P. C.*
1882
January 9.

PRIVY COUNCIL.

HIRA LAL (PLAINTIFF) *v.* GANESH PRASAD AND ANOTHER (DEFENDANTS).

[On appeal from the High Court of Judicature for the North-Western Provinces at Allahabad.]

Proof of document—Secondary evidence.

The proprietary right in a taluka was sold with the reservation of part of the land belonging to it, subject to the agreement that the vendor should be indemnified by the vendee in respect of the revenue required to be paid on the reserved part. Afterwards assignments on both sides took place, and the plaintiff, claiming through the vendor, sued the defendants, who derived title from the vendee, to enforce this liability. The plaintiff alleged, but did not produce, an *ikrar-nama* admitting this agreement between the original parties to the sale. The only proof adduced was a judgment in a suit in which this agreement had been held established. The plaintiff's case failed, as it has not been adjudged that the right to this indemnity related to a future revenue settlement, nor had it been decided that the agreement was to run with the land so as to bind others, under whatever title they might be in possession

In the suit in which that judgment was given, the *ikrar-nama* not having been produced, the Court of first instance would not admit secondary evidence of its contents. On appeal, inspection of the document having been offered to, and declined by the appellate Court, secondary evidence was admitted.

On this appeal, the error was pointed out of allowing the plaintiff to give secondary evidence of the contents of a document, the original of which was in his custody, without the Court's looking at the document.

Appeal from a decree of the High Court of the North-Western Provinces (10th July, 1879), affirming a decree of the Subordinate Judge of Allahabad (26th February, 1879), dismissing the appellant's suit with costs.

The question on this appeal was as to the operation of an agreement alleged to have been made upon the sale of zamindari rights in land, part of a taluka, whereby the vendee had undertaken to indemnify the vendors in respect of payments of Government revenue upon certain bighas, part of the same taluka, retained by the vendors; and whether this agreement bound the respondents, as assignees claiming under the vendee. It was contended that notwithstanding the transfers, by the original parties to the agreement, of both the part sold and the part retained, the assignees from the purchaser, who were the present respondents, were bound by the agreement made; and that those who derived title from the

* *Present:*—Sir B. PEACOCK, Sir R. P. COLLIER, Sir R. COUCH and Sir A. HOBHOUSE.

vendors, represented by the appellant, had a right to be thus indemnified.

The land was within the boundaries of taluka Mawaiya, pargana Kewai, in the Allahabad district. This taluka was sold in 1830 by Ghulam Singh and others, zamindars of the taluka, to a vendee who purchased it *be-nami* for the predecessor in title of the present respondents. Disputes followed as to the liability for the malguzari; and the sale-deed was said to contain a condition that the vendors should remain possessed of 1845 bighas, on which the vendee and his representatives were to pay the revenue, as well as that assessed upon their own. It was also alleged that, on the 26th April, 1831, an *ikrar-nama* to this effect was executed between the parties to the sale-deed.

In 1853, as the result of an auction-sale of part of the reserved bighas, Makhan Lal, whom the appellant represented, became possessed of 422 bighas.

On the 5th April, 1875, the Commissioner of Allahabad, in settlement operations, decided that, whatever changes in the proprietorship of these lands might have occurred, no right to permanent exemption from the revenue had been made out, and that liability under s. 83 of Act XIX of 1873 (1) must be enforced. This was confirmed by the Board of Revenue on the 1st September, 1875, and 7th February, 1876.

Thereupon the present suit was brought on the 23rd July, 1878, in the Court of the Subordinate Judge of Allahabad, claiming in effect that the defendants, the owners of the taluka, should pay the revenue assessed on the 422 bighas in the hands of the plaintiff, as heir of Makhan Lal deceased; and that they should be declared liable to pay such revenue without at any time holding the plaintiff liable to repay them. The defence was that the land had not been sold free of revenue in perpetuity, and that the orders then recently made in the settlement department were final.

The issues were, 1st, whether the suit was cognizable in the Civil Courts; 2ndly, whether the alleged agreement could

(1). The North-Western Provinces Land-Revenue Act, 1873, s. 83, enacts that no length of rent-free occupancy of any land, nor any grant of land made by the proprietors, shall release such land from its liability to be charged with the payment of Government revenue.

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be enforced in this manner. The only evidence adduced of the existence of the agreement was a judgment of the Sadr Dewani Adalat of Agra, dated 14th March, 1853, in which it was found, as a fact, that there was a condition in the sale-deed, executed in 1830, whereby the land in that suit referred to (which included the 422 bighas now in question), was to be held free of both rent and revenue in perpetuity.

The Subordinate Judge dismissed the suit as not cognizable by his Court. The High Court, (Spankie and Oldfield, JJ.), on appeal, held that the orders made in the settlement department, assessing the proprietor of the lands, and exempting the defendants who were not the recorded proprietors of the land, were valid and final. But it was held that, on the assumption that there had been made a contract of indemnity, binding on the successors in estate of the parties to that contract, a suit might lie in consequence of the acts and omissions of the defendants. However, on the question whether an agreement to this effect had been proved, and could be enforced, (a question stated in the second issue), the Court held that there was nothing to show that the liability for the revenue, undertaken by the vendee, was other than one personal to him. The present defendants were the last of a series of purchasers of the property sold, and their having purchased it did not render them liable for a breach of a condition attached to the first, or original, contract of sale. The decision of 1853 was one in which one Dulhin Begam, through whom the defendants made title, had been held liable; but that decision could not be said to have determined that the possession and ownership of this property carried with it the liability on their part to make good any loss to the successors in estate of the vendors occasioned by revenue assessment (1).

On this appeal,

Mr. *J. Graham*, Q.C., and Mr. *W. A. Raikes*, appeared for the appellant.

Mr. *J. F. Leith*, Q.C., and Mr. *H. Cowell*, for the respondents.

For the appellant it was argued that the agreement of 1830 between vendor and purchaser of the zamindari rights in the taluka, then transferred, created a charge on the vendee, and all those

(1). The judgments will be found reported at page 415 and following pages of vol. II, All. Series, I. L. R.

who derived title under him, to keep indemnified the purchaser, and his successors in estate, in reference to the Government revenue that might be payable at any time on the land, the subject of the agreement. Such an agreement was not affected by the duration of the settlement then current, not having been expressly limited to it. There was some analogy between such a contract, and the English real property law relating to grant of rent charge, and covenant for enjoyment free from taxes; on which subject reference was made to *Packhouse* v. *Middleton* (1) and other cases collected in the note at para. 43 of Chap. XV, s. 1, of Sugden's *Vendors and Purchasers*.

Counsel for the respondents were not called upon.

Their Lordships' judgment was delivered by

SIR ROBERT COLLIER.—This appeal comes before their Lordships under somewhat peculiar circumstances. The case of the plaintiff, who is the appellant, is in substance this: that in October, 1830, three persons, named Sheo Ghulam Singh, Beni Singh, and Mardan Singh, sold a taluka to a person of the name of Ghulam Muhammad, reserving to themselves a certain portion of that taluka, which is differently described as 1,845 bighas, and 1,400 bighas,—in fact, various figures are given describing it,—subject to this condition, that they were to pay no rent for this portion reserved, nor the Government revenue, but that the Government revenue was to be paid by the vendee. They say that by the conditions of the deed of sale, subsequently confirmed by an *ikrar-nama* of April, 1831, this was expressly agreed and stipulated on the part of the vendee. The plaintiff is a purchaser of a part of the reserved portion, deriving title from the original vendors. The defendant is a person to whom one Dulhin Begam, (who was the widow of a person named Ghulam Ahmad, for whom it is alleged that the original vendee purchased *be-nami*,) sold it—it does not appear when.

The plaintiff seeks to establish that the agreement between the original vendor and vendee is binding upon the present defendant, and that he is bound to indemnify him, the plaintiff, for the payment of the Government revenue in respect of the reserved property, or such portion of the reserved property as he possesses.

(1). Cases in Chancery, Temp. Car. II, 173.

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The plaintiff does not put in the original deed,—that is said to have been in the possession of the original defendants,—and he does not give, nor did he ever give, any satisfactory evidence of its contents. He does not put in the *ikrar-nama*, on which he principally relies as setting forth the agreement which has been referred to, and he gives no reason whatever for not producing it. He does not state whether or not it is in his possession; whether he has made any search for it; whether it is lost; nor does he attempt to give any secondary evidence of it, but he relies entirely upon a judgment which was obtained in the year 1853, by the original vendors together with another person, against Dulhin Begam, who has been before spoken of; and he contends that this judgment, without any other evidence whatever, proves his case.

This judgment turns chiefly upon the construction of the *ikrar-nama*. Their Lordships cannot help observing, in passing, on the extraordinary course which appears to have been pursued by the Court of the Sadr Dewani Adalat in that suit. In the Court of first instance, the plaintiff, although he admitted that he had the *ikrar-nama* in his possession, did not produce it, alleging that it had been in the possession of the defendants, and that they might have tampered with it, or had tampered with it. But as he did not produce it, the Judge, (it appears to their Lordships quite properly), held that the secondary evidence of it could not be admitted, and dismissed the suit. When the case came on appeal to the Sadr Court at Agra, it seems that the plaintiff did then produce this document, and offer it for the inspection of the Court. The Court refused to look at it, but admitted secondary evidence of its contents. It appears to their Lordships that the Sadr Court was wrong in that course of proceeding. If the plaintiff had the original and did not produce it in the Court below, his case was not proved, because it rested almost entirely on the *ikrar-nama*, there being no evidence of the contents of the deed of sale; but to accept secondary evidence of the document which was in the plaintiff's custody, without looking at the original, seems to their Lordships to be an extraordinary course. But, be this as it may, the plaintiff is right in contending that this was a suit between the same parties in estate relating in a great degree to the same subject-matter, and in relying

upon it as far as he can as an estoppel. It remains to ascertain what the real effect of the judgment in that suit was. The claim was "for a declaration of right and proprietary possession, exempt from the payment of the rateable rent (by prohibiting the defendant from demanding the rateable revenue)." And the point decided in the Sadr Court is thus stated:—"The Court, for the above reasons, reverse the decision of the Principal Sadr Amín, and decree in favour of the appellants for possession of the land, exempt from the payment of revenue, and *wasilat* to the amount claimed by them."

It appears to their Lordships that this judgment is ambiguous in one or two respects. It does not appear definitely on the face of it whether it was adjudged that the claim to be indemnified for the payment of Government revenue related to the then impending revenue settlement which the parties may perhaps be assumed to have had in contemplation when they entered into the agreement, or whether it related to the next settlement or to any subsequent settlement. The judgment might be consistent with either view. Further, it does not appear whether the effect of the judgment is simply to render the defendant, Dulhin Begam, liable to indemnify the plaintiffs in respect of the reserved rent, or whether the contract of indemnity is to be taken to run with the land, and to bind all persons who may be hereafter in possession of it under any title whatever. Dulhin Begam, it may be observed, as far as their Lordships are able to understand the evidence on this part of the case, which is as obscure as the rest of it, would seem to be, as has been said, the widow of Ghulam Ahmad, the real purchaser, and thus to have been a representative of the purchaser bound by his undertaking; but it would by no means follow that the land is to be bound in whosesoever hands it may hereafter come by purchase or otherwise. The judgment, thus ambiguous, is applied almost wholly to the construction of the *ikrar-nama*, which the Court did not look at. If this *ikrar-nama* had been produced in the present suit, their Lordships might, by applying the judgment to the terms of it, have been able to determine the effect of that judgment; but, in the absence of the *ikrar-nama*, which the plaintiff has not produced, and the non-production of

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which he has not accounted for, their Lordships are unable to construe the judgment in the sense in which the plaintiff seeks to have it construed. The more obvious interpretation of it seems to be the more limited one.

Under these circumstances, their Lordships are of opinion that the plaintiff has failed to prove his case; and they will therefore humbly advise Her Majesty that the judgment appealed against be affirmed, and that the appeal be dismissed with costs.

Solicitors for the Appellant: Messrs *Watkins and Lattey.*

Solicitors for the Respondents: Messrs *W. and A. Ranken Ford.*

CIVIL JURISDICTION.

1882
April 11.

Before Mr. Justice Straight and Mr. Justice Oldfield.

WAZIR MUHAMMAD KHAN (PLAINTIFF) *v.* GAURI DAT AND ANOTHER (DEFENDANTS).*

Act XII of 1881 (*N-W. P. Rent Act*), *s.* 93 (*g*)—*Suit for arrears of revenue—Jurisdiction.*

Held that a suit against a co-sharer and the transferrees of his share for arrears of Government revenue which became due before such transfer, the plaintiff claiming as lambardar and as heir to the deceased lambardar during whose incumbency such arrears became due, was cognizable in the Revenue Courts. The principle laid down in *Bhikhan Khan* v. *Ratan Kuar* (1) followed.

THIS was a reference under s. 205 of Act XII of 1881 by the Collector of Saháranpur. The Collector stated the case as follows:—

"Wazir Muhammad Khan and others, styling themselves heirs of deceased lambardar Ilahi Bakhsh, and Wazir Muhammad Khan also styling himself lambardar, sued on the 13th September, 1881, Amanat Khan a co-sharer, and two other defendants, auction-purchasers of Amanat Khan's rights in April, 1879, for arrears of revenue on account of kharif 1286 fasli paid by Ilahi Bakhsh when lambardar. Subsequently, saving Wazir Muhammad Khan, the other plaintiffs withdrew their claim, and the plaint stood in Wazir Muhammad Khan's name alone. Wazir Muhammad Khan became

* Misc. No. 12 of 1882.

(1) I. L. R., 1 All. 512.