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APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Brett.

KHANKAR ABDUR RAHMAN (*Defendant* No. 2) *v.* ALI HAFEZ AND OTHERS (*Plaintiffs*). * [12th December 1900.]

Evidence Act (I of 1872), s. 92—Conduct of parties—Oral evidence when admissible to prove that a conveyance is a mortgage by way of conditional sale—Admissibility of parol evidence to vary a written contract.

Under the provisions of s. 92 of the Evidence Act (I of 1872) oral evidence of the acts and conduct of parties, such as evidence of the repayment of the money, the return of the deed and the exercise of the acts of possession by the vendor, is admissible to show that a certain conveyance was really a mortgage by way of conditional sale.

***Preonath Shaha* v. *Madhu Sudan Bhuiya* (1) referred to.**

The case of *Balkishen Das* v. *Legge* (2) did not in any way affect the rule laid down in the case of *Preonath Shaha* v. *Madhu Sudan Bhuiya* (1).

Nothing in s 86 of the Bengal Tenancy Act requires the surrender of a ryot's occupancy right to be in writing.

THIS appeal arose out of an action brought by the plaintiffs to recover possession of certain immoveable property on establishment of title thereto. The land in dispute originally formed part of a tenure measuring 107 bighas held by one Khankar Abdur Rahman and his brother Lutfar Rahman. Abdur Rahman defendant No. 2) sold his half share of the *jote* to one Amirunessah, whose heirs sold the land in dispute in 1277 B.S. to one Niamatulla and Azmatulla, and in 1279 B. S. he (Abdur Rahman) took a lease of the said land. Defendant No. 1 in execution of a **[257]** money-decree obtained against defendant No. 2 attached his share of the disputed land. On this the plaintiff preferred a claim which was disallowed, and hence this suit was instituted. The case of the plaintiff was that, after the death of his father Niamatulla there was a partition, and the land in dispute fell to the share of his brother, defendant No. 3, who took possession of it, but later on, in 1298 B. S., the partition was revised, and in that the plaintiff obtained the said lands. The plaintiff further alleged that Abdur Rahman surrendered his holding in 1294 B. S. to defendant No. 3 his landlord, who, remitting the arrears of rent then due, entered into possession of the property. The defence *inter alia* was that, in 1299 B. S., defendant No. 3 sold the lands to one Abdur Rahman, that the defendant No. 1 was in continuous possession, first under defendant No. 3 and then under Abdur Rahman ; that the defendant never surrended his holding and if at all it was surrendered, it was not a valid surrender, not having been done by a registered instrument. To prove that the transfer by defendant No. 3 to Abdur Rahman was not an out and out sale, but it was really a mortgage by conditional sale, evidence to the effect that the deed was returned to defendant No. 3, that the money was repaid, and that defendant No 3 was all along in possession of the disputed land was admitted. The Court of First Instance having found that there was a valid surrender by Abdur Rahman in 1294 B. S., and also having found upon the evidence that defendant No. 3

* Appeal from Appellate Decree, No. 2633 of 1899, against the decree of W. Tennon, Esquire, District Judge of Murshidabad, dated the 6th of September 1898, affirming the decree of Babu Kapali Prasanna Mukerjee, Munsif of Kandi, dated the 23rd of September 1897.

(1) (1898) I. L. R. 25 Cal. 603.

(2) (1899) L. R. 27 I. A. 58 ; I. L. R. 22 All. 149.

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conditionally transferred an interest in the disputed lands to Abdur Rahman in 1295, and afterwards he (defendant No. 3) made a transfer to the plaintiff, decreed the suit. On appeal the learned District Judge confirmed the decision of the first Court. Against this decision defendant No. 2 appealed to the High Court.

Babu *Sarada Churn Mitter* and Babu *Mohendra Kumar Mitter*, for the appellant.

Mr. *Khundkar*, Dr. *Ashutosh Mookerjee* and Moulvi *Saughet Ali*, for the respondents.

1900, DECEMBER 12. The judgment of the High Court (BANERJEE and BRETT, JJ.) was as follows :—

In this appeal, which arises out of a suit for establishment of the plaintiffs' right and for confirmation of their possession **[258]** in respect of certain immoveable property, two questions have been raised by the learned Vakil for the defendant-appellant, *first*, whether the Court of Appeal below was right in admitting extrinsic evidence to show that a certain conveyance was really a mortgage by way of conditional sale, and *second*, whether the Court of Appeal below was right in holding that there could be a valid surrender of an occupancy holding without a written document.

Upon the first question this is how the matter stands. The extrinsic evidence that was admitted was evidence of the acts and conduct of the parties, that is, evidence of the repayment of the money, the return of the deed, and the exercise of acts of possession by the vendor, and not evidence of any oral agreements or statements by the parties, and it was not disputed in the argument before us that *that* was the case. If that was so, the evidence would be admissible, as s. 92 of the Evidence Act does not exclude the evidence of acts and conduct of the parties. The view we take is supported by a Full Bench decision of this Court in the case of *Preonath Saha* v. *Madhu Sudan Bhuiya* (1).

It was contended by the learned Vakil for the appellant that *that* decision must be taken to have been in effect overruled by the decision of the Privy Council in the case of *Balkishen Das* v. *Legge* (2). We do not consider this argument sound. The evidence that their Lordships considered inadmissible in the case just referred to was certain oral evidence of intention, which had been admitted in the Courts below, and the ground upon which their decision is based is that such evidence is excluded by s. 92 of the Evidence Act. Their Lordships do not lay down any rule of exclusion of evidence over and above that contained in s. 92 ; and s. 92 of the Evidence Act, as we have already observed, whilst it excludes evidence of any oral agreement or statement, does not exclude evidence of the acts and conduct of the parties not being in the nature of an oral agreement or statement. To understand clearly the meaning of **[259]** their Lordships when they observe, "—Evidence of the respondent and of a person named Imam was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both Courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties "—we have referred to the judgment of the High Court reported in Indian Law Reports, 19 Allahabad, 434, and we find that the evidence which is

(1) (1898) I. L. R. 25 Cal. 603. (2) (1899) L. R. 27 I. A. 58.

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referred to as inadmissible consisted of the statements of one of the parties to the transaction and of a pleader, which went to show that at the time when the negotiations were going on, which led to the execution of the deeds under consideration, one of the parties said that he would not execute the deed, unless it was a mortgage, and the other answered, and that answer was supported by the pleader, that the two deeds which they were going to have would together amount to a mortgage only. That was adduced as evidence of the intention of the parties, and that evidence was considered inadmissible. That evidence consisted only of oral statements of the parties, and therefore comes directly within the scope of s. 92. There was no other evidence of the acts and conduct of the parties adduced in that case, which was considered by the Privy Council. We are, therefore, of opinion that the case of *Balkishen Das* v. *Legge* (1) does not in any way affect the rule laid down in the case of *Preonath Shaha* v. *Madhu Sudan Bhuiya* (2). The first question raised in this appeal must therefore be answered in the affirmative.

As to the second question, there is nothing in s. 86 of the Bengal Tenancy Act, which contains the provisions of the Act relating to surrender of a ryot's holding, to show that such surrender must be in writing. It was argued that as the surrender was made in consideration of the remission of certain arrears of rent, it should be viewed in the light of a transfer by sale of the ryots' occupancy rights, for which a writing was necessary. One simple answer to this argument is this, that it proceeds **[260]** upon an erroneous assumption that an occupancy right is always transferable by sale. The second question must also, therefore, be answered in the affirmative.

That being so, the appeal fails, and must be dismissed with costs.

Appeal dismissed.

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28 C. 260.

SMALL CAUSE COURT REFERENCE.

Before Sir Francis W. Maclean, Kt., K.C.I.E., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Hill.

JUGAL KISSORE (*Plaintiff*) *v.* SEWMUK ROY AND OTHERS (*Defendants*).* [7th February, 1901].

Small Cause Court, Presidency Town—Practice and procedure—Reference to High Court—Presidency Small Cause Courts Act (XV of 1882), ss. 69, 70—Contingent judgment—Security for the amount of the judgment and the costs of reference—Time for furnishing such security—Power to extend time to furnish the security.

In cases of reference from the Presidency Small Cause Court the provisions of the statute which governs the matter should be strictly complied with.

In a suit for damages the Officiating Chief Judge of the Presidency Small Cause Court, on May 28, 1900, gave judgment for the plaintiff contingent upon the opinion of the High Court, and a reference was made to the High Court under s. 69 of the Presidency Small Cause Courts Act. The defendants, at whose request the contingent judgment was given, did not fully deposit the amount of the judgment and the costs of the reference until November 14, 1900. A preliminary objection having been taken to the hearing of the reference on the ground that it was not properly before the Court:

***Held*, that as security for the amount of the judgment and the costs of the reference was not furnished "at once" as required by s. 70 of the Presidency Small Cause Courts Act, the preliminary objection must prevail, and that the reference must be dismissed, the defendants paying the costs of the reference.**

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* Reference from the Presidency Small Cause Court, suit No. 4 of 1900.

(1) (1899) L. R. 27 I. A. 58. (2) (1898) I. L. R. 25 Cal. 603.