

decide this first point in favor of Nilmoney Sing, and proceed now to deal with the evidence bearing upon the genuineness or otherwise of the alleged will of Bamou Dass.

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 IN THE
 MATTER OF
 THE PETI-
 TION OF
 NILMONEY
 SING.

I would, therefore, set aside the order of the lower Court, and dismiss the application of the Raja petitioner for revocation of the will of Bamou Dass, and decree the suit of the plaintiff Bhojhariui with costs in both Courts (1).

Appeal allowed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

JUGTANUND MISSER (PLAINTIFF) v. NERGHAN SINGH AND
 ANOTHER (DEFENDANTS).*

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 Sept. 15.

Evidence Act (I of 1872), s 92, prov. 3—Parol Evidence in addition to condition in Kistibundi—Part Performance of portion of obligation in Kistibundi.

Per GARTH, C. J.—Where, at the time of the execution of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force until some condition precedent has been performed, the rule that parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the contract has not become binding, cannot apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.

The true meaning of the words “any obligation” in the 3rd proviso to s. 92 of Act I of 1872 is any obligation whatever under the contract, and not some particular obligation which the contract may contain.

ONE Ram Monorath sold certain properties to Nerghan Singh and another (defendants), and desired them to pay parts of the purchase-money to one Jugtanund Misser (the plaintiff), to be applied to the discharge of certain debts charged on the properties. The defendants paid part of the purchase-money in cash to the plaintiff, and for the remainder executed a kistibuudi in his favor, and gave as security a mortgage on certain immove-

* Appeal from Appellate Decree, No. 636 of 1879, against the decree of E. Grey, Esq., Judge of Gaya, dated the 30th December 1878, reversing the decree of Baboo Matadin, Officiating Subordinate Judge of that district, dated the 28th August 1877.

(1) See *In the matter of the Petition of Bhubosunduree Dabee*, post, p. 460.

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able property belonging to them. The kistibundi contained stipulations that the property which was purchased by the defendants should be at once placed in their hands, (and they in accordance with such stipulation entered into possession), and further that the remainder of the purchase-money was to be paid in certain instalments, on failure of any one of which, the whole sum remaining due should become payable. The instalments not being paid, the plaintiff brought the present suit to recover the whole sum remaining due.

The defendants contended, that it had been verbally agreed between the parties at the time when the kistibundi was executed, that the obligation to pay these instalments was not to be put in force until the plaintiff had paid to one Gobindhur Singh a debt which had been charged upon the property conveyed, and that, at the time the suit was brought, this debt had not been satisfied.

The Subordinate Judge, on the 28th August 1877, held, that parol evidence could not be thus admitted to add a very important condition to the kistibundi, and decreed the suit with interest in favor of the plaintiff.

On the 29th September 1877, a decree was obtained against the plaintiff for the money due to Gobindhur Singh.

The defendants appealed to the District Judge, who decided that parol evidence of the oral agreement was admissible under proviso 3 of s. 92 of Act I of 1872, inasmuch as that agreement constituted a condition precedent to the attaching of the obligation upon which the suit was brought. He therefore remanded the case in order that evidence of the parol agreement should be taken, and on the case coming up again before him, on the strength of the evidence received, decided the case in favor of the defendants.

The plaintiff appealed to the High Court.

Mr. *R. E. Twidale* and Baboo *Juggesh Chunder Dey* for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Moonshee *Mahomed Yusoof* for the respondents.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

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GARTH, C. J. (who, after setting out the facts as above, continued):—I think that the District Judge was wrong in admitting the parol evidence; he appears to have admitted it under proviso 3 to s. 92 of the Evidence Act; but that proviso in my opinion does not apply to a case of this kind.

I think that the District Judge has taken a wrong view of proviso 3. That proviso, as it seems to me, is intended to introduce into the law of evidence the rule which is well established and understood in England, and treated of in s. 1038 of Mr. Taylor's book on Evidence. That rule is, that when, at the time of a written contract being entered into, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the written contract has not become binding.

This will be found exemplified and explained in the following cases:—*Davis v. Jones* (1), *Bell v. Lord Ingestre* (2), *Pym v. Campbell* (3), and *Annagurabala Chetti v. Kristnasami Nayakhan* (4).

These cases show that, until the condition is performed, there is in fact no written agreement at all.

But this rule could never apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.

To admit parol evidence to show that some particular stipulation could not be enforced, would be to introduce the mischief which s. 92 was intended to prevent; and it seems clear to me that the true meaning of the words "any obligation" in proviso 3 is any obligation whatever under the contract, and not, as is contended by the defendants, some particular obligation which the contract may contain.

(1) 17 C. B., 625.

(3) 6 E. and B., 370.

(2) 12 Q. B., 317.

(4) 1 Mad. H. C. Rep., 457.

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I think, therefore, that the parol evidence was inadmissible, and that as the defence entirely rests upon it, the plaintiff is entitled to a decree.

The plaintiff will be entitled to his costs in both Courts.

MITTER, J.—I concur in this decision. I do not think it necessary to decide the question whether the defendants are entitled to prove the parol agreement upon which they rely; because, assuming that they were so entitled, it was shown in the course of the argument that the plaintiff has discharged the obligation imposed upon him by that agreement.

Appeal allowed.

Before Mr. Justice Tottenham and Mr. Justice Maclean.

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Sept. 15.

MOZHURUDDIN (DEFENDANT) v. GOBIND CHUNDER NUNDI
(PLAINTIFF).*

Landlord and Tenant—Forfeiture of Holding—Denial by a Tenant of his Landlord's Title.

A, a ryot with rights of occupancy, in a rent-suit brought against him by *B*, the purchaser of an *aima* (1) *mehal*, denied the existence of the relationship of landlord and tenant between himself and *B*, on the ground that the lands occupied by him were not included on the *aima mehal* purchased by *B*. *B*'s rent-suit having been dismissed for failure of evidence on this point, *B* afterwards brought a regular suit to evict *A*, and for mesne profits. *Held*, that *A*, by denying the title of *B*, in the rent-suit, thereby forfeited his rights of occupancy, and became liable to eviction.

THIS was a suit instituted by the plaintiff Gobind Chunder Nundi to evict the defendant Sheikh Mozhuruddin, a ryot with rights of occupancy, from certain lands comprised within the boundaries of the *aima mehal* Pilshua, the purchased property

* Appeal from Appellate Decree, No. 1829 of 1879, against the decree of C. D. Field, Esq., Judge of East Burdwan, dated the 6th May 1879, modifying the decree of Baboo Janokinath Mookerjee, Munsif of Cutwa, dated the 31st January 1879.

(1) *Aima*.—Land granted by the Mogul Government, either rent-free or subject to a small quit-rent, to learned or religious persons of the Mahomedan faith, or for religious and charitable uses in relation to Mahomedanism. Such tenures were recognised by the British Government as hereditary and transferable.—*Wilson's Glossary.*