1938.

BHAGI MALIK v. SATYABADI OTA.

JAMES, J.

of Part 2 of Act VI of 1870 and a suit for resumption of the chaukidari land on the ground that the chaukidar receives his remuneration in another way would not be cognizable in the civil courts. It is not necessary for us to say whether this jagir is actually liable to resumption under Act VI of 1870 though on the face of it it appears to be so; but it was not liable to resumption on the grounds set out in the plaint and the decree of the learned Subordinate Judge cannot be maintained.

I would allow this appeal and set aside the decree of the Subordinate Judge, restoring the decree of the Munsif. The appellant is entitled to his costs throughout.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and James, J.

1938.

January, 6.

RADHAMOHAN THAKUR

v.

BIPIN BEHARI MITRA.*

Sale—title to vended property, when passes—intention of parties, how is to be proved—terms unambiguous—external evidence, whether admissible—recital as to passing of consideration, whether differs from strictly contractual part—Evidence Act, 1872 (*Act I of* 1872), *section* 92.

In a contract of sale the strictly contractual part, as for instance, the arrangement between the parties as to when the property shall pass is, if the contract has been reduced to writing, to be determined solely from the words of the writing and evidence is not admissible for the purpose, as

* Circuit Court, Cuttack. Appeal from Appellate Decree no. 62 of 1935, from a decision of Babu B. K. Sarkar, Additional Subordinate Judge of Cuttack, dated the 24th July 1935, reversing a decision of Babu B. N. Ray, Munsif, 1st Court, Cuttack, dated the 31st July, 1934.

mentioned in section 92 of the Evidence Act, 1872, of contradicting, varying, adding to, or substracting from its terms; in this respect it differs from the recital of fact, that is to say, the passing of consideration, which is not a matter of contract but a matter of fact. In the latter case, there is nothing in section 92 which prevents a person from adducing evidence for the purpose of showing that the recital was untrue.

If the terms of the contract as to when the property is to pass are ambiguous, then recourse may be had to external evidence with a view to determining what the intention of the parties was, but if the intention of the parties has been stated in unambiguous terms, those terms must remain the sole criterion of the intention of the parties.

Rasikananda Mallik v. *Gangadhar Panda*(1), followed.

Maheswar Mahanty v. *Dayanidhi Mahanty*(2), explained.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of James, J.

S. N. Sen Gupta and *L. K. Das Gupta*, for the appellants.

S. C. Bose (with him *A. S. Khan* and *N. N. Mitra*), for the respondents.

JAMES, J.—On the 24th of August, 1931, Janaki Nath Banarji sold to Babu Bipin Behari Mitra four annas share of a zamindari for the sum of twelve hundred rupees. The sale deed was duly registered. Bipin Behari Mitra paid to Janaki Nath Banarji's agent the sum of Rs. 70 in cash with a written promise to pay the balance of Rs. 1,130 which represented the amount of a mortgage debt secured on this property due to the plaintiffs of this suit. After the deed had been executed Bipin Behari entered into possession of the property; and the guardian of the two minors among the mortgagees, Srimati Nomamoyee Dasi, issued notice upon him to pay the mortgage debt.

(1) (1929) 1 Cutt. L. T. 1; S. A. 62 of 1927.
(2) (1930) 1 Cutt. L. T. 12; S. A. 110 of 1928.

1938.

RADHAMOHAN THAKUR v. BIPIN BEHARI MITTRA.

JAMES, J.

The mortgage debt was not paid, and subsequently on the 11th of January, 1932, the mortgagees approached the vendor and obtained from him a sale deed purporting to convey this property to them. The mortgagees then instituted a suit against Bipin Behari praying for a declaration that they were the lawful owners of the property with the false allegation that they were in possession and praying for confirmation of possession. The plaintiffs alleged that at the time of the conveyance to Bipin Behari it had been agreed that title should not pass until the full consideration was paid and that as Bipin Behari had not paid the full consideration, no title to the property had passed by the conveyance of the 24th of August, 1931. The Munsif decreed the plaintiffs' suit; but his decision was reversed on appeal by the Subordinate Judge. The Subordinate Judge has found that the consideration of the sale deed consisted of Rs. 70 to be paid in cash and Rs. 1,130 for payment of which a written promise was given and that title and possession passed to Bipin Behari immediately on the registration of the sale deed. The plaintiffs (the subsequent purchasers) have come in second appeal from that decision.

It is argued on behalf of the appellants that on the terms of the sale deed as it stands it should be inferred that the passing of title is to be postponed until the full consideration is paid and that no evidence beyond that of the deed itself should be admitted to prove what the contract between the parties actually was. It is suggested that the terms of the sale deed are precisely the same as those of the deed in *Rasikananda Mallik's* case(1) which has been quoted by the learned Subordinate Judge; but in that case the deed specified that the transfer of ownership was to take place after the payment of the consideration. The learned Subordinate Judge has relied upon the decision in *Maheswar Mahanty* v.

(1) (1929) 1 Cutt. L. T. 1; S. A. 62 of 1927.

Dayanidhi Mahanty(1) wherein it was held that title did pass although the whole consideration had not been paid. There is actually no conflict between the two decisions and the facts of the present case are very similar to those of *Maheswar Mahanty's* case(1). Here we have consideration consisting in part of payment made in cash and in part in a written promise to pay with the recital that the vendee is to acquire title and possession from the day of the execution of the sale deed and with the further recital in the present case that the purchaser is to be entitled to institute suits against tenants of the share conveyed from whom arrears of rent may be due. Ordinarily the title to property transferred by sale passes on the registration of the sale deed although it may sometimes happen that the parties agree that title shall not pass until the consideration is completely paid. The learned Advocate for the appellants has in the present case been unable to demonstrate from anything in the sale deed itself an intention that the passing of title should be postponed to full payment of the mortgage debt; and apart from the conveyance itself, the subsequent conduct of the parties indicates that the intention was that title should pass on the registration of the document.

No error of law has been pointed out in the decision of the learned Subordinate Judge and I would dismiss this appeal with costs.

COURTNEY TERRELL, C. J.—I agree. I would only add a few words because of the way in which the learned Subordinate Judge has, I think, somewhat mistaken the correct view of the law of construction of contracts and the effect of section 92 of the Evidence Act, notwithstanding that he has arrived in the end at what is, I agree, the correct conclusion. This question of whether in giving effect to a sale deed the property is to pass on the execution and registration of the deed or whether it is to pass upon the full

(1) (1930) 1 Cutt. L. T. 12; S. A. 110 of 1928.

1938.

RADHAMOHAN THAKUR v. BIPIN BEHARI MITTRA.

COURTNEY TERRELL, C. J.

payment of the consideration money arises somewhat frequently and has given rise to various cases in this particular Court and I venture to think that the correct principle should be stated. The learned Subordinate Judge was under the impression that there was a conflict of view between the case of *Rasikananda Mallik* v. *Gangadhar Panda*(1) in which I delivered the judgment and the subsequent case of *Maheswar Mahanty* v. *Dayanidhi Mahanty*(2). There is no conflict of any sort. In a contract of this character there is contained a recital of the receipt of the purchase money. There are also terms which provide for the passing of the property. This strictly contractual part, that is to say, the arrangement between the parties as to when the property shall pass is, if the contract has been reduced to writing, to be determined solely from the words of the writing and evidence is not admissible for the purpose, as mentioned in section 92, " of contradicting, varying, adding to, or substracting from its terms ". The question when the property is to pass is a matter of contract. In that respect it differs from the recital of fact, that is to say, the passing of the consideration which is not a matter of contract but a matter of fact. If the terms of the contract as to when the property is to pass are ambiguous, then recourse may be had to external evidence with a view to determining what the intention of the parties was; but if the intention of the parties has been stated in unambiguous terms, those terms must remain the sole criterion of the intention of the parties. As a rule contracts are so drawn that the property passes on the completion of the contract by registration; and if one of the parties wishes to show that the contract has not that effect, he must do one of two things: either he must show that the contract on its correct wording is in accordance with the terms which he suggests or he must show that the contract is ambiguous in its terms capable

(1) (1929) 1 Cutt. L. T. 1; S. A. 62 of 1927.
(2) (1930) 1 Cutt. L. T. 12; S. A. 110 of 1928.

of either meaning and it is for him to show by external evidence that the intention of the parties was that the property should pass not on the execution and registration of the document but on the happening of some other event. In such cases evidence is admissbile to show that one of the parties retained possession of the kobala in confirmation of evidence that the intention of the parties was that the property should not pass until the happening of some subsequent event; that is to say, the party tendering such evidence first of all contends that such is the meaning of the contract and then he produces the evidence of the retaining of the kobala not with a view to contradicting, varying, adding to or substracting from the terms of the contract, but by way of confirmatory evidence that that was in fact the intention of the parties. In that sense the evidence of the retention of the kobala does not infringe the conditions of section 92. In the first case which I have mentioned and in which I was a party, the contract itself was construed and its contents were held to be free from ambiguity. In those circumstances the contract having been construed as one that the property should not pass until the whole consideration was paid and being unambiguous, external evidence was excluded. In the subsequent case decided by Mr. Justice Fazl Ali sitting singly the contract was construed as providing that the property should pass immediately and without waiting for the payment of the whole consideration. The decision to which I was a party was mentioned by the learned Judge and then he quotes the following passage: "It is now settled law that section 92 of the Evidence Act will not debar a party to a contract in writing from showing notwithstanding the recitals in the deed that the consideration specified in the deed was not in fact paid as therein recited but was agreed to be paid in a different manner." Now the learned Subordinate Judge has taken that to be a disagreement with the first decision. First of all he

1938.

RADHAMOHAN TYAKYA v. BIPIN BEHARI MITTRA.

mentioned *Rasikananda's* case(1) as being a case in which the terms are to be gathered from the sale deed itself and from nothing else and then he thinks that Mr. Justice Fazl Ali has expressed a contrary view. He says:

COURTNEY TERRELL, C. J.

"It has there been held that it is now settled law that section 92 of the Evidence Act will not debar a party to a contract in writing from showing notwithstanding the recitals in the deed that the consideration specified in the deed was not in fact paid as therein recited *but was agreed to be paid in a different manner.*"

This is precisely what Mr. Justice Fazl Ali did not decide. The decision with which I respectfully agree says that section 92 will not prevent a party from disputing the *recitals* in the deed. Thus if the vendor should decide, not having received his purchase money, to sue for the purchase money, he will not be overcome by the fact that the document stated that the whole of the consideration money was paid as preventing him from raising a point in a suit for recovery of purchase money that had not been paid. It is certainly true, as Mr. Justice Fazl Ali has said, that there is nothing in section 92 which prevents a person from adducing evidence for the purpose of showing that the recitals were untrue. Statements of facts are different from the nature of the contract between the parties which must be determined from a reading of the document itself. If the document is ambiguous in character, then certainly reference can be made to evidence for the purpose of ascertaining what the intention of the parties was. If on the other hand the contract is unambiguous in its terms, then you cannot introduce evidence for the purpose of showing that the contract means something other than what it expresses in unambiguous terms. Here the learned Judge has held first of all that the contract in express terms states that the passing of the property is to take place immediately. He finds in the evidence, that is to say, conduct of the parties after the document was

(1) (1929) 1 Cutt. L. T. 1; S. A. 62 of 1927.

executed, evidence of fact not in contradiction of the document but confirming the view that that was what the parties originally intended. This is not in conflict with section 92. He held that the contract expressly provided for the passing of the property at once. If the other party should however feel inclined to sue for his purchase money, then mere recital in the document will not prevent him from showing what the true facts are.

1938.

RADHAMOHAN THAKUR v. BIPIN BEHARI MITTRA.

COURTNEY TERRELL, C. J.

In these circumstances I agree that the appeal fails on the construction of the document and the conclusion arrived at by the learned Judge is, I think, a correct one. I agree therefore that the appeal should be dismissed with costs.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and James, J.

RAJA RAMCHANDRA DEB

v.

FAKIR PAIKARA.*

1938.

January, 11.

Orissa Tenancy Act, 1913 (*Bihar and Orissa Act II of* 1913), *sections* 31 *and* 250—"*maximum fee*", *meaning of —amount of mutation fee payable under section* 31, *how is to be determined.*

When the court has to find what is the proper amount of mutation fee which can be recovered under section 250(*e*) of the Orissa Tenancy Act, 1913, a customary amount proved by evidence to be such as would be sufficient to prove a long established and binding custom of the estate, would be the

* Circuit Court, Cuttack. Appeals from Appellate Decrees nos. 79 to 83 of 1935, from a decision of Sadhu Charan Mahanty, Esq., District Judge of Cuttack, dated the 19th June, 1935, modifying a decision of Babu M. N. Guha, Deputy Collector of Khurda, dated the 5th June, 1934.