Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

ALI JAWAD AND OTHERS (PLAINTIFFS) *v.* KULANJAN SINGH AND OTHERS (DEFENDANTS.)* 1922 *February*, 28.

Act No. I of 1872 (*Indian Evidence Act*), *section* 92, *Proviso* (3)—*Evidence*—*Admissibility of parol evidence to qualify the terms of a document in writing.*

Held on a construction of proviso (3) to section 92 of the Indian Evidence Act, 1872, that a distinction must be drawn between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent or a defeasance. It may be shown that the instrument was not meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event.

Ramjibun Serowgy v. *Oghore Nath Chatterjee* (1) and *Vithu Jairam* v. *Akaram* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Maulvi *Mukhtar Ahmad*, for the appellants.

Munshi *Haribans Sahai*, for the respondents.

RYVES and GOKUL PRASAD, JJ.:—The facts of this case are as follows. The plaintiffs executed on the 18th of September, 1903, a usufructuary mortgage for five years in favour of Kulanjan Singh and Sat Ram. The deed is not on the record and it is not clear what exactly was mortgaged. According to the plaintiffs, on the 10th of August, 1905, they executed a simple mortgage for Rs. 599 in favour of Mahabir Singh in which an eight anna zamindari share in five villages was hypothecated. The interest chargeable was Rs. 2 per mensem. On the 8th of October, 1908, the plaintiffs executed a usufructuary mortgage of an eight anna two pie share in three villages which had been hypothecated in the mortgage of 1905 in favour of Kulanjan Singh alone. This mortgage was for Rs. 2,400 and for 15 years. The plaintiffs stated that under a contemporaneous oral agreement, when the mortgage of the 10th of August, 1905, was entered into, it was agreed between the parties that if the plaintiffs executed a usufructuary mortgage subsequently, then in that case the mortgagee would not charge the interest as agreed

* Second Appeal No. 655 of 1919, from a decree of Abdul Hasan, Additional Subordinate Judge of Jaunpur, dated the 24th of April, 1918, confirming a decree of Farid-ud-din Ahmad Khan, Additional Munsif of Jaunpur, dated the 4th of January, 1917.

(1) (1897) I. L. R., 25 Calc., 401. (2) (1917) 42 Indian Cases, 372.

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upon in the mortgage-deed of 1905. It appears that proceedings were taken before the District Judge in lunacy with reference to one of the plaintiffs and in those proceedings the guardian of the lunatic wished to raise a loan on the property, whereupon the defendants produced the mortgage-deed of 1905 and claimed that it had not been fully discharged. This was the cause of action alleged in the plaint and the plaintiffs sued for a declaration that the mortgage-deed of 1905 had been paid off. The main defence with which we are now concerned was that there were two mortgage-deeds executed in August, 1905, and that as a matter of fact only the interest due on those two mortgages had been paid when the mortgage of 1908 was executed and that the principal sums due on both the mortgages were still unpaid. Both courts have tried the case on the allegations of fact mentioned in the plaint, assuming them to be correct, but have come to the conclusion that oral evidence was inadmissible to prove the contemporaneous agreement set up by the plaintiffs and, consequently, that having regard to the terms of the mortgage of 1908, the allegation of the plaintiffs was not proved. They dismissed the suit. The plaintiffs come here in second appeal and they urge two points, (1) that under the proviso to section 92 of the Indian Evidence Act oral evidence could be given to prove that on the happening of a certain event the agreement to pay interest would cease to be operative, and (2) that they could prove that as a matter of fact when the document of 1908 was executed the whole amount due under the mortgage of 1905 was remitted and that this was evident from the terms of the document of 1908 itself and the court below had misread the document.

The meaning of proviso (3) would seem to be illustrated by illustration (*j*) to section 92 and it would seem to refer to cases where there was an oral agreement to the effect that a contract in writing was to take effect only on the happening of a particular contingency.

On the first point it has been pointed out that "a distinction must be drawn between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent or a defeasance. It may be shown that the instrument was not

meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event." (*Vide* Woodroffe and Amir Ali, Law of Evidence, 6th Edition, page 601). This seems to sum up the English law on the question, and it does not seem to us that in this respect proviso (3) lays down anything different. In the case of *Ramjibun Serowgy* v. *Oghore Nath Chatterjee* (1) Mr. Justice SALE took the same view. He says: "I do not think that it was intended by proviso (3) to permit the terms of a written contract to be varied by a contemporaneous oral agreement; but having regard to the illustrations (*b*) and (*j*), I think the proper meaning of proviso (3) is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all and that it was to impose no obligation at all until the happening of a certain event, may be proved." The same view was taken by a learned Judge of the Nagpur Chief Court in *Vithu Jairam* v. *Akaram*, (2) and we agree entirely with that judgment. This disposes of the first point.

As to the second point, of course the plaintiffs could prove, if it was a fact, that when the mortgage of 1908 was executed, all liability under the previous mortgage of 1905 was discharged. This, however, was not their case as brought in their plaint and the argument that the terms of the document itself are only consistent with this view cannot be supported. Under the mortgage of 1905, the principal sum of Rs. 599 was advanced. When the mortgage of 1908 was executed, it was recited that a sum of Rs. 600 was left with the mortgagee "to pay Mahabir." That is all. No reference is made to any particular debt or to any particular mortgage, much less is there any recital to the effect that this payment of Rs. 600 was in complete satisfaction of the whole debt due to Mahabir. But it is said that the words later on written in the document must be considered. They are to the effect that the property then mortgaged "is free from all charges and liability." It is said these words can only mean that the whole liability under the mortgage of the 10th of August, 1905, was admitted to have been discharged. There might have been some force in this argument if it were not a

(1) (1897) I. L. R., 25 Calc., 401. (2) (1917) 42 Indian Cases, 872.

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fact that there were several mortgages between these parties on the record, and we find the same words occurring in other mortgages where they cannot have the meaning which the plaintiffs now seek to put on this mortgage. It seems to be a set phrase used carelessly by the scribe of these documents. In the written statement it is stated that as a matter of fact there were two mortgages executed in the month of August, 1905, by the plaintiffs in favour of Mahabir. Both the deeds are on the record. The allegation is that when the deed of 1908 was executed the sum of Rs. 600 which was left to be paid to Mahabir represented not the whole amount due to Mahabir but the interest then due on the two mortgages. This may be so or it may not, but it shows that the words relied upon as proving the complete satisfaction of the particular mortgage of the 10th of August, 1905, do not of necessity mean what the appellants contend. It is, however, a remarkable circumstance which is on the record that the mortgage-deed of the 10th of August, 1905, was in the possession of Mahabir and was produced by him. If it had been paid off and nothing remained due whatever under that mortgage, one would have expected it to have been given back to the plaintiffs or at least to the defendant Kulanjan Singh, who satisfied it, with an endorsement to that effect.

In our opinion, therefore, the view taken by the courts below is right and we dismiss this appeal with costs.

Appeal dismissed.

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March, 2.

Before Mr. Justice Gokul Prasad and Mr. Justice Stuart.

GULAB CHAND (PLAINTIFF) *v.* KAMAL SINGH AND ANOTHER (DEFENDANTS).*

Act No. IX of 1872 *(Indian Contract Act), section* 25—*Contract—Consideration—Forbearance to sue for enforcement of a claim.*

If a person believes that he has a *bond fide* claim to enforce, his forbearance from trying to put that claim in court and to have it decided will be a good consideration for a contract, however the claim, if brought, may be decided.

Miles v. *New Zealand Alford Estate Company* (1) referred to.

THE facts of this case sufficiently appear from the judgment GOKUL PRASAD, J.

*Second Appeal No. 529 of 1920, from a decree of T. K. Johnston, District Judge of Agra, dated the 3rd of February, 1920, reversing a decree of Kaulesh ar Nath Rai, Subordinate Judge of Agra, dated the 6th of March, 1918.

(1) (1886) L. R., 32 Ch. D., 266.