altered from what it would have been had the document he signed been adopted as the Memorandum of Association.

The decree of the Court below is, therefore, reversed, and the plaint dismissed with costs. The plaintiffs must also pay the defendant his costs of appeal.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 111 *of* 1876.

BANA'PA AND ANOTHER (DEFENDANTS AND APPELLANTS) *v.* SUNDARDAS JAGJIVANDAS (PLAINTIFF AND RESPONDENT). September 21

Indian Evidence Act (*I. of* 1872), *Sec.* 92—*Evidence of oral agreement contemporaneous with a deed of sale.*

The defendant admitted the execution of a deed of sale, but alleged that contemporaneously with it he entered into an oral agreement with the vendee that the deed was to be merely a security for the payment of a certain sum of money by the defendant to the vendee, and that a large portion of the sum so secured had already been paid to the vendee.

Held in special appeal that as the alleged agreement was wholly inconsistent with the terms of the deed of sale, evidence to prove such agreement was excluded by Act No. 1 of 1872, Section 92.

Muttyloll Seal v. *Annundochunder Sandle* (5 Moore Ind. Ap. 72) distinguished.

THIS was a special appeal from the decision of W. H. Crowe, Senior Assistant Judge at Kaládgi in the District of Belgaum, reversing the decree of Khrishnarao Pandurang, Second Class Subordinate Judge of Bijápur.

The plaintiff Sundardas sued to be put in possession of and have his title declared to a house situated in Bijápur, and alleged that the defendants, Banápa and Shetapa, sold it, together with some lands and immoveable property, to the plaintiff's brother Haridás (deceased) for Rs. 1,000, under a deed dated the 20th May 1868; that the whole property was in the possession of the

1876.

BANA'PA AND ANOTHER v. SUNDARDAS JAGJIVANDAS.

tenants; and that they refused to vacate it. The following is the deed of sale :—

"To Rájeshri Haridás Jagjivandas of Bárámati, residing in Bijápur. A sale deed is executed by Banapa and Shetapa, sons of Ayapa, residing in the 'Purani Bazaar' Petha, in the city of Bijápur, in the Fasli year 1277 [A.D. 1867-68] as follows :—Having had to pay a debt to Venkan Bhat, son of Shesh Bhat, Chapar Magir Gosavi, residing in the city of Bijápur, this day I* got from him a remission, &c., and had the [amount of the] debt, through the medium of arbitrators, fixed at the sum of (Rs. 1,000) one thousand rupees, and made you responsible to pay the amount to Venkan Bhat. So I become liable to pay you the said one thousand rupees. In lieu thereof, I have this day sold to you, of my [own] accord, my private property, moveable and immoveable, in the city of Bijápur and in the Mahal of Bagayat in the taluka aforesaid of Bijápur, in the sub-division aforesaid, in the division of Kaládgi, of which the particulars are; * * *

[We] have sold, of our [own] accord, to you the moveable and immoveable property, as specified [above], for rupees one thousand, and given the same into your possession this day. Our right and [that of those entitled to] our estate do not subsist upon the property. You may enjoy the same in any way you please. [We] will get the registry of the said lands entered in your name. Your [right of] ownership subsists upon the house, lands, and other property aforesaid. We have no right or interest whatever therein. This we execute of our own accord, and with sound mind and full purpose. Dated the 20th May 1868. Written by Ballaji Ramchandra Kulkarni, in the Kasba of Bijápur.

Witnesses.

(1). Ramchandra Ballaji Morihakar, in his own handwriting.

(2). Ragavendra Appaji Nimbalkar.

Banapa Betgiri, in his own handwriting.

Shetapa, in his own handwriting."

The defendants admitted the execution of the deed, but set up a contemporaneous parol agreement in modification of the terms thereof. They stated that they owed Rs. 1,000 to one Venkan

* While the pronoun "I" is used in the first part of this document, the plural

Bhat; that the plaintiff's brother Haridás undertook to pay off that debt; that the defendants were to repay to Haridás that sum with Rs. 80 for his trouble, by yearly instalments of Rs. 125; that they passed the deed of sale as a security for the repayment of the said amount, of which they had already paid Rs. 821, and had to pay only the balance remaining due; and that, under these circumstances, the deed must not be considered as a sale, but merely as a security for the repayment of money.

The Subordinate Judge of Bijápur allowed the defendants to give evidence of the alleged parol agreement, and holding it proved, rejected the plaintiff's claim. In appeal the plaintiff, *inter alia*, objected that the Subordinate Judge was wrong in admitting evidence of a parol agreement to alter or vary the terms of a written contract. The Assistant Judge, after framing an issue on the point, decided that evidence of such oral agreement was inadmissible under the Evidence Act I. of 1872. The following extract from his judgment shows his reasons :—

"The first matter necessary to be considered is whether defendants can be allowed to vary the terms of the written contract by parol evidence to the above effect. I find that in the case of *Dádá Honáji* v. *Bábáji Jagushet*[1] it was held that evidence of a contemporaneous oral agreement to suspend the operation of a written contract of sale until an agreement for a re-sale is executed is admissible as a defence even in a court of law. So again in *Muttyloll Seal* v. *Annundochunder Sandle*[2] a conveyance by lease and release in fee was held to be subject to a parol defeasance and to be in the nature of a mortgage. It was then pleaded that the deeds themselves superseded any parol evidence, Statute of Frauds (29 Car. II. c. 3), but their Lordships declined to alter the decision of the Lower Court. In the case of *Bholanath Khetri* v. *Kali Prasad*[3] a contract in writing was admitted by the parties, but it was held that the defendant could give parol evidence to supplement the written contract and show that it was intended to be a mortgage and not an absolute bill of sale. These decisions, however, were all given prior to the passing of the Indian Evidence Act (No. I. of 1872) which must now be accepted as the final authority on rules of evidence

(1) Bom

1876.

BANA'PA AND ANOTHER v. SUNDARDAS JAGJIVANDAS.

Section 92 of that Act runs as follows :—'When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms.'

"This rule is subject to certain provisions which I shall now consider. Proviso 2 lays down that any separate oral agreement as to any matter on which a document is silent, *and which is not inconsistent with its terms*, may be proved. The oral agreement insisted on by the defendants in the present case would alter entirely the complexion of the contract as contained in the written deed. Not only was it not intended to operate as a sale, but it was not even a mortgage with possession, for by the defendants' account they have never given up possession. If the object of the parties was that alleged by the defendants, nothing could have been easier than to have mortgaged this property for the sum they wanted. The deed in dispute constitutes a binding contract of sale. The defendants set forth therein that they have made plaintiff liable for their debt of Rs. 1,000 to Venkan Bhat, and in lieu thereof they have sold the property enumerated and given possession of the same. The sale is perfectly absolute, not a word about any supplementary agreement being stated. The agreement, which the defendants contend was really entered into, is totally inconsistent with the terms of the written contract. This is the only proviso that appears to me capable of application to the present case. It is not alleged that there was any subsequent oral agreement modifying the terms of the written one, nor that there was a separate oral agreement constituting a condition precedent to the attaching of any obligation under the written contract, but that under no conditions was the written contract intended to operate. I consider that the evidence offered by the defendants is inadmissible by law. I, therefore, pass a decree for specific performance of the written agreement of conveyance. I reverse the decree of the Lower Court, and award plaintiff's

1876.

BANA'PA AND ANOTHER v. SUNDARDAS JAGJIVANDAS.

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J.

Maneckshâh Jehângirshâh (for *Shántárám Nárâyán*) appeared for the special appellants.

Pandurang Balibhadra appeared for the special respondent.

The arguments of the pleaders on both sides and the authorities cited by them will appear from the following judgment delivered by

WESTROPP, C.J.:—The deed (Exhibit No. 3), dated 20th May 1868, purports to be a sale of the property mentioned therein by the defendants to Haridás, since deceased, and who is represented by his brother Sundardas as his heir. That sale is, in the deed, stated to be in consideration of Rs. 1,000 paid to Venkan Bhat, who was a creditor of the defendants to that amount. The plaintiff seeks to eject the defendants from a house at Bijápur forming part of the property mentioned in the deed. The defendants admit that they executed the deed, and do not allege that they were induced so to do by fraud or intimidation on the part of Haridás, the vendee, or that they were under any mistake in fact or in law, or any fact invalidating it, or other circumstance bringing them within the exceptions in Proviso 1 to Section 92 of the Indian Evidence Act I. of 1872. The defendants, however, allege that, contemporaneously with the deed of sale, they entered into an oral agreement with Haridás that the deed of sale was to be merely a security for the sum of Rs. 1,000 paid, as already mentioned by him, to Venkan Bhat and Rs. 80 for his trouble, and that they would repay him that amount of Rs. 1,080 by yearly instalments of Rs. 125. They also averred that they had repaid him Rs. 821, and that only the balance remained due to Haridás or his representative. The Subordinate Judge admitted evidence of the alleged oral agreement contemporaneous with the deed of sale, and held that oral agreement to be proved. The Assistant Judge has reversed that decree, because he was of opinion that, whatever may have been the former state of the law as to the admissibility of such evidence, it was excluded by Section 92 of the Indian Evidence Act; and in that opinion we concur, inasmuch as the oral agreement, alleged to have been entered into

1876.

BANA'PA AND ANOTHER v. SUNDARDAS JAGJIVANDAS.

the terms of the deed, and we are unable to conceive a case in which Section 92 would exclude evidence of an oral agreement if it would not do so in this case. The defendants do not contend that they supposed the deed of sale when they executed it to be other than what it purports to be; but they say it is modified by the contemporaneous oral agreement, and it has been argued for them that it is a fraud on the part of Haridás to treat the deed of sale as such; but that would not be a contemporaneous but a subsequent fraud, or rather a breach of the oral contract; and, if we were to hold that to be such fraud as is contemplated by the first proviso to Section 92, we should be rendering that section nugatory; for, in every case in which a party stood upon the written contract, and declined to act upon the alleged oral contract, fraud might be equally imputed, and the apparent object of the section—viz., the discouragement of perjury—would be frustrated. There would appear to have been some conflicting decisions on the state of the law on such a point before the Indian Evidence Act came into force—see *ex. gr. Dada Honáji* v. *Bábaji Jagushet*[1], *Guddalur* v. *Kunnattur*[2], and *Bholanath Khetri* v. *Kaliprasad Agurwalla*[3] on the one side and the Full Bench case *Kasheenath Chatterjee* v. *Chundy Churn Banerje*[4], and the authorities there cited. It is unnecessary for us to give an opinion as to which of these decisions was right, inasmuch as we think that such cases as the present were those in which the Legislature, by Section 92 of the Indian Evidence Act, intended to exclude evidence of oral agreements contemporaneous and inconsistent with written agreements. The circumstances in the case of *Muttyloll Seal* v. *Annundochunder Sandle*[5] were very special. There were a bond and warrant of attorney to confess judgment with a defeasance thereupon indorsed, prior to the release, and lease of even date with the release, which tended to show that the release, though absolute in form, was intended to be a mortgage, which prevent that case from being applicable on the present occasion where all of those circumstances are absent.

The decree must, we think, be affirmed with costs.

(1) 2 Bom. H. C. Rep. 36.
(2) 7 Mad. H. C. Rep. 189.
(3) 8 Beng. L. R. 89.
(4) 5 Calc. W. R. 68 Civ. Rul.