1903
February 24.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.

SHAMSH-UL-JAHAN BEGAM AND ANOTHER (DEFENDANTS) *v.* AHMAD WALI KHAN (PLAINTIFF).*

Act No. I of 1872 *(Indian Evidence Act), section* 92—*Construction of document—Evidence of oral agreement not excluded.*

The plaintiff sued to recover money which he had been compelled to pay in virtue of a mortgage executed by his two half-sisters and himself. His claim was based on the plea that, though appearing in the bond as a co-obligor, he was in reality merely a surety. *Held* that evidence was admissible to show that the plaintiff executed the mortgage-bond as a surety only.

The plaintiff failed to prove that he was other than a principal, whereupon it was *held* that he was not entitled to recover anything from the defendants by way of contribution, the case upon which he came into Court being totally different from a suit for contribution. *Mul Chand* v. *Madho Ram* (1) followed.

THE suit out of which this appeal arose was brought by one Ahmad Wali Khan to recover a sum of Rs. 16,425 odd, being moneys paid by him to satisfy a mortgage of the 6th of October 1896, which was executed by the defendants Musammat Shamsh-ul-Jahan Begam and Kamar-ul-Jahan Begam and the plaintiff in favour of one Banarsi Prasad, the plaintiff's allegation being that he only joined in the mortgage as surety for the defendants. The defendants were half-sisters of the plaintiff, and the money in respect of which the mortgage was executed was admittedly borrowed for the defence of Sardar Wali Khan (the full brother of the defendants and half brother of the plaintiff), who was charged with and subsequently found guilty of murder. The Court of first instance (Subordinate Judge of Bareilly) decreed the plaintiff's claim, holding that the consideration-money of the mortgage had been received by the defendants alone and in no part by the plaintiff. From this decree the defendants appealed to the High Court.

Maulvi *Ghulam Mujtaba* (for whom Munshi *Gulzari Lal*), for the appellants.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This suit was brought by the plaintiff, Ahmad Wali Khan, to recover a sum of

* First Appeal No. 66 of 1901, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 19th of December, 1900.

(1) (1888) I. L. R., 10 All., 421.

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Rs. 16,425 odd, being the moneys paid by him to satisfy a mortgage of the 6th of October, 1896, which was executed by the defendants Musammats Shamsh-ul-Jahan Begam and Kamar-ul-Jahan Begam, and the plaintiff, in favour of one Banarsi Prasad, on the allegation that the plaintiff joined in the mortgage only as a surety for the defendants. The defendants are the half-sisters of the plaintiff, and the money in respect of which the mortgage was executed, was admittedly borrowed for the defence of Sardar Wali Khan (the full brother of the defendants and half-brother of the plaintiff), who was charged with, and subsequently found guilty of, murder. The Court below decreed the plaintiff's claim. The present appeal has now been preferred to this Court. The terms of the bond are very clear. It purports to be a mortgage by both the defendants and the plaintiff of shares in certain properties which belonged to them separately to secure a sum of Rs. 10,000 which was advanced by the mortgagee, one Banarsi Prasad, for the purposes we have named. From the endorsement on the bond it appears that it was presented for registration by the plaintiff; and it further appears that the plaintiff admitted before the Sub-Registrar the execution and completion of the instrument, and requested that it might be verified by the Musammats defendants at their residence, and "that the money would be taken in the presence of the defendants."

It appears that an earlier suit was instituted by the defendants against the plaintiff for a declaration that the bond in question was a fabricated document to which the defendants were no parties, and that they had not received any consideration for the execution of the bond. The Court of first instance decreed the plaintiff's claim in that suit, but upon appeal to this Court the decree of the lower Court was set aside and the suit of the plaintiffs dismissed. The plaintiff has now instituted the present suit, the object being to throw all the liability for the mortgage debt in question upon his half-sisters. He does not merely seek contribution, but sets up the case that he executed the bond merely as surety for them, and in no other capacity. The learned Subordinate Judge has accepted the case put forward by the plaintiff and has decreed his claim. He

apparently has based his decision largely, if not entirely, upon the fact that the money advanced by Banarsi Prasad was actually paid in the presence of the Sub-Registrar to the defendants. He says: — "The evidence adduced by the plaintiff shows that the amount of Rs. 9,900 was borrowed from Banarsi Prasad under the deed of the 6th October, 1896, and that this whole amount was paid at the time of its registration to the defendants;" and later on he gives, as the ground for his finding that the defendants were solely liable for this debt, the following: — "After a consideration of the evidence on the record, I am inclined to think that the defendants received the whole amount of Rs. 9,900 at the time of registration of the deed sued upon. Subsequent return by them of the amount to the plaintiff is not alleged. I therefore hold that consideration of the mortgage deed to the extent of Rs. 9,900 had passed to the defendants." Now if there is any fact clear in the case, it is that the money was borrowed for the purposes of the defence of Sardar Wali Khan, and was not intended to go into the pockets of either the plaintiff or the defendants; that the money was, as a matter of fact, handed over to the defendants in the presence of the Sub-Registrar and the plaintiff is true; but this was done at the instance of the plaintiff himself, who, according to the registration endorsement upon the bond, requested that the money might be paid in the presence of the defendants. It is to be observed in this endorsement that it is not requested that the money should be paid to the defendants, but merely that it should be paid in their presence. From this we gather that the intention was not that it should be paid to the defendants for their own personal use, but simply that the mortgagee should have the protection of having it paid in the presence of all the mortgagors.

We were at first disposed to think that the plaintiff could not give evidence at variance with the express language of the bond to prove that he was surety merely; but having regard to the decision in the case of *Mul Chand* v. *Madho Ram* (1), we are disposed to think that such evidence is admissible, notwithstanding the provisions of section 92 of the Indian Evidence

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Act. The parol evidence which has been given does not appear to us to throw much light upon the question before us. It certainly does not establish the case that the plaintiff was merely surety for the defendants. He no doubt himself has sworn that the money was procured for the defendants, and that he merely became surety for it; but having regard to the fact that it was admittedly borrowed for the defence of his own half-brother, we are unable to come to the conclusion that it is true that he was merely a surety. Gulab Rai, one of the witnesses who was the *munib* of the firm of Banarsi Prasad, has produced the account-books of the firm, which show that the three parties (the plaintiff and the two defendants) were jointly debited with the entire debt of Rs. 10,000, and that when the money was paid by the plaintiff he and they were credited with the amount so paid. This shows that the mortgagee, at all events, regarded the three parties as jointly his debtors. Mubarak Ali Khan, who is a son-in-law of the plaintiff, proves nothing more than that the money was taken into the room in which the defendants were seated behind a *parda*, and paid in the presence of the Sub-Registrar, and that they admitted having received the money. To the same effect is the evidence of Saadat Wali Khan, the plaintiff's son. Upon this evidence it is impossible for us to agree with the view adopted by the learned Subordinate Judge. The evidence establishes beyond any doubt that the plaintiff and his two half-sisters borrowed the money for the defence of Sardar Wali Khan, and that they each and all borrowed it as principals. The mere circumstance that the consideration-money was brought into the room where the Musammats were seated and the acknowledgment by them of its receipt, does not establish that they were alone principals in the transaction, and that the plaintiff was merely a surety. In all probability the payment of the money in the presence of the Musammats was a wise precaution on the part of the lender to ensure that the defendants should not afterwards attempt to set up the case that the money had not been received by them, or that they were no parties to the transaction—a case which nevertheless they did attempt to set up in the former suit.

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For these reasons we must allow the appeal. The learned vakil for the respondent has asked us, in the event of our holding an unfavourable view of his main contention, at all events to give the plaintiff a decree for contribution towards the amount of the debt which was satisfied by him. We are unable to accede to this application. To do so would be to change entirely the character of the suit, and to enable him to recover moneys contrary to the position which he had taken up in bringing this action, and in his defence in the former suit, in which he alleged that he was only a surety for his half-sisters. We can show no indulgence to a litigant who comes into Court with a false case. The claim for general relief would not justify us in so doing. He sued merely as surety, and he cannot now turn round and say that, though not a surety, he was a joint mortgagor, and as such joint mortgagor, entitled to contribution from the other co-mortgagors.

For these reasons we allow the appeal and dismiss the suit with costs in both Courts.

Appeal decreed.

REVISIONAL CRIMINAL.

1903
February 27.

Before Mr. Justice Banerji.

CHURAMAN *v.* RAM LAL.*

Criminal Procedure Code, section 522—*Act No. XLV of* 1860 *(Indian Penal Code), section* 350—*Restoration of possession of immovable property—Use of criminal force.*

To support an order under section 522 of the Code of Criminal Procedure, restoring possession of immovable property, it is necessary for the Court to find as a fact, not only that the person in whose favour such order is made was deprived of possession by an offence, but that such offence was attended by the use of criminal force. *Ram Chandra Boral* v. *Jityandria* (1) and *Ishan Chandra Kalla* v. *Dina Nath Badhak* (2) followed.

THIS was a reference under section 438 of the Code of Criminal Procedure made by the Additional Sessions Judge of Aligarh. The applicant Churaman was a tenant of the Awa estate. He was ejected from certain agricultural land under

* Criminal Reference No. 49 of 1903.

(1) (1897) I. L. R., 25 Calc., 434. (2) (1899) I. L. R., 27 Calc., 174.