APPELLATE CIVIL.

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

DATTOO VALAD TOTARAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMCHANDRA TOTARAM AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.* 1905. *August 2.*

Indian Evidence Act (I of 1872), section 92—Written document—Absolute conveyance—Mortgage—Contemporaneous oral agreement or statement of intention—Inference from circumstances.

The plaintiff sued to recover possession of land contending that the document under which the defendants held the land, though in form an absolute conveyance, was intended to operate merely as a mortgage. The plaintiff's contention was based on the grounds that the consideration was a previously existing debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death and that after his death his widow remained in possession for three years; that there was no transfer of the land into the *khata* of the transferee and that the consideration was grossly inadequate.

The first Court held the transaction to be an out-and-out sale and dismissed the suit.

On appeal by the plaintiff,

Held, confirming the decree, that the meaning of the contention of the plaintiff was that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from the said several circumstances relied on, but that in questions of this kind Courts in India must be guided by section 92 of the Evidence Act (I of 1872), and cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which *Alderson* v. *White*(1) or *Lincoln* v. *Wright*(2) furnish examples. This, however, would not have precluded the plaintiff from relying on the provisos to the section, had any of them been applicable.

APPEAL from the decision of R. G. Bhadbhade, First Class Subordinate Judge of Dhulia, in original suit No. 723 of 1903.

The plaintiff sued to recover possession of certain lands together with three years' *mesne* profits, alleging that his father Totaram passed a conveyance to defendants' father on the 4th July 1878 for the said lands, the consideration being stated to be Rs. 400, that the real transaction was a mortgage, but the

* Appeal No. 123 of 1904.

(1) (1858) 2 De G. and J. 98. (2) (1859) 4 De G. and J. 16.

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defendants' father having represented to the plaintiff's father, who was indebted to other creditors, that a mortgage would clash against a new legislation which was then expected, the latter was induced to consent to pass the said conveyance but was not paid the consideration; that the lands were at the time of the said transaction worth about Rs. 6,000; that the plaintiff's father remained in possession of the lands until his death in 1881; that the plaintiff was then a minor and went to live elsewhere, and that the defendants, thereupon, took wrongful possession of the lands. The plaintiff further alleged that even if the payment of the consideration, namely, Rs. 400, to his father be proved, the mortgage was satisfied by the profits of the land.

The defendants answered *inter alia* that their deceased father purchased the lands *bonâ fide* for the consideration of Rs. 400 paid in cash; that there was no fraud or misrepresentation on his part, nor was the transaction one in the nature of a mortgage; that the consideration was then adequate; that the lands were at the time of the suit worth about Rs. 3,000; and that the suit was time-barred.

The Subordinate Judge found that the transaction in suit was not a mortgage; that the previous debts of Rs. 400 due by the plaintiff's father were wiped off on account of the consideration and that the suit was time-barred. He, therefore, dismissed the suit.

The plaintiff appealed.

Robertson (with *V. V. Ranade*) for the appellant (plaintiff):—

There are various circumstances in the case which go to show that the transaction, though called a sale, was really not so. It was in fact a mortgage because no consideration actually passed, there was no transfer of the *khata* to the name of the vendee, the consideration was totally inadequate, and what is most important is that the property remained in the possession of the vendor.

[JENKINS, C. J.—But how do you get over the effect of the Privy Council ruling in *Balkishen Das* v. *W. F. Legge*[1].]

(1) (1899) 22 All. 149.

We submit that in a case like the present external circumstances can be taken into consideration to determine the real nature of the transaction. Even the proviso to section 92 of the Evidence Act supports our view.

Bahadurji (with *M. B. Chaubal*) for the respondents (defendants) was not called upon.

JENKINS, C. J.—The plaintiff sues to recover possession of land, alleging that the document passed by his father, though in form an absolute conveyance, was intended to operate merely as a mortgage.

The grounds on which that contention was based are that the consideration was a debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death, and that after his death his widow remained in possession for three years; that there was no transfer of the land into the *khata* of the transferee; and that the consideration was inadequate.

The lower Court has decided against the claim of the plaintiff, holding that the transaction was what it purported to be an out-and-out sale. It accordingly dismissed the suit with costs.

From that decree the present appeal is preferred.

If we look to the deed alone, it is clear that the decree is correct, and that the plaintiff's father parted with his interest in the property. But it is said that the circumstances to which we have alluded require that we should draw an inference that the document is not what it appears to be.

We can only understand that as meaning that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from these several circumstances.

But it has been pointed out by the Privy Council in *Balkishen Das* v. *W. F. Legge*[1] that in questions of this kind the Courts in India must be guided by section 92 of the Evidence Act; and that we cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which *Alderson* v. *White*[2], or *Lincoln* v. *Wright*[3] furnish us

(1) (1899) 22 All. 149; 2 Bom. L. R. 523. (2) (1858) 2 De G. and J. 98.
(3) (1859) 4 De G. and J. 16.

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with examples. We think that the contention urged by the appellant is opposed to the ruling of the Privy Council.

This does not preclude a litigant from relying on the provisos to the section; but there is no case made here which would enable us to say that any of them are applicable to the circumstances of this case.

We must, therefore, confirm the decree with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

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

1905. *August 4.*

BAI HANSA (ORIGINAL DEFENDANT), APPELLANT, *v.* ABDULLA MUSTAFFA (ORIGINAL PLAINTIFF), RESPONDENT.*

Mahomedan Law—Suit for restitution of conjugal rights—Non-payment of dower—Consummation of marriage.

To a husband's suit for restitution of conjugal rights, the wife pleaded non-payment of dower. To this the husband pleaded consummation of marriage.

Held, that after consummation of marriage, non-payment of dower, even though proved, cannot be pleaded in defence of an action for restitution of conjugal rights.

Abdul Kadir v. *Salima*(1), *Kunhi* v. *Moidin*(2), and *Hamidunnessa Bibi* v. *Zohiruddin Sheik*(3), followed.

SECOND appeal from the decision of J. C. Gloster, District Judge of Broach, confirming the decree of S. B. Upasani, Subordinate Judge of Ankleshvar.

The plaintiff sued the first defendant for restitution of conjugal rights alleging that she was married to him about twelve years before suit and had since then been living with him and had issue by him, that about three years before suit she went to her father's house on business and was not allowed to return to him, that he gave a written notice on the 25th December 1900 to her father asking that she might be sent back and that notice

* Second appeal No. 124 of 1905.

(1) (1886) 8 All. 149. (2) (1888) 11 Mad. 327.

(3) (1890) 17 Cal. 670.