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R. JAGA-
NATHAN
PADAYACHI
v.
R.M.K.M.S.
CHINNAYA
CHETTIAR

unjust or inequitable in substance. In these circumstances we do not feel called upon to exercise our discretion to interfere with it in revision.

In the result we dismiss the appeal with costs, advocate's fee two gold mohurs.

HEALD AND
MYA BU, JJ.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

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June 27.

MAUNG SHWE PHOO AND EIGHT OTHERS

v.

MAUNG TUN SHIN AND THREE OTHERS. *

Evidence Act (1 of 1872), s. 92—Oral evidence to prove an outright sale by deed to be a mortgage inadmissible.

Where a registered instrument clearly showed a transaction between the parties to be a sale, oral evidence to show that it was intended to be a mortgage or that there was a contemporaneous oral or unregistered agreement, forming part of the same transaction, to resell the property is inadmissible in evidence. It is otherwise, when the agreement to resell is a distinct transaction. Section 92 of the Evidence Act will not allow oral evidence of intention of parties to a deed to construe such deed.

Balkishen Das v. Legge, 22 All. 149, *Maung Bin v. Ma Htaing*, 3 L.B.R. 100, *Maung Walav. Maung Shwe Gon*, 1 Ran. 472; *Ma Thauing v. Ma Than*, 5 Ran. 175; *North Eastern Railway Co. v. Lord Hastings*, (1900) A.C. 260; *Watchem v. Attorney-General of East Africa Protectorate*, (1919) A.C. 533—referred to.

Baijnath Singh v. Hajee Valley Mahomed Hajee Abba, 3 Ran. 106—distinguished.

Loo Nee—for Appellants.

Thein Maung—for Respondents.

HEALD AND MYA BU, JJ.—The plaintiffs-appellants Nos. 1, 2 and 3 are the children of a deceased Karen couple named U Shwe Kyay and Ma No. Ma E Byu (plaintiff-appellant No. 9) is Ma No's sister. The plaintiffs-appellants Nos. 4, 5, 6, 7 and 8 are the children of Ma E Byu.

* Civil First Appeal No. 203 of 1926.

There are two pieces of land in dispute. They are Holding Nos. 41 and 52 of 1924-25 situate in Tawnyo Kwin, Kyaunggon Township, Bassein District, measuring 27·63 acres and 16·37 acres respectively.

It is not disputed that Holding No. 41 originally belonged to U Shwe Kyay and Ma No and Holding No. 52 to Ma E Byu, and that prior to 1921 these lands were conveyed by U Shwe Kyay, Ma No, Ma E Byu and Maung Shwe Hla Tun (plaintiff-appellant No. 4) in favour of R.M.A.R.M. Letchamanan Chettiar by means of a registered deed of sale. It would have been much more satisfactory to know when and for what sum of money that conveyance was made, of which the record of the trial Court contains no information. But fortunately this information is not essential for the proper adjudication on the points for decision.

It is also not disputed that on the 17th May 1921 R.M.A.R.M. Letchamanan Chettiar sold the lands to the plaintiffs-appellants for Rs. 1,700 by a registered deed of sale, that the plaintiffs-appellants in turn conveyed the same to the defendants-respondents Nos. 1 and 2 on the same day by another registered deed of sale for Rs. 3,000, that the former had to pay to the Chettiar altogether Rs. 3,400 for the land as well as in discharge of debts, that they paid up this amount by adding Rs. 400 to the sum of Rs. 3,000 received from the defendants respondents Nos. 1 and 2, and that the latter sold these two pieces of land along with another piece (not in suit) to the defendants-respondents No. 3 and 4 on 3rd July 1924 for a sum of Rs. 11,000.

The plaintiffs' suit is for a decree directing the defendants Nos. 3 and 4 to reconvey the plaint lands to them. The plaint is so defective that it does not even declare the plaintiffs' readiness and willingness to pay the sum of Rs. 3,000 or any other sum ; and in order to understand the true purport of their allegation reference

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has to be made not only to the plaint but also to the first plaintiff's examination for the purpose of framing issues and his and Maung Shwe Hla Tun's depositions.

The allegations in the plaint are to the effect that though the transfer by U Shwe Kyay, Ma No, Ma E Byu and Maung Shwe Hla Tun in favour of the Chettiar was by means of a registered deed of sale, it was merely "a temporary transfer on account of debts" due to the Chettiar; that the sum of Rs. 3,000 mentioned in the deed of sale in favour of the defendants Nos. 1 and 2 was not the price paid for the land but was money lent to them by the latter on the understanding (a) that the lands would be temporarily transferred by the execution of a deed of sale, (b) that the transferees were to reconvey the land at any time on payment of Rs. 3,000 with interest at the rate of Rs. 2 per cent. per mensem and (c) that the plaintiffs would pay up the interest regularly once a year. The plaintiffs further alleged that the 3rd and 4th defendants purchased the plaint lands with notice of this arrangement between them and the 1st and 2nd defendants.

The defence is denial of the alleged arrangement. The defendants contend that the transfer by the plaintiffs to the 1st and 2nd defendants was nothing but an out-and-out conveyance.

When examined for the purpose of framing issues, plaintiff No. 1 stated "we borrowed Rs. 3,000 from him (defendant No. 1) to pay off the debts and transferred the two pieces of land to him by a registered deed of sale. At the time of the transfer there was an agreement that the land would be conveyed to us at any time on payment of Rs. 3,000 bearing interest at 2 per cent. per mensem."

Issues were then framed. The learned Additional District Judge, apparently losing sight of the importance of the distinction between prior, contemporaneous

and subsequent agreements with reference to the provisions of section 92 of the Indian Evidence Act, worded the first issue in a very general way as follows:— "Was there an agreement between the plaintiffs and defendants Nos. 1 and 2 that the latter would return the plaint land at any time on payment of Rs. 3,000 with interest at 2 per cent. per mensem?"

It was then pointed out on behalf of the defendants that the plaintiffs were seeking to prove by oral evidence that the sale effected by the registered deed was in effect only a mortgage or conditional sale and that such evidence was excluded by the provisions of section 92. Reply given on behalf of the plaintiffs was that the agreement relied on by them was an agreement to resell or allow repurchase and that section 92 did not shut out oral evidence in proof of it. This gave rise to a preliminary issue which was decided in favour of the plaintiffs. Thus it was open to the plaintiffs to lead evidence to prove the agreement relied on.

Maung Shwe Phoo (plaintiff No. 1) stated:—

"We owed the Chettiar Rs. 3,400. Then we went to Ma Shwe Me who had dealings with the 1st defendant and asked her to see if I could raise a loan from him. Tun Shin (1st defendant) said he would do business and made an appointment for the 11th Lazan Kason 1283 B.E. (17-5-21) at Kyaunggon. On that date we kept the appointment and met him Shwe Hla Tun, Kya Tun (3rd plaintiff), the defendant (1st defendant) and I went to the Chetty. I asked the Chetty to return our land in accordance with the promise. He agreed and made up the accounts and found that we owed Rs. 3,400 altogether. Tun Shin said he would pay this sum and we went to the registration office. The Chetty then got a deed drawn up conveying the land back to us. I then said to Tun Shin that I would get a mortgage deed drawn up but the defendant said 'No, let it be a deed of sale, similar to the Chetty's.' Transactions of this kind are common in our part of the world. Tun Shin promised that he would

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return the land to us on payment of Rs. 3,000 inserted in the deed of sale."

The only other plaintiff who gave evidence is Maung Shwe Hla Tun. He said :—

"Then accounts were settled and Rs. 3,400 was found due. Maung Tun Shin said to the Chetty that he would pay this amount. Then we went off to the registration office. First of all the Chetty signed a deed of a sale, reconveying the land to us. Tun Shin said, 'You must sell outright. Mortgages are too troublesome. You must do the same for me as you did for the Chetty. I don't want your lands. You can have them back when you can redeem them.' We agreed."

The above accounts of the transaction clearly show that the plaintiffs' case in reality was that the transaction contained in the deed of sale in favour of the first and second defendants was not a sale but a mortgage or a conditional sale by virtue of a contemporaneous oral agreement between the parties to the transaction. The learned counsel for the appellants also made his position clear to us by stating that he relied on contemporaneous oral agreement and the surrounding circumstances and conduct of the parties to the transaction to show that the transaction was in reality a mortgage or a sale with a reservation in favour of the vendors for repurchase. In these circumstances it is clear that the evidence adduced by the plaintiffs is obnoxious to the provisions of section 92 of the Indian Evidence Act. See *Maung Wala v. Maung Shwe Gon and one* (1), which followed *Maung Bin v. Ma Hlaing and others* (2) and *Balkishen Das and others v. W. F. Legge* (3). For the appellants reliance is placed on the decision of the Privy Council in the case of *Baijnath Singh v. Hajee Vally Mohamed Hajee Abba* (4), wherein their Lordships observed

(1) (1923) 1 Ran. 472.

(2) (1905) 3 L.B.R. 100.

(3) (1899) 22 All. 149.

(4) (1925) 3 Ran. 106.

"section 92 merely prescribes a rule of evidence ; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances." This case is distinguishable from the one before us and also from the cases cited above. What was sought to be proved in *Baijnath Singh's* case (1) was that the bought and sold notes did not represent the contract between the parties which took place apart from the notes. In the case before us the plaintiffs are seeking to prove that the real nature of the transaction was different from that expressed in the deed. With reference to oral evidence of surrounding circumstances and conduct of the parties in contradiction to the terms of a written contract, the law appears to be as follows:—"If the terms of the contract are ambiguous, the rights of the parties may be determined with reference to such circumstances and conduct as pointed out by their Lordships of the Privy Council in *Ma Thaung v. Ma Than* (2) and as ruled in *Watcham v. Attorney General of the East Africa Protectorate* (3). But where the terms of the contract are unambiguous no such evidence can be given in contradiction to the terms of the contract." See *The North Eastern Railway Company v. Lord Hastings* (4). The terms of the deed Exhibit 1 are clear and unequivocal and they express an outright sale. We have no doubt that the evidence relied on by the plaintiffs and tendered by them is excluded by section 92 of the Indian Evidence Act. For these reasons it is not open to the plaintiffs to prove that the transaction was a mortgage or that there was a contemporaneous oral agreement to resell. The plaintiffs' suit therefore fails.

In the result the appeal must be, and it is hereby, dismissed with costs.

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(1) (1925) 3 Ran. 106.

(3) (1919) A.C. 533.

(2) (1927) 5 Ran. 175 at p. 183.

(4) (1900) A.C. 260 at p. 263.