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Narain v. *Ram Pertab Singh* (1); and *Baldeo* v. *Harrison*.(2) In the last case the meaning of the word 'issue' is defined. Preparing and signing an order is embodying the order under the seal of the Court, just as preparing and signing the decree is embodying an adjudicating order under the seal of the Court. Decree is prepared some days after the judgment is delivered, but it bears the date on which the judgment is pronounced; and limitation runs from the date on which the judgment is pronounced, and not from the date the decree is ready.

CHANDAVARKAR, J.:—The notice must be taken to be issued when the Court orders that it should issue, the order of the Court being itself the issue of the notice, though owing to the exigencies of business the notice has to be formally drawn up afterwards and signed and then despatched. These subsequent acts are all mere matters of routine following as a matter of course the first act of the Court which consists in judicially ordering under section 248 the issue of the notice. The judicial pronouncement that there shall be notice is itself the issuing, just in the same way that there is a decree made, not when it is drawn up and the Judge signs it, but the moment it is pronounced by the Judge in Court. This view is in accordance with the decision of this Court in *Damodar Shaligram* v. *Sonaji*.(3)

(1) (1881) Allahabad Weekly Notes, 120.
(2) (1890) *Ibid*, 245.
(3) (1903) 27 Bom. 622, 5 Bom. L. R. 594.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904. *January* 20.

DAGDU VALAD JAIRAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BHANA VALAD JAIRAM AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Contract—Proposal with unqualified assent—Mistake in expression—Common mistake—Unilateral mistake—Evidence Act (1 of 1872), section 92, proviso 1—Contracting party not able to read—Contract differing from that pretended to be read.

It is of the essence of a contract that there should be (expressly or by implication) a proposal to which an unqualified assent has been given: without

* Second Appeal No. 78 of 1903.

such assent there is no contract : the minds of the contracting parties are not at one.

Mistake in expression may be either common or unilateral.

Mistake in expression implies that the minds of the parties are not at one on that which is expressed ; but it does not follow that in every case where there in fact has been such mistake there is no contract. Practical convenience dictates that men should be held to the external expression of their intentions, unless this be outweighed by other considerations : and to this legal effect is given by the law of evidence, which permits oral proof at variance with documents only in certain cases : in the rest the proof, if it be of mistake, is not received, so that the mistake does not come to light, and in a Court of law does not exist.

The Court, administering equitable principles, permits mistake to be proved when it is common : that is, where the expression of the contract is contrary to the concurrent intention of all the parties. If such mistake be established, then the Court can give the relief of rectification, but what is rectified is not the agreement, but the mistaken expression of it.

The general rule is that the intention of contracting parties is to be gathered from the words they have used. Where the mistake is unilateral, it does not ordinarily affect the rights which are the legitimate consequence of the words, though it may affect the remedy that will be awarded against the party in error.

But mistake known at the time to the other party may be proved and performance in accordance with the terms of the error will not be compelled.

A mistake even not known has legal consequences, provided there can be restoration of all parties concerned to their original position.

Where a contracting party, who cannot read, has a written contract falsely read over to him and the contract written differs from that pretended to be read, the signature on the document is of no force because he never intended to sign and therefore in contemplation of law did not sign the document on which the signature is.

If a person executes a document knowing its contents but misappreciates its legal effect, he cannot deny its execution.

SECOND APPEAL from the decision of F. X. DeSouza, District Judge of Khándesh, confirming the decree of V. R. Kulkarni, Subordinate Judge of Shirpur.

Certain lands originally belonged to one Mohan Fulsing, who had mortgaged them to Ramdas Gangadas for Rs. 1,000 with interest at 2 per cent. Subsequently defendant 1 purchased them from Mohan for Rs. 2,000 under a sale-deed dated the 5th September, 1894, subject to the mortgage lien of Ramdas, and on the 5th December, 1894, defendant 1 sold them to plaintiffs

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for Rs. 2,300 under a sale-deed which contained the following covenant:—"If the said lands have been mortgaged or sold, etc., to anybody, I (defendant 1), am responsible for the same." After the purchase by plaintiffs, Ramdas brought a suit, No. 352 of 1896, upon his mortgage and obtained a decree for the recovery of the mortgage-debt by sale of the mortgaged property and in order to save the lands from being sold in satisfaction of the mortgage decree the plaintiffs paid to Ramdas Rs. 1,973-13-6. Thereupon in the year 1901 the plaintiffs brought the present suit against defendant 1 and his brothers for the recovery of Rs. 1,973-13-6 and interest thereon, namely, Rs. 201-2-6, in all Rs. 2,175, alleging that defendant 1 in his capacity as the manager of the undivided family consisting of himself and his two brothers had sold the lands to him and had agreed to be responsible for all previous burdens on the said lands.

Defendants 1 and 2 contended that they did not agree to pay the previous burdens on the lands, that the clause to that effect in the sale-deed was fraudulent and made without their knowledge and consent, and that supposing that the clause was genuine still they were not liable to plaintiffs' claim.

Defendant 3 was absent.

The Subordinate Judge found that it was not proved that defendant 1 undertook to pay the mortgage burden of Ramdas on the lands when he sold them to plaintiffs. He therefore dismissed the suit.

On appeal by the plaintiffs the Judge confirmed the decree. The following are extracts from his judgment:—

Plaintiffs' pleader relies on the express terms of the stipulation embodied in the sale-deed to show that it covered all previous subsisting encumbrances whether created by defendant 1 himself or his predecessor-in-title, Mor[illegible] Fulsing, and he has argued that parol evidence varying or contradicting the clear terms of such an agreement is inadmissible under the provisions of section 92 of the Indian Evidence Act. It will be noted, however, that defendant 1 in his case has put forward a plea of mistake, misrepresentation and fraud and in such circumstances "Courts of equity are constantly in the habit of admitting parol evidence to qualify and correct and even to defeat the terms of written instruments." (Story, Equity Jurisprudence, Vol. 2, p. 750). If so, it is clear that parol evidence is admissible in the present case to show in what sense the terms of the covenant were understood by the parties, especially in view of the fact that defendant 1 is an illiterate agriculturist and the stipulation in question

is admittedly an interlineation and therefore presumably not forming part of the original draft document, but the result of an exchange of views between the parties on the spur of the moment.

* * * * *

I, therefore, hold that what defendant 1 conveyed was his right, title and interest in the land with a guarantee probably against any encumbrances created by himself. The words in which that guarantee was expressed were unfortunate and plaintiffs have now fraudulently endeavoured to avoid themselves of their latitude and ambiguity to the detriment of defendants by bringing the present suit.

The plaintiffs preferred a second appeal.

Scott (Advocate-General) with *D. W. Pilgaumkar* appeared for the appellants (plaintiffs):—The covenant of indemnity contained in our sale-deed is unlimited in its terms. The Judge was of opinion that the covenant was the result of the exchange of views between the parties. He, therefore, held that it can be rectified on a consideration of the evidence showing the rectification. The defendants have not taken any steps to get the covenant rectified. So long as the covenant stands we are entitled to a decree. A party cannot be allowed to evade the provisions of section 92 of the Evidence Act.

Setlur (with *R. N. Inamdar*) appeared for the respondents (defendants):—We gave authority to the writer of the deed to insert an indemnity clause with reference to any incumbrance created by the vendor and not an unlimited covenant like the one in dispute. Further, the covenant in question is admittedly an interlineation. We alleged a case of mistake which is clearly covered by proviso (1) of section 92 of the Evidence Act. We found out our mistake after the present suit was brought and then we applied for its rectification. The mistake was a common mistake.

The covenant by itself is not clear as to the person creating a charge on the property. Therefore this is a case of latent ambiguity and we can clear up the ambiguity by oral evidence.

We could have brought a suit for the rectification of the covenant. We therefore submit that we can claim the same relief though we are defendants in the suit.

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Scott, in reply:—The plea in the written statement was that the covenant was a forgery and not a mistake. The Judge made out a new case by holding that it was a mistake.

JENKINS, C. J.:—This suit is to recover a sum of Rs. 1,973-13-0, with Rs. 201-2-6 as interest, for breach of a covenant against incumbrances contained in a conveyance of property by defendant No. 1 to plaintiff No. 3.

The property at one time belonged to Mohan Fulsing and his brothers, and was mortgaged to Ramdas Gangadas to secure Rs. 1,000 with interest.

On the 6th September, 1894, Mohan Fulsing and his brothers sold the property for Rs. 2,000 to defendant No. 1, who on the 5th December in the same year resold to the plaintiff No. 2 for Rs. 2,300.

In the conveyance executed on this sale there was a covenant by the 1st defendant in these terms: "If the said lands have been mortgaged or sold, etc., to any body, I am responsible for the same." Ramdas Gangadas in 1896 sued on his mortgage, and in satisfaction of his claim the plaintiff No. 2 paid Rs. 1,973-13-0. It is for this sum with interest that the plaintiffs now sue. The plea in the written statement is that the defendants 1 and 2 did not agree to pay the previous burdens on the land they sold to the plaintiffs, that the entry to that effect in the sale-deed was fraudulent and made without their knowledge and consent, and supposing the entry to be genuine, still the defendants are not liable to the plaintiffs' claim.

In the Court of the Subordinate Judge the suit was dismissed with costs. The plaintiffs appealed, and in the District Court the following issue was raised:—"Was the lower Court in error in holding that defendant 1 had not undertaken to pay off the previous incumbrances on the property to plaintiff 2?" It substantially agrees with the only issue raised in the first Court. We refer to it not as an aid towards the solution of this case (for it cannot be so regarded) but to make it the occasion for insisting on the importance of defining with precision at the outset the points on which a decision must turn. This no doubt requires thought and care, but the time is well spent; while vague and general

issues for the most part mean that the case is approached without a clear idea of its essentials.

The discussion before us has not proceeded on the lines of the written statement, but has been limited to the question whether the defendant No. 1 could or could not escape liability on the ground of mistake.

The mistake, if any, was in expression, and mistake of that sort may be either common or unilateral.

Mistake has been aptly described as merely a dramatic circumstance: and we think it will be found that the legal consequences associated with it are referable to the fundamental considerations, which lie at the root of all contractual obligation.

Speaking generally, it is of the essence of a contract that there should be (expressly or by implication) a proposal to which an unqualified assent has been given: without such assent there is no contract: the minds of the contracting parties are not at one.

Mistake in expression (it is of that class of mistake alone that we speak in this judgment) implies that the minds of the parties were not at one on that which is expressed: but it does not follow that in every case where there in fact has been such mistake, there is no contract. Practical convenience dictates that men should be held to the external expression of their intentions, unless this be outweighed by other considerations; and to this legal effect is given by the law of evidence, which permits oral proof at variance with documents only in certain cases: in the rest the proof, if it be of mistake, is not received, so that the mistake does not come to light and in a Court of law does not exist. We must therefore see where mistake can be brought to light, and what are the consequences that follow. Without tracing the stages by which the result has been reached, it will suffice to say that the Court in administering equitable principles permits mistake to be proved where it is common: that is where the expression of the contract is contrary to the concurrent intention of all the parties.

If such mistake be established, then the Court can give the relief of rectification, but be it noted, (as therein error often lurks) that what is rectified is not the agreement, but the mistaken expression of it.

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Ordinarily this mistaken expression would be in the form of a document, and the existence of a real agreement prior to the document, is necessarily implied. The rectification consists in bringing the document into conformity with this prior agreement, and without such agreement there can be no rectification. It is an adjustment of the machinery to its proper end.

The position has been thus described in the argument in *Paget* v. *Marshall* (1) adopted by the Court, "if two persons contract, and they really agree to one thing, and set down in writing another thing, and afterwards execute a deed on that wrong footing, the Court will substitute the correct for the incorrect expression—in other words, will rectify the deed."

It is true that rectification is not claimed in this suit as a relief by the defendants, for the rules of procedure by which Mofussil Courts are governed do not permit of a counterclaim in this suit for that purpose, nor is there a cross suit for rectification: but as a Court guided by the principles of justice, equity and good conscience we can give effect as a plea to those facts, which in a suit brought for that purpose would entitle a plaintiff to rectification: cf. *Fife* v. *Clayton* (2) and *Steele* v. *Haddock*.(3)

So much for common mistake: we must now see how matters stand when the mistake is unilateral.

The general rule, as we have indicated, is that the intention of the contracting parties is to be gathered from the words they have used, and a mistake by one ordinarily does not affect the rights, which are the legitimate consequence of the words, though it may affect the remedy that will be awarded against the party in error.

But mistake known at the time to the other party may be proved, and performance in accordance with the terms of the error will not be compelled: *Smith* v. *Hughes*.(4)

There are cases which go to show that mistake, even when not so known, has legal consequences, provided there can be restoration of all parties concerned to their original position. But it is needless at this stage to discuss this, as the plaintiff through his pleader has expressed his willingness to forego his present claim,

(1) (1884) 28 Ch. D. 255 at p. 262.
(2) (1807) 13 Ves. 546.
(3) (1855) 24 L. J. Ex. 78.
(4) (1871) L. R. 6 Q. B. 597.

and give up the land, provided he be restored to his original position by being refunded what shall be decided to be due to him in respect of all he has paid in connection with his purchase and the mortgage.

These are the principles that govern in those cases, of which this is a type, but we cannot now apply them here as the findings of fact are defective.

The issues necessary to a proper determination of this point are:—

1. Was the unlimited covenant against incumbrances as expressed in the conveyance contrary to the concurrent intention of all the parties?

2. If so, what was the real agreement between the parties?

3. If the unlimited covenant was not contrary to the concurrent intention of all the parties, did the defendant No. 1 enter into that covenant under any and what mistake?

4. If there was a mistake on the part of the defendant No. 1, (*a*) was this known to the plaintiff No. 2 at the date of the conveyance containing the covenant and (*b*) could the plaintiff No. 2 in the circumstances reasonably have supposed that the covenant expressed the real intention of defendant No. 1?

For the purpose of determining the existence of mistake in a written document oral evidence is admissible when the circumstances are appropriate: see proviso 1 to section 92 of the Evidence Act. This evidence must be clear, and the Court in weighing it will be entitled to take into consideration defendant No. 1's capacity and all the circumstances as they existed at the date of the sale to plaintiff No. 2.

There is another aspect of this case, which has not been presented to us, but which we think calls for allusion. The second defendant is illiterate, and it is established that if a man, who cannot read, has a written contract falsely read over to him and the contract written differs from that pretended to be read, the signature of the document is of no force because he never intended to sign, and therefore in contemplation of law did not sign the document on which the signature is: *Foster* v. *Mackinnon*[1]. And it is all one in law to read it in other words and to declare the effect thereof in other manner than is contained in the writing: *Thoroughgood's case*.[2] But if a person executes

(1) (1869) L. R. 4 C. P. p. 711. (2) (1582) 1 Co. Rep. (Part 11) 445.

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a document knowing its contents but misappreciating its legal effect he cannot deny his execution. For the purpose of dealing with the case on this footing a finding on the following issue is requisite.

Prior to the execution by defendant No. 2 of the document, was the covenant falsely read over to him or was the effect thereof declared to him in other manner than is contained in the writing, and if so, in what manner?

There will be a remand for the determination of these issues and the return must be in two months. No further evidence unless the Judge deems it necessary.

Issues sent back.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904. *March* 8.

RANCHOD SHAMJI (ORIGINAL DEFENDANT), APPELLANT, *v.* ABDULA-BHAI MITHABHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Ownership of soil—Encroachment by protrusion of beams—Mandatory injunction.

Plaintiff's beams overhung defendant's soil and defendant erected a building which overhung those beams. A question having arisen as to whether the beams gave the plaintiff a right to the column of air above them,

Held, that the defendant being the owner of the soil was entitled *primâ facie* to all above it and the diminution in his rights by reason of the beams did not extend beyond the protrusion of the beams themselves.

SECOND APPEAL from the decision of Chandulal M., First Class Subordinate Judge of Ahmedabad, with Appellate Powers, varying the decree of N. V. Samant, Subordinate Judge of Dohad.

The plaintiff sued for the removal of a superstructure newly raised by the defendant on the open ground adjoining the back wall of the plaintiff's house, alleging that the said superstructure prevented the access of light and air coming to his house from over the ground, or in the alternative that such part of the

* Second Appeal No. 565 of 1903.