

applicant must either deposit in Court the amount of the decree or give security as provided for by the section, so that the deposit of the decretal amount or the furnishing of security is a condition precedent to the entertaining of an application to set aside an *ex parte* decree. As this condition was not fulfilled in the present case, the application was rightly dismissed, and we dismiss this application for revision with costs.

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JAGAN NATH

v.
CHET RAJ.

APPELLATE CIVIL.

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March 14.

Before Mr. Justice Banerji.

BAGESHRI DAYAL (PLAINTIFF). v. PANCHO AND ANOTHER (DEFENDANTS). *
Act No. 1 of 1872 (Indian Evidence Act), sections 92, 99—Suit for recovery of haq-i-chaharum—Sale alleged to be disguised as a usufructuary mortgage—Admissibility of evidence.

The plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant to the second defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. *Held* that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale. *Rahiman v. Elahi Bakhsh* (1) dissented from; *Jagat Mohini Dasi v. Rakehal Das Bisazi* (2) and *Pathammal v. Syed Kalai Ravuthar* (3) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Satish Chandra Banerji*, for the appellant.

Hon'ble Pandit *Madan Mohan Malaviya* and Mr. *M. L. Sandal*, for the respondents.

BANERJI, J.—The suit out of which this appeal has arisen was brought by the appellant to recover one-fourth of the amount alleged to have been paid by the second defendant to the first defendant as consideration for the sale of a house. The plaintiff based his claim upon a custom prevailing in the locality. The document by which the property was conveyed by the first defendant to the second defendant purported to be a deed of

* Second Appeal No. 632 of 1904, from a decree of F. J. Pert, Esq., District Judge, Benares, dated the 14th April, 1904, confirming a decree of Babu Bhairo Dial Singh, Munsif, Benares, dated the 30th January, 1904.

(1) (1900) I. L. R., 28 Calc., 70. (2) (1905) 2 Calcutta Law Journal, p. 385.
(3) (1903) I. L. R., 27 Mad., 329

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usufructuary mortgage. But it was stated by the plaintiff that the transaction between the parties was in reality a sale, and that in order to defeat his claim and to perpetrate a fraud upon him, the document had been drawn up ostensibly as a usufructuary mortgage. Both the Courts below have held that the plaintiff was not entitled to give evidence to prove that the transaction was in reality a sale and not a mortgage, as on the face of the deed it appeared to be, and they have based their opinion upon the provisions of section 92 of the Evidence Act. In my judgment the Courts below are wrong. Section 92 forbids the admission of evidence of an oral agreement for the purpose of contradicting, varying, adding to, or subtracting from the terms of a written document *as between the parties to such document or their representatives in interest*. The rule of exclusion laid down in the section does not apply to the case of a third party who is not a party to the document. On the contrary, section 99 distinctly provides that persons who are not parties to a document may give evidence tending to show a contemporaneous agreement varying the terms of the document. Further, as fraud was alleged in this case, even if the plaintiff were a party to the document, he would under the first proviso of section 92 be entitled to give evidence as to the fraud and as to the real nature of the transaction. The Courts below have relied for their decision upon the ruling of the Calcutta High Court in *Rahiman v. Elahi Bakhsh* (1). That case no doubt supports the view of the Courts below. But with great deference I am unable to agree with it. The learned Judges do not appear to have given effect to the provisions of section 99, and apparently did not consider that section 92 only precludes parties to an instrument or their representatives in interest from giving oral evidence for the purpose of contradicting or varying the terms of a written document. This case was not followed by the same Court in *Jagat Mohini Dasi v. Rakhai Das Bisazi* (2) and the correctness of it was doubted. It was also dissented from by the Madras High Court in *Pathammal v. Syed Kalai Ravuthar* (3). The two cases last mentioned support the view I have taken above. I accordingly

(1) (1900) I. L. R., 28 Calc., 70. (2) (1905) Calcutta Law Journal, p. 388.

(3) (1903) I. L. R., 27 Mad., 329.

allow the appeal; set aside the decrees of the Courts below, and remand the case to the Court of first instance under section 562 of the Code of Civil Procedure for trial on the merits. The appellant will have his costs of this appeal. Other costs will follow the event.

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Appeal decreed and cause remanded.

Before Mr. Justice Richards.

CHANDRA BHAN (DEFENDANT) v. GIRWAR LAL (PLAINTIFF).*

Act (Local) No. 1 of 1900 (North-Western Provinces and Oudh Municipalities Act), section 187—Rules framed by Local Government for the regulation of Municipal elections—Procedure—Power to award costs—Suit to set aside order awarding costs—Jurisdiction.

A Magistrate trying a petition to set aside the election of a member of a Municipal Board is not empowered to award costs against the unsuccessful party, and if he does so, it is competent to the party against whom costs are awarded to sue in a Civil Court to have so much of the Magistrate's order as relates to costs set aside.

ONE Chandra Bhan was elected a member of the Municipal Board of Agra. Another candidate for election, Girwar Lal, under the rules framed by the Local Government for the regulation of elections, filed a petition praying that the election of Chandra Bhan might be set aside. An inquiry into the allegations contained in this petition was made by a Magistrate, who dismissed it and at the same time ordered that the costs to which Chandra Bhan had been put in resisting the petition should be paid by the petitioner, Girwar Lal. In pursuance of this order certain property belonging to Girwar Lal was attached by Chandra Bhan, and thereupon Girwar Lal filed a suit in a Civil Court asking the Court to set aside so much of the Magistrate's order as awarded costs, and also the attachment of the plaintiff's property. The Court of first instance (Officiating Munsif of Agra) dismissed the suit, holding that no such suit would lie in a Civil Court. The plaintiff appealed. The lower appellate Court (District Judge of Agra) reversed the decision of the

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* Second Appeal No. 585 of 1904, from a decree of W. F. Wells, Esq., District Judge, Agra, dated the 31st March, 1904, reversing a decree of Babu Ram Chandra Saksena, officiating Munsif of Agra, dated the 14th December, 1903.