APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

1906. *June* 21.

ABAJI ANNAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* LAXMAN BIN TUKARAM AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Indian Evidence Act (I of 1872), section 92—Redemption Suit—Sale out and out—Construction—Evidence of intention—Admissibility—Dekkhan Agriculturists' Relief Act (XVII of 1879).

Plaintiffs, who were agriculturists, brought a suit to redeem and the defendant contended that the transaction in suit was a sale out and out and not a mortgage. The lower Courts held that the transaction was a mortgage and allowed redemption.

Held, on second appeal by the defendant, that evidence of intention cannot be given for the purpose merely of construing a document which purported to be a sale out and out and not a mortgage; section 92 of the Indian Evidence Act (I of 1872), subject to the proviso therein contained, forbids evidence to be given of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from the terms of any contract, grant or other disposition of property the terms of which have been reduced to writing as mentioned in that section.

While there are restrictions on the admissibility of oral evidence, section 92 in its first proviso recognizes that facts may be proved by oral evidence which would invalidate a document or entitle any person to any decree or order relating thereto. And where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently.

SECOND appeal from the decision of D. G. Gharpure, First Class Subordinate Judge of Poona, confirming the decree of T. N. Sanjana, Subordinate Judge of Haveli.

The plaintiffs, who were agriculturists, sued for an account and redemption of the land in suit upon payment to the defendant of the amount due, if any, by annual instalments, alleging that the transaction, though in form a sale, was in reality a mortgage.

The defendant contended that the transaction in dispute was a sale out and out and that under it he entered into possession.

* Second appeal No. 619 of 1905.

The Subordinate Judge found that the plaintiffs had established the existence of circumstances entitling them to prove that the transaction was a mortgage and not a sale and that they had proved that such was the transaction. He, therefore, decreed redemption directing the plaintiffs to pay to the defendant Rs. 750 by yearly instalments of Rs. 100. With respect to the real nature of the transaction, the Subordinate Judge observed as follows:—

Although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale, there was an oral agreement by way of defeasance, yet the Court will look to the subsequent *conduct* of the parties, and if it clearly appears from such conduct that the apparent vendee treated the transaction as one of mortgage, the Court will give effect to it as a mortgage and nothing more. *Baksu* v. *Govinda*, I. L. R. 4 Bom. 594. In this case, the vendee's conduct relied upon as showing that he has treated the transaction as a mortgage, is his own admission in suit No. 339 of 1896. That was a suit for redemption by a third person. Therein also there was a sale-deed taken, but there was a writing passed by the defendant acknowledging the mortgagor's right to redeem.

On appeal by the defendant the Judge confirmed the decree and in relation to the consideration for the transaction he made the following remarks:—

As to consideration, I was asked to act upon the frequent instances occurring in the Deccan, where bogus payments are made before village registrars. It is impossible to take such instances into consideration. Every case must be decided upon its own merits.

The defendant preferred a second appeal.

J. R. Gharpure for the appellant (defendant):—The plaintiffs sued us for an account and redemption under the provisions of the Dekkhan Agriculturists' Relief Act. The suit was based upon a document which evidences a sale out and out. The sale was accompanied with delivery of possession and we took rent note in which the plaintiffs attorned to us. Subsequently we took actual possession from the plaintiffs. These are sufficient indications that the parties intended the transaction to be an absolute sale. The lower Courts were wrong in admitting oral evidence to prove that the transaction was really a mortgage and not a sale. They ignored the ruling of the Privy Council in

1906.

ABAJI v. LAXMAN.

Balkishen Das v. *W. F. Legge* [1], and the rulings of the High Courts in *Achutaramaraju* v. *Subbaraju* [2], *Dattoo* v. *Ramchandra* [3], *Hanmant Narsinha* v. *Govind Pandurang* [4], and *Keshavrao* v. *Raya Pandu* [5]. These decisions are in complete harmony with the principle laid down by the House of Lords in *North Eastern Railway* v. *Hastings* (*Lord*) [6].

The lower Courts have based their conclusion mainly on our admission in suit No. 339 of 1896. We contend that the admission is not covered by section 31 of the Evidence Act. It was made in a suit between us and a stranger. The present plaintiffs were not parties to that suit. Therein also a deed of sale was taken but there was a writing passed to the defendant acknowledging the mortgagor's right to redeem. We got possession of the land subsequent to that suit. An admission will be binding only when it operates as an estoppel: *Mussumat Oodey Koowur* v. *Mussumat Ladoo* [7], *Pertap Chunder* v. *Mohendronath* [8].

M. R. Bodas for the respondents (plaintiffs):—The lower Courts have come to a correct conclusion by the light of the decision in *Baksu Lakshman* v. *Govinda* [9] and the cases following it. We are agriculturists, and in cases between agriculturists and their money-lending creditors it is always the practice to advance money on an understanding that the document, though in form a sale, should operate as a mortgage. The transaction in suit was rightly held to be a mortgage having regard to the defendant's admission in suit No. 339 of 1896.

We further submit that the cases relied on do not apply. Evidence as to the conduct of parties may be gone into. The conduct is not to be investigated into as an oral agreement: *Khankar Abdur Rahman* v. *Ali Hafez* [10], *Mahomed Ali Hossein* v. *Nazar Ali* [11].

(1) (1899) 22 All. 149.
(2) (1901) 25 Mad 7.
(3) (1905) 30 Bom. 119 : 7 Bom. L. R. 669.
(4) (1905) 8 Bom. L. R. 283.
(5) (1906) 8 Bom. L. R. 287.
(6) [1900] A. C. 260.
(7) (1870) 13 Moo. I. A. 585.
(8) (1889) 17 Cal. 291.
(9) (1880) 4 Bom. 594.
(10) (1900) 28 Cal. 256.
(11) (1901) 28 Cal. 289.

Gharpure in reply:—The plaintiffs brought the present redemption suit in connection with a transaction which is a sale. They cannot get that relief in the present suit. They may bring another suit setting forth any of the circumstances mentioned in proviso (1) to section 92 of the Evidence Act and the evidence of the kind led in the present suit may be gone into in that suit.

JENKINS, C. J.:—The plaintiffs sue for redemption asking that an account may be taken under the provisions of the Deccan Agriculturists' Relief Act.

Their case in the plaint is that the transaction in respect of which they have brought this suit is a mortgage.

The defendant by his written statement asserts that the land was not mortgaged to him, but sold out and out.

If the document evidencing the transaction be looked at (and that alone), then it is clear that the transaction was, as the defendant states, a sale out and out.

The lower Courts, however, have decided this suit in the plaintiffs' favour holding that the transaction was a mortgage and not a sale.

The defendant appeals from the decree of the lower appellate Court.

For the appellant, in this Court, it is pointed out that neither Court has observed the principles established in the case of *Balkishen Das* v. *W. F. Legge* (1), and that no attention has been paid to the decision of the Madras High Court in *Achutaramaraju* v. *Subbaraju* (2), or of this High Court in *Dattoo* v. *Ramchandra* (3).

It appears to us that this contention is not without foundation. It is clear that evidence of intention cannot be given for the purpose merely of construing a document such as that with which we are now concerned; and section 92 of the Evidence Act, subject to the proviso therein contained, forbids evidence to be given of any oral agreement or statement for the purpose of contradicting, varying, adding to, or subtracting from the terms of any contract, grant or other disposition of property the terms

(1) (1899) 22 All. 149. (2) (1901) 25 Mad. 7.
(3) (1905) 30 Bom. 119 : 7 Bom. L. R. 669.

1906.

ABAJI v. LAXMAN.

of which have been reduced to writing as mentioned in that section.

We think the provisions of section 92 have not been sufficiently observed by the lower Courts.

But at the same time it would be wrong for us to reverse the decree of the lower appellate Court, for both the lower Courts seem to have erred in form rather than in substance. While there are the restrictions on the admissibility of oral evidence to which we have referred, section 92 in its first proviso recognizes that facts may be proved by oral evidence which would invalidate a document or entitle any person to any decree or order relating thereto. And where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently: see *Pertap Chunder Ghose* v. *Mohendranath Purkait* [1].

This, we think, must have been in the mind of the Judge of the first Court when he raised the first issue in the form he did; that issue runs as follows:—

> Whether the plaintiffs prove the existence of circumstances entitling them to prove that the transaction was a mortgage and not a sale?

We think, however, that the defendant is entitled to have the issue framed with greater particularity that he may have due warning of the case he has to meet. The materials before us do not enable us to do this with as much precision as we could wish, and the only issues we can frame are these:—

(1) Do the plaintiffs prove any fact which would invalidate the document or entitling them to any decree or order relating thereto?

(2) Are the plaintiffs entitled to any, and what, relief?

The investigation in the lower Courts has been inadequate; therefore, the parties will be at liberty to adduce further evidence.

The return should be made in three months.

The frequency of the complaint that agriculturists are entrapped into the execution of documents of sale in the belief

[1] (1889) 17 Cal. 291 at p. 297.

1906.

ABAJI v. LAXMAN.

that the right to redeem still remains with them, leads us to express the hope that there may be early legislation which will enable the Courts, at least where an agriculturist is concerned, to investigate and determine the real nature of the transaction, unfettered by section 92 of the Evidence Act, and to award such relief as the justice of the case may require.

Issues sent down.

G. B. R.

PRIVY COUNCIL.

BAI KESSERBAI (PLAINTIFF) *v.* HUNSRAJ MORARJI AND ANOTHER (DEFENDANTS).

P. C.*
1906.
February 23, 27, 28.
May 9.

[On appeal from the High Court of Judicature at Bombay.]

Hindu Law—Inheritance—Law of Bombay School—Mitakshara—Vyavahara Mayukha · Succession to Stridhan—Co-widow—Husband's brother—Husband's brother's son—Deed of gift, construction of—Absolute or limited estate of inheritance—Vyavahara Mayukha, chapter IV, section 10, placita 28 *and* 30, *construction of.*

By the Hindu law of the Bombay School, *viz.*, the Mitakshara subject to the doctrine to be found in the Vyavahara Mayukha where the latter differs from it, a co-widow is entitled to succeed to the property of a woman dying without issue, in preference to her husband's brother or husband's brother's son.

A deed executed by a Hindu in favour of his future wife conveyed immoveable property to her, "her heirs, executors, administrators and assigns" on the condition that if she died "without leaving issue of the intended marriage who shall succeed to a vested interest" in the property, and without exercising a power of appointment given her by the deed, then "the property shall vest in her legal heirs according to the Hindu law of the Bombay School."

Held, that she took an absolute estate of inheritance in the property.

The true construction of *placitum* 30 of chapter IV, section 10, of the Vyavahara Mayukha, and one that brings it into harmony with the Mitakshara, and also reconciles it with *placitum* 28, is that it should be read distributively as regards the property of women married according to one of the approved forms and the property of those married in one of the lower forms. In the one case those of the heirs enumerated by Brihaspati who are blood relations of the husband, namely, the husband's sister's son, the husband's brother's son, and the husband's brother will succeed to the woman's property and in the other case the relations of the father will succeed.

* *Present*: Lord Davey, Sir Andrew Scoble and Sir Arthur Wilson.