introduced into the case, by the allegation that the plaintiff had not debited himself in his return to the Government for income-tax in respect of the interest on these bonds, and that the bond in question was thus shown to be fictitious. The Judicial Commissioner of Oudh gave it as his experience that it is a very common thing in India (it is not certain that it is not a very common thing in other places as well as India), for persons not to make a full return of their income, running the chance of being surcharged if they are found out. It appears in this case that the Judicial Commissioner at once doubled the return that the plaintiff had made, on the assumption, probably, as a general rule, perhaps a safe one, that it is only a half return that persons make. That, of course, would be a very wrong thing on the part of the plaintiff, but it does not appear to their Lordships to have any weight in changing the *onus* which lay upon the defendant of showing that no consideration passed for this mortgage. Their Lordships adopt the judgment of the Judicial Commissioner, and will therefore humbly advise Her Majesty that this appeal should be dismissed.

The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondents: Mr. *J. F. Watkins.*

C. B.