

APPELLATE CIVIL.

Before Mr. Justice Zafar Ali and Mr. Justice Jai Lal.

GHANAYA LAL AND OTHERS (DEFENDANTES)

Appellants

versus

RALLIA RAM AND OTHERS (PLAINTIFFS)

Respondents.

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March 20.

Civil Appeal No. 2579 of 1924.

*Indian Evidence Act, I of 1872, section 92, proviso 4—
Contract—written—Subsequent oral agreement modifying
terms thereof—whether admissible.*

Held, that a subsequent oral agreement to take less than what is due under a registered mortgage-bond, being an agreement modifying the terms of a written contract, is inadmissible under section 92, proviso 4 of the Evidence Act.

Mallapa v. Atum Nagu Chetty (1), and Jagan Nath v. Shankar (2), followed.

First appeal from the decree of Mirza Abdul Rub, Senior Subordinate Judge, Amritsar, dated the 3rd July 1924, granting the plaintiffs a preliminary decree.

MOTI SAGAR AND NAWALKISHORE, for Appellants.

BADRI DAS AND J. L. Kapur, for Respondents.

The judgment of the Court was delivered by—

ZAFAR ALI J.—This was a suit for the recovery of mortgage money. According to the mortgage deed bearing date the 9th December 1926, the properties mortgaged were six shops and houses situated in Amritsar and the mortgage was with possession for a sum of Rs. 30,000. But on the very date of the mortgage the plaintiffs-mortgagees granted a

(1) (1918) I.L.R. 42 Mad. 41 (F.B.). (2) (1919) I.L.R. 44 Bom. 55.

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lease to the mortgagors allowing them to remain in possession of the properties as tenants on a monthly rent of Rs. 187-8-0, which was equal to the interest at the stipulated rate of annas ten per cent. per mensem. In 1910 the mortgagees sued to recover rent, and obtained a decree on the 9th July, 1920, for Rs. 5,350 on account of rent up to the 7th June, 1910, and Rs. 577 as costs of the suit. On the 12th February 1912, the mortgagors in pursuance of an agreement with the mortgagees sold off two of the houses for Rs. 16,500 and paid this amount to the latter in reduction of the mortgage debt. Rs. 444 more were realised by the mortgagees in execution of the decree for rent on the 25th March, 1914. On the date of the institution of the present suit, *i.e.* on the 17th November, 1916. the mortgagees claimed Rs. 31,059-3-0 as per detail below :—

1. Rs. 30,000-0-0 ... Principal.
2. Rs. 5,350-0-0 ... The rent decreed.
3. Rs. 577-0-0 ... Costs of the suit for rent.
4. Rs. 3,787-8-0 ... Interest from the 7th June 1910 to 12th February, 1912.
5. Rs. 8,288-11-0 Interest from the 12th February, 1912 to 17th November, 1916 (the date of institution of the present suit).

Total Rs. 48,003-3-0

Deducting from the above the total of the two sums received by them, *i.e.*, Rs. 16,500 and Rs. 444 the plaintiffs claimed the balance Rs. 31,059-3-0.

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The defendants pleaded *inter alia* that the suit was barred by the provisions of Order II, r. 2 of the Civil Procedure Code. This plea found favour with the trial court who dismissed the suit. On appeal by the plaintiffs a Division Bench of this High Court came to the conclusion that Order II, r. 2 was not applicable and remanded the case for decision on the merits by order, dated the 27th November, 1922. Nearly a year later, *i.e.*, on the 25th November, 1923, four of the mortgagors who had one-half share in the properties mortgaged entered into a compromise with the mortgagees according to which the latter received from the former Rs. 18,000 in cash and *hundis* in satisfaction of half the mortgage debt then due and released one of the mortgaged houses in their favour. The remaining mortgagors pressed the original pleas, *viz.*, (1) that by a mutual settlement verbally made on the 12th February, 1912, the mortgagees had agreed to accept Rs. 35,500 in full satisfaction of the mortgage debt then due, and to charge interest at Re. 0-7-6 per cent. per mensem after that date, that Rs. 16,500 having been paid, the balance due was Rs. 19,000 only; and (2) that the plaintiffs had failed to give them credit for the sum of Rs. 300 which was paid to them on the 17th March, 1910.

With regard to the alleged oral agreement, the learned Senior Subordinate Judge of the Court below characterised the evidence produced in support of it as "flimsy, vague and indefinite", and further maintained that no oral agreement modifying the terms of a contract which was reduced to writing and registered could be proved. In respect of the item of Rs. 300 the learned Senior Subordinate Judge held that as the mortgagors had failed to claim credit for

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it in the suit for rent they could not be permitted to claim it in the present suit. Having arrived at these findings he granted the mortgagees a decree for Rs. 22,500 and costs in the terms of Order XXXIV, r. 4, Civil Procedure Code

The contesting mortgagors appeal and on their behalf we have heard Mr. Moti Sagar. He has taken us through all the evidence bearing on the alleged oral agreement, and after a careful consideration of it we come to the conclusion that it is really vague and inconclusive. We do not, however, consider it necessary to review it here because we are of opinion that the alleged oral agreement could not be proved. In *Mal-lapa v. Atum Nagu Chetty* (1), a Full Bench of the Madras High Court decided that a subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and if it has to be proved, oral evidence is inadmissible under section 92, proviso 4, of the Indian Evidence Act. This ruling was followed by a Division Bench of the Bombay High Court in *Jagan Nath v. Shankar* (2), where it was held that oral evidence was inadmissible to prove discharge of the mortgage debt under section 92, proviso 4, of the Evidence Act, 1872. Mr. Moti Sagar frankly concedes that these rulings are in point and that he is unable to say anything against them. But he lays claim to interest on the sum of Rs. 444, and further claims the item of Rs. 300 with interest, and lastly he urges that the mortgagors were liable to pay only half the costs of the suit. As regards the item of Rs. 444 it is clear that it was paid towards rent or interest and, there-

(1) (1918) I.L.R. 42 Mad. 41 (F.B.). (2) (1919) I.L.R. 44 Bom. 55.

fore, the mortgagors are not entitled to any interest on this amount. We must allow the item of Rs. 300 with interest because it was admittedly received by the mortgagees and they have failed to account for it. With regard to costs we see no reason why the appellants should be made to pay full costs while the mortgagees press their claim for half the mortgage money as against them.

We, therefore, accept the appeal and modify the decree of the Court below only so far as to give the mortgagors credit for Rs. 300 plus interest thereon from the date of payment, and to allow the plaintiffs half the costs incurred by them in the trial Court. In this Court the parties shall bear their own costs.

A. N. C.

Appeal accepted in part.

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