APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1897. *March 2.*

CHINTAMAN BHAT (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHRINIVAS BHAT (ORIGINAL DEFENDANT), RESPONDENT.*

Oaths Act (X of 1873)—Refusal to take an oath—Effect of such refusal—Estoppel—Evidence.

The plaintiff sued to recover certain land from eight defendants, alleging it to be his exclusive property. One of the defendants pleaded that he was a co-owner with the plaintiff, who had hitherto paid him his share of the rent. In the course of the case he offered to withdraw his opposition to the plaintiff's claim if the plaintiff would swear a binding oath that his (the defendant's) allegations were false and that the plaintiff had held exclusive possession of the property. The plaintiff refused to take the proposed oath. The Court, however, attached no importance to the refusal, and on the evidence passed a decree for the plaintiff. The defendant appealed and in the appellate Court the plaintiff's son on behalf of his father refused the oath, while on the other hand the defendant said he was willing, if required, to swear to the truth of his case. The Judge was of opinion that the plaintiff's refusal to take the proposed oath and the defendant's readiness to take it was, under the circumstances of the case, conclusive, and disregarding the recorded evidence he reversed the decree of the lower Court and allowed the defendant's claim.

Held (reversing the appellate decree and restoring the decree of the lower Court) that the appellate Court was wrong in deciding the case on the ground of the plaintiff's refusal to take the proposed oath. That refusal did not conclusively prove the falsity of the plaintiff's claim. It was merely a piece of conduct which was evidence to be considered in the case together with the other evidence. In this case there was abundant other evidence all of which was in favour of the plaintiff, and his refusal to take the oath did not necessarily constitute a sufficient reason to set aside that evidence.

A party who makes an oath as prescribed by his adversary confers by so doing on his statement the character of conclusive proof, but his mere refusal to make the oath does not under the terms of the Oaths Act (X of 1873) justify any legal presumption against him. Such refusal is to be considered merely as a piece of conduct to be considered along with the other evidence.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Bolgaum.

The plaintiff sued to recover possession of certain land, alleging that the defendants were his tenants and denied his title. Defendant No. 8, who alone resisted the plaintiff's claim, pleaded

* S. A. No. 767 of 1896.

that he was a co-sharer with the plaintiff and that they owned the land in equal shares.

In the Court of first instance the defendant proposed that, if the plaintiff would take an oath that the defence was false and that he (the plaintiff) had been in exclusive possession and enjoyment of the land in dispute, he would withdraw from the case.

The plaintiff refused to take the oath as proposed.

The Subordinate Judge attached no importance to this refusal by the plaintiff to take the proposed oath, and decided, on the evidence before him, that the plaintiff was the sole owner of the land in dispute, and passed a decree in his favour.

On appeal the District Judge reversed this decision, holding that the plaintiff's refusal to take the oath rendered it impossible to resist the conviction that the truth lay on the side of the defendant. On this ground alone the District Judge reversed the decree of the lower Court and rejected the plaintiff's claim.

The following is an extract from the judgment :—

"The defendant's contention is that although the land was entered in the plaintiff's name, that was because it formed a part of the undivided estate (another part outlying in other villages) and that notwithstanding the plaintiff always paid the defendant his share of the rent pursuant to the understanding evidenced in the documents, fraudulent or otherwise, of 1858. The defendant went further and agreed that, if the plaintiff would swear a binding oath that his presentment of the case was false, he (the plaintiff) had had exclusive possession and had never paid to him (the defendant) his half-share of the *phala*, he (the defendant) would at once withdraw from the case. The plaintiff refused to take the oath on the ground that he was an old man.

"Now it is evident, on the pleadings and record, that, apart from this business of the oath, the evidence is all in favour of the plaintiff. The defendant had to rely on the solitary statement of one witness to prove the payment once of his share eight years ago.

* * * * * * * *

"But I am greatly inclined to decide this case by the ordeal. There is nothing in the Oaths Act, 1873, which enjoins upon a Court the duty of presuming adversely to a plaintiff or defendant who refuses to take an oath tendered under its provisions. It was once held (*Issen Meah* v. *Kalaram* (1) *per* Mitter, J.) that a Court was well justified in doing so, and in practically deciding the case on the presumption so drawn. Mitter, J., is of course a particularly valu-

(1) 2 Cal. L. R., 476.

1897.

CHINTAMAN v. SHRINIVAS.

able authority on such a point; he is especially qualified to guage the working of a native conscience and apportion the real value to be attached to such a refusal. But in this case more happened. At the hearing I asked the plaintiff to come forward and say why he would not take the oath if his allegations were true. He is an old man and was represented by his son, a priest of apparently about 45. This man was instructing Mr. Chhatre and was the active mover in the case. He refused on behalf of his father to take the oath, though at first he was partly disposed to take it himself. Not being a party, however, that would not do. He then in his turn said that if the defendant would take a similar oath of the truth of his case, he for his part would not oppose the appeal further. This the defendant at once agreed to do. Now I doubt whether such a tender could be made by any one but the actual party, and Mr. Chhatre very rightly declined to ratify the proposal without instructions from his client. Yet the mind of the Court was inevitably influenced by this episode in favour of the defendant (appellant). The point at issue is very simple, and it is one on which while all the evidence might well be (as it is) on the plaintiff's side, there might be a true explanation such as the defendant gives. When, then, such explanation being difficult of proof the defendant comes forward and stakes his whole interest on the plaintiff's oath that his apparently true evidence is really true, and the plaintiff refuses to take that oath; when, in turn, the plaintiff's side tenders a like challenge to the defendant which is promptly accepted, it is impossible to avoid the conviction that truth lies on the side of the defendant. It is all very well to say, as was faintly urged here, that a defendant ought not to have the option of imposing this kind of unpleasant ordeal on a plaintiff; that respectable natives have a great dislike to taking any sort of solemn oath of the sort, and so forth. But it has to be remembered that in tendering an oath under the Act the party so tendering stakes his whole case absolutely on his confidence in his opponent's veracity under a peculiarly solemn sanction, that if the oath be taken it concludes the case against the party tendering it, while if it be refused, the law says nothing about the view which the Judge is to found on the episode: so that it is not an ordeal which could be lightly and generally proffered. I have no doubt at all, from my observation of the demeanor of the parties while the point was under discussion, that the defendant was in the right, and as, after all, the main function of a Court is to see justice done, though the approaches to that result may be a little irregular, I shall venture here to answer the issue in defendant's favour, and hold that he is entitled to one-half he claims."

Against this decision plaintiff preferred a second appeal to the High Court.

B. A. Bhagvat for appellant.

N. V. Gokhale for respondent.

1897.

CHINTAMAN v. SHRINIVAS.

PARSONS, J. :—The point which I have to consider is, how far the Judge of the lower appellate Court was justified in disregarding the evidence on the record and deciding the case on a presumption drawn from the refusal of the plaintiff to take a solemn oath under the Oaths Act of 1873 that defendant's presentment of the case was false. I assume that there was such a refusal, because although the statement in the Exhibit 39 is signed by plaintiff's pleader, I take it that he had asked his client and was stating to the Court what his client had said. The refusal, however, was made in the Court of first instance, and the Judge of that Court said that under the circumstances of the case he attached no importance to the refusal. There was no refusal by the plaintiff himself in the appellate Court; his son only was present there, and it would have been much better if the District Judge had caused the plaintiff himself to be asked whether he would take an oath or abide by the result of an oath taken by the defendant, before he decided the appeal in the way he has done.

So far as the Oaths Act itself deals with the subject, no presumption one way or the other is directed to be drawn. The refusal to take an oath, then, can only be a piece of conduct, which is evidence to be considered in the case. I do not know, and the Judge does not tell me, why in this particular case the refusal should be considered as conclusive evidence of the falseness of the claim. In order, therefore, to support his decision I should have to hold that in every case in which a plaintiff is called on to take an oath, and refuses to do so, judgment is to be passed against him. I am satisfied that this would not be right. There are many good reasons why a man should refuse to solemnly swear to the truth even of a true claim. It is in the case of a false defence that a defendant would most readily as a last resource risk everything on the chance of an oath being taken by the plaintiff. I think that, at the most, a refusal can only be considered along with other evidence. Where there is evidence on both sides, and a doubt arises as to which is the true case, then a refusal might well be taken into evidence to decide the point. Such was the case in *Issen Meah* v. *Kalaram Chunder*

1897.

CHINTAMAN v. SHRINIVAS.

Naw (1). I do not think that a refusal can be held to work as an estoppel, so as to conclusively prove the falseness of the claim made by the person refusing.

As the Judge finds that the evidence is all in favour of the plaintiff, and that the defendant would not resist the claim otherwise than by what the Judge calls the ordeal, and as I think he has wrongly decided the case by the ordeal, I must reverse his decree and restore that of the Court of first instance with costs in both Courts of appeal on the defendant.

RANADE, J.:—The contest in this case lies between the appellant-plaintiff, who claims the land in dispute to belong exclusively to himself, and the respondent (original defendant No. 8), who contends that he and the appellant are entitled to share it equally as reversionary heirs of Shankar after his widow Umabai's death. The undisputed facts are, that these two parties were reversionary heirs, and had, in 1858, agreed to keep this land joint, when they partitioned other property. In 1864, the appellant took a kabuláyat of the land from the tenants in his own name, and in 1866, after Umabai's death, the land was entered in the appellant's name, and all the rent-notes from 1867 to 1893 were taken by him. The respondent contended that the appellant during all this time paid a portion of the rent to him, but the Court of first instance held that these alleged payments were not proved. Respondent then offered to give up his contention, if appellant denied on solemn oath that he ever paid a portion of the rent to respondent. The appellant refused to take the oath, but the Court of first instance attached no importance to this refusal, and awarded the appellant-plaintiff's claim.

In appeal, the District Judge, while admitting that, apart from the oath incident, the evidence was all in favour of the present appellant, held that the appellant's refusal to take the oath prescribed satisfied him that the present respondent was in the right, and he accordingly allowed respondent the half-share claimed by him.

The point we have to consider is, whether the District Judge was justified, by the terms of the Oaths Act, in inferring from

(1) 2 C. L. R., 476.

the appellant's refusal to take the oath, that he had been paying his half-share of the rent to the respondent, when admittedly all the evidence on the record supported appellant's claim. Section 9 of the Act provides that, if any party to a proceeding offers to be bound by any special oath under section 8, if such oath be made by the other party, the Court may ask such other party or cause him to be asked if he will make the oath. If such other party agrees to make the oath, the oath may be administered to him (section 10). The evidence so given shall, as against the party who offered to be bound by the oath, be *conclusive proof* of the matter stated (section 11). Finally, if the party refuses to make the oath, the Court shall record as part of the proceedings the nature of the oath, and the fact of refusal with reasons for such refusal (section 12).

It will be seen from these sections that, while a party, who makes an oath as prescribed by his adversary, confers by so doing on his statement the character of conclusive proof, his mere refusal to make the oath does not, under the terms of the Act, justify any legal presumption against him. The refusal is to be considered apparently as a piece of conduct—evidence in the case, to be judged of along with other evidence. Of course where, as in the case reported in *Issen Meah* v. *Kalaram Chunder Naw* [1], there is no such other evidence, the refusal by itself may justify the Court in presuming that his case was false. But where, as in the present case, there is abundant evidence all in favour of the party refusing to make the oath, the mere refusal will not necessarily constitute a sufficient reason to set aside that evidence. As ruled in *Muhammad Zahur* v. *Cheda Lal* [2], following in this respect an earlier ruling in *Vasudeva* v. *Naraina Pai* [3], the Oaths Act does not constrain the Court to pass a decision in favour of a particular party. This is the case, even if the party make the oath prescribed. His statement on such oath will, of course, bind the other party *pro tanto*, but it does not prevent the Court from exercising its mind judicially in deciding the whole case. A party may well refuse to take the oath prescribed for other reasons than his consciousness that his case is

(1) 2 C. L. R., 176. (2) I. L. R., 14 All., 141.

(3) I. L. R., 2 Mad., 356.

1897.

CHINTAMAN v. SHRINIVAS.

false. He may, as a respectable man, dislike the odium of winning his case on the strength of the oath ordeal, instead of on the strength of his evidence. This seems to have been the case with the present appellant. If the whole evidence was in his favour, he might very well refuse to take the ordeal. The proceedings in the District Court do not even show clearly that appellant was not, like the respondent, ready to stake the case on his adversary's oath. On the whole, we feel satisfied that the District Judge was bound, under the circumstances, to dispose of the case solely on the evidence before him, irrespective of the oath incident. We accordingly reverse the decree and restore the decree of the Court of first instance. All costs on respondent.

Decree reversed.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Tyabji.

1897. *March* 3.

RAMCHANDRA VITHURAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* JAIRAM AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Mortgage-debt payable by instalments—Money decree obtained by mortgagee for two instalments—Execution—Sale of mortgaged property in execution of money decree for such instalments without notice by mortgagee of lien for future instalments—Property sold free of incumbrances—Civil Procedure Code (Act XIV of 1882), *Secs.* 237 *and* 287.

The effect of sections 237 and 287 of the Civil Procedure Code (Act XIV of 1882) plainly is to impose a duty on the person applying for execution to disclose to the Court his own lien (which he must know of) in his application for sale, and on the Court the duty of specifying the same in the proclamation.

Where, therefore, in execution of a simple money decree obtained for some of the instalments due on his mortgage-bond a mortgagee brought to sale the property which he held in mortgage, but in his application for execution did not mention his lien on the property for the instalments that were still to fall due,

Held, that the purchaser, if he supposed that he was purchasing the full proprietary title, purchased the property free of the mortgagee's lien.

Agarchand v. *Rukhma*(1), *Khevraj* v. *Lingaya*(2), *Sheshgiri* v. *Salvador Vas*(3) and *Dhondo* v. *Raoji*(4) referred to.

* Second Appeal, No. 803 of 1896.

(1) I. L. R., 12 Bom., 678.
(2) I. L. R., 5 Bom., 2.
(3) I. L. R., 5 Bom., 5.
(4) I. L. R., 20 Bom., 290.