1865.
Jan. 30.

Special Appeal No. 729 of 1864.

DÁDÁ HONÁJI and another... ... ...*Appellants.*

BÁBÁJI JAGUSHET... ... ...*Respondent.*

"Justice, Equity, and good Conscience"—English Law—Reg. IV. of 1827, Sec. 26—Sale of Land—Evidence—Written Contract—Oral addition or alteration—Contemporaneous oral agreement—Remand.

Although the English law is not obligatory upon the court in the Mofussil, they ought, in proceeding according to justice, equity, and good conscience (Reg. IV. of 1827, Sec. 26) to be governed by the principles of English law applicable to a similar state of circumstances.

Oral evidence is admissible in Equity, where, by way of defence, the object is to get rid of a written contract of a sale of land by showing that it is not the contract really entered into by the parties; but the evidence must be very powerful to induce the Court to believe that the terms expressed are not the real ones.

Evidence of a contemporaneous oral agreement to suspend the operation of a written contract of sale until an agreement for a resale is executed is admissible as a defence even in a Court of Law.

THIS was a special appeal from the decision of the District Judge of the Konkan in Appeal Suit No. 534 of 1863.

The case was heard before COUCH, NEWTON, and WARDEN, JJ.

White, McCombie, and *Sha'nta'ra'm Na'ra'yan* for the appellants.

Vishvana'th Na'ra'yan Mandlik and *Ganpatra'v Bhaskar* for the respondent.

Cur. adv. vult.

The facts are stated in the judgment.

COUCH, J.:—In this case the plaintiff (the special respondent) sued the defendants (the special appellants) for the specific performance of a contract for the sale by the first defendant, Dádá, to the plaintiff, of a house, for Rs. 675, of which sum he alleged he had paid Rs. 275 to Dádá, and had agreed to pay the balance of Rs. 400 to the second defendant Náráyan, who held a mortgage on the house.

The defendant Dádá admitted the contract of sale to the plaintiff, but alleged that, at the time it was made, the plaintiff agreed to resell the property upon payment to him, at any

time of the amount of the then purchase-money, and that he would make a written agreement to that effect before he took possession.

The Munsif of Panvel, who tried the case, appear to have thought that there was no agreement for a resale, as alleged; but he did not come to any express finding upon the point, and threw out the plaintiff's claim upon another ground.

The Acting Judge of the Konkan District, on appeal, held that "the conditions of the written evidence of the deed of sale could be impeached only by other written evidence, which was not forthcoming. The deed of sale could not be contradicted by oral evidence;" and, after considering the ground of the Munsif's decision, reversed it, but returned the case, in order that the Munsif might find whether the house had become sold to the defendant Náráyan, in consequence of the nonpayment to him at the proper time of the sum due on his mortgage, and if not, what sum must the plaintiff pay to him in order to redeem the house.

The Munsif, having found that the house had not become sold to the defendant Náráyan, and that the plaintiff should pay to him Rs. 416-13-9 in order to redeem it, the present Judge of the Konkan confirmed those findings, and reversed the Munsif's decree, and awarded to the plaintiff possession of the house on his paying to the defendant Náráyan or into court on his account, Rs. 416-13-9.

From this decree the defendants have appealed to this court; and the ground relied upon is that the Acting Judge was in error in refusing to take into his consideration the evidence of the agreement for a resale of the house, and that he misapprehended the defence.

The rule of law is not incorrectly stated by the Acting Judge in the passage from his judgment which we have quoted; but we are of opinion that the application of it to the present case is erroneous.

The judgment of the Privy Council in *Varden Seth Sam* v. *Luckpathy Royjee Lallah and others* (*a*) is an authority of the

(*a*) 9 Moo. Ind. App., 303.

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highest court of appeal that, although the English law is not obligatory upon the courts in the Mofusail, they ought, in proceeding according to "justice, equity, and good conscience," to be governed by the principles of the English law applicable to a similar state of circumstances.

The distinction between the case of a party seeking to enforce a written agreement with an oral addition or alteration, and of a party who seeks to show the addition or alteration by way of defence, has been acted upon in various cases by Courts of Equity. They are examined and considered by Lord St. Leonards, in his work on the Law of Vendors and Purchasers, Chap. 4 Sec. 8, para. 13 (*b*), where he says: "It is not necessary in order to render the evidence admissible that its object should be to show fraud, mistake, or surprise, collateral to, or independent of, the written contract, although that usually is its tendency; but the evidence is admissible where, by way of defence the object is to get rid of the contract by showing that it is not the contract really entered into by the parties: although where, even as a defence the evidence is used to show that the terms of the contract are not the real ones, the evidence, when admitted, must be very powerful to induce the Court to belive that the terms expressed are not the real ones."

It is unnecessary for us to cite the cases upon which the learned author and judge founds this conclusion, or to examine them in detail with a view of showing the grounds of our concurrence with him. To do so would be rather a parade and affectation of learning; but we have quoted the above passage as expressing, in language which has been carefully considered, the result of the decisions of English Courts of Equity.

In the present case the evidence of the agreement for resale was offered by way of defence, and as showing that the contract which the plaintiff sought to have performed was not the contract really entered into.

(*b*) 13th Ed., p. 133.

We must therefore remand the case for retrial, on the question whether the agreement alleged by the defendant was made; but, in doing so, we commend to the notice of the Judge the words of Lord St. Leonards "that the evidence, when admitted, must be very powerful to induce the Court to believe that the terms expressed are not the real ones." If he should find that no such agreement was made, the decree already passed will be the right one; but if otherwise, he must pass a decree accordingly.

We have considered this case as one of an oral addition to, or alteration of, the written contract; but the alleged oral agreement is rather one to suspend the operation of the contract of sale to the plaintiff until the agreement for the resale was executed: and evidence of such a contemporaneous oral agreement is admissible as a defence even in a Court of Law:—*Wallis* v. *Littell* (*c*); *Pym* v. *Campbell*. (*d*)

We think the award of costs by the Judge against the defendant Náráyan is correct, as he failed in the defence he set up that the house had become his property.

The decree is, therefore, reversed, and the case remanded and we direct the costs to follow the final decision.

Appeal allowed.

(*c*) 11 C. B., N. S., 369 : 31 Law J., N. S., C. P., 100.
(*d*) 6 E. & B., 370 ; 25 Law J., N. S., Q. B., 277.