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Rangnekar J

to the benefit of the sub-leases, and in fact the learned Judge in one part of the judgment says that it is common ground that the benefit of the sub-leases should go to the defendant. That being so, it seems to me it is a great pity that the parties could not agree upon the drafts, the responsibility for which, in my opinion, lies on the attitude taken up by the Pandias. I agree that the appeal must be allowed.

PER CURIAM. Appeal allowed. Plaintiff entitled to the relief asked for in prayers A, B and C of the plaint. Liberty to the defendant to apply in case the plaintiff does not carry out his part of the bargain. Interest to run at six per cent. from September 18, 1936. Conveyance to be executed within one month with liberty to extend the time. Plaintiff will be entitled to the costs of the suit as well as of the appeal from the defendant. Counterclaim dismissed with costs. Cross-objections also dismissed with costs. Security of Rs. 15,000 furnished by the appellant to be returned to his attorneys.

Attorneys for appellant: Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

Attorneys for respondent: Messrs. *Gagrat & Co.*

Appeal allowed.

N. K. A.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice.

JANARDAN GOVIND MAHALE (ORIGINAL PLAINTIFF), APPELLANT *v.* VENKATESH VAMAN SHENVI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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September 9

Indian Evidence Act (I of 1872), s. 92, prov. (1)—Partition deed—Land in a particular survey number giving correct description as to acreage and assessment assigned to plaintiff—Defendant contending that inclusion of suit portion in the number was a mistake known to all parties—Oral evidence admissible to prove common mistake.

*Second Appeal No. 208 of 1936.

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When a written contract is challenged on the ground of mistake common to all parties, the remedy is rectification, because in such a case the parties have entered into an agreement, as to which their minds were at one, but in reducing the agreement to writing a mistake has been made, and the written instrument does not give effect to the agreement which the parties actually entered into. All that the Court has to do in such a case is to rectify, not the contract, but the document embodying it and put that document in such a form as to carry out the contract which the parties really entered into, and for this purpose oral evidence is admissible under prov. (*1*) to s. 92 of the Indian Evidence Act, 1872.

Where there is an unilateral mistake, the position is different, because in that case there is, in fact, no contract. Therefore if one is dealing with a case of unilateral mistake every mistake of such a nature would not give rise to a claim to relief and serve as a defence under prov. (*1*) to s. 92 of the Indian Evidence Act, 1872.

Dagdu v. *Bhana*,[1] referred to.

SECOND APPEAL against the decision of G. H. Salvi, District Judge of Kanara at Karwar, confirming the decree passed by V. V. Pandit, Subordinate Judge at Karwar.

Suit to recover possesion.

The facts material for the purposes of this report are stated in the judgment of the Chief Justice.

G. P. Murdeshwar and *R. A. Mundkar*, for the appellant.

D. R. Manerikar, for respondent No. 1.

D. D. Yennemadi, for respondents Nos. 2 and 3.

BEAUMONT C. J. This is a second appeal from the District Judge of Karwar. The plaintiff is suing for a certain property which forms part of survey No. 145, and his title is derived under a partition deed made in the year 1921, which is exhibit 35. The partition was between the predecessors of the plaintiff, and of defendant No. 1 and two other persons, and under it survey No. 145 was allotted to the plaintiff, and survey No. 143 was allotted to defendant No. 1. Both those survey numbers were described by reference to acreage and assessment, and it is not disputed that the suit property was comprised in survey No. 145 according to the acreage and assessment given in the

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partition deed. Therefore, *prima facie*, the plaintiff is entitled to succeed, but the defendant gave evidence the effect of which was to show that all parties to the partition deed in fact intended that the suit property should be included in survey No. 143, and that its inclusion in survey No. 145 was a mistake. The question of law on this second appeal is whether that evidence was admissible, or whether the parties are bound by the terms of the document.

Under s. 92 of the Indian Evidence Act, when the terms of a contract have been reduced to writing, no evidence of any oral agreement can be admitted as between the parties to such contract for the purpose of contradicting, varying, adding to, or substracting from, its terms. Then there are certain provisos, of which the first is in these terms :—

"Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law."

In the trial Court the learned Judge took the view that there was in the description of survey No. 145 a latent ambiguity because he thought that, though the reference to the acreage and assessment was appropriate to survey No. 145, the reference to the rent was not, and accordingly he considered that he could let in evidence to show which was the governing part of the description. I doubt whether that principle is applicable, because we have a definite description of survey No. 145 by reference to acreage and assessment, and only a somewhat indefinite reference to the rent of that survey number combined with other survey numbers, and I think it would be difficult, as matter of construction of the document, to say that the reference to rent controls the specific figures as to acreage and assessment. In my opinion,

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if the evidence is to be admitted, it must be under prov. (1) to s. 92. Under English law if a defendant is contesting a claim against him based on a written document and challenges the document on the ground that it was based on fraud or mistake, it is, in my opinion, necessary for him to counter-claim either for rescission or rectification, and unless he adopts that course, the document would take effect according to its terms. But as was pointed out by this Court in *Dagdu* v. *Bhana*[1] there is nothing in the proviso to s. 92 to suggest that the facts which may be proved under that proviso can only be proved in support of a claim to which those facts give rise, and such facts may be pleaded in this country by way of defence only. As the learned Chief Justice pointed out, the procedure in the Mofussil Courts does not admit of counter-claims. I am bound by the decision in *Dagdu* v. *Bhana*,[1] and the question, therefore, is whether the facts which were given in evidence in this case are such as would invalidate the document, if a claim to invalidate it were made. The suggestion in this case is that the document was founded on a mistake. Fraud is not alleged, and it is, of course, not every mistake in a document which would invalidate it. The validity of every contract depends on the presence of the *animus contrahendi*, the intention to contract. When a written contract is challenged on the ground of mistake common to all parties, the remedy is rectification, because in such a case the parties have entered into an agreement, as to which their minds were at one, but in reducing the agreement to writing a mistake has been made, and the written instrument does not give effect to the agreement which the parties actually entered into. All that the Court has to do in such a case is to rectify, not the contract, but the document embodying it, and put that document into such a form as to carry out

[1] (1904) 28 Bom. 420.

the contract which the parties really entered into. Where there is unilateral mistake, the position is different, because in that case there is, in fact, no contract. The minds of the parties were not at one; one intended one thing, and the other intended something else, and if any relief can be granted, it must be rescission. But at that point the rule of estoppel, which is part of the law of evidence, steps in. In normal cases a party who has entered into a written contract and thereby represented to the other parties to the document that he intends to be bound by the terms thereof is not entitled as against those parties to give evidence that in fact he intended something else. Unless that were so, there would be no finality in written contracts. Therefore, if one is dealing with a case of unilateral mistake, it is by no means every mistake of such a nature which would give rise to a claim to relief and serve as a defence under prov. (*1*) to s. 92. In the present case, I think the learned Judges in the lower Courts had not very clearly in their minds the distinction in law between a common mistake and an unilateral mistake, but as I read the judgments of both the lower Courts, I think they really hold that the mistake was one common to all parties. The learned District Judge in appeal says quite clearly that he is satisfied that the plaintiff never for a moment supposed that he was getting the suit property as part of survey No. 145. I think that in effect the finding is that there was common mistake, and if that is so, the evidence would found a claim for rectification of the contract. In my opinion, therefore, the evidence was admissible under prov. (*1*) to s. 92. The appeal is, therefore, dismissed with costs.

Decree confirmed.

J. G. R.