

As regards the cross-objections I see no reason why the plaintiff should be exempted from the payment of the costs of the suit, and the cross-objections must succeed to this extent. The suit must be dismissed with costs.

PRINSEP, J.—I am of the same opinion.

HILL, J.—I am also of the same opinion.

Appeal dismissed.

Attorneys for the appellant : Messrs. N. C. Burrell & Co.

Attorneys for the respondents : Messrs. Swinhoe & Co.

B. D. B.

1901
 MOKHADA
 DASSEE
 v.
 NUNDO
 LALL
 HALDAR.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Banerjee and Mr. Justice Brett.

MAHOMED ALI HOSSEIN (PLAINTIFF No. 1) v. NAZAR ALI AND OTHERS (DEFENDANTS).*

1901
 Feb. 20.

Evidence Act (I of 1872), s. 92—Acts and conduct of parties—Oral evidence when admissible to prove that a conveyance is really a mortgage by way of conditional sale—Admissibility of parol evidence to vary a written contract—The Indian Law Reports Act (XVIII of 1875), s. 3.

Oral evidence of the acts and conduct of parties, such as evidence of promise by the vendee to restore the property on repayment in two or three years, is admissible to show that a certain conveyance was really a mortgage by way of conditional sale.

Balkishan Das and others v. Legge (1) explained. *Preonath Shahu v. Madhu Sudan Bhuiya* (2) referred to.

Per MACLEAN, C. J.—S. 3 of the Indian Law Reports Act (XVIII of 1875) does not prevent a High Court from looking at an unreported judgment of other Judges of the same Court.

THIS appeal arose out of a suit brought by the plaintiffs for redemption of certain land. The allegations of the plaintiffs were that the land was mortgaged to defendant No. 5 by defendant

* Appeal from Appellate Decree No. 1201 of 1898, against the decree of Babu Beprodass Chatterjee, Subordinate Judge of Murshidabad, dated the 22nd of March 1898, modifying the decree of Babu Kali Prasanna Mukhopadhyaya, Munsif of Kandi, dated the 16th of August 1897.

(1) (1899) L. R., 27 I. A., 58 ; I. L. R., 22 All., 149.

(2) (1898) I. L. R., 25 Calc., 603.

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No. 1 by a deed dated the 6th Kartic 1293 B. S. (22nd October 1886), whereby the said defendant No. 5 was put in possession of the land in lieu of interest, that defendant No. 4, wife of defendant No. 1, who before the said mortgage became owner of the land, sold it to defendant No. 6 by a *kobala*, dated the 8th Aswin 1294 (23rd November 1887) for the sum of Rs. 180, out of which she took Rs. 89 in cash and Rs. 91 was made payable by defendant No. 6 to defendant No. 5 on account of the aforesaid mortgage; that on the 29th Aswin 1296 B. S. (14th October 1889) defendant No. 6 sold it to plaintiff No. 1 for Rs. 189 by a *kobala* wherein defendant No. 6 stated that he had paid off the sum due to defendant No. 5 in Magh 1294 and obtained possession of the land; that the plaintiffs Nos. 2 to 5 as lessees under defendant No. 6 and subsequently under plaintiff No. 1 brought a suit for recovery of possession of the said land against defendants Nos. 1 to 5, but this was dismissed on the ground that they were not entitled to possession, until the mortgage debt of defendant No. 1 to defendant No. 5 was satisfied, and hence the present suit was brought on deposit of the said debt. The defence *inter alia* was that though the deed of sale of the 8th Aswin 1294 B. S. (23rd November 1887) executed by defendant No. 4 in favor of defendant No. 6 was an out-and-out sale, yet it was really a deed of conditional sale; that defendant No. 1 at the request of defendant No. 6 paid the sum to defendant No. 5 in Jeyt 1296, and a *kabuliat* having been executed in his favor he (defendant No. 1) obtained possession of the land in dispute. The witnesses on behalf of the defendant deposed that Uzir Ali, defendant No. 6, promised to restore the property on repayment in two or three years. The Court of first instance decreed the plaintiff's suit. On appeal, the learned Subordinate Judge on the evidence held that the deed of the 8th Aswin 1284 B. S., though purporting to be a deed of sale, was really a deed of conditional sale, and directed that the plaintiff No. 1 was entitled only to an order, if the defendants No. 1 to 4 failed to pay him the sum of Rs. 89 with interest at 2 per cent. per annum from the date of the *katkobala* to the date of the decree within six months.

Against this decision the plaintiff No. 1 appealed to the High Court.

Moulvi *Zahidur Rohim Zahed* for the appellant.—The Court below was wrong to enter into the question as to whether the conveyance was anything but what it appeared on the face of it, and the evidence received by the Court was inadmissible. See the cases of *Balkishen Das v. Legge* (1); *Kashinath Das v. Hurri Hur Mookerjee* (2) *Rahiman v. Elahi Baksh* (3); *Rakken v. Alagappudayan* (4).

Babu *Dwarka Nath Chuckerbutty* for the respondents was not called upon.

1901, FEB. 20. The following judgments were delivered by the High Court (MACLEAN, C. J., BANERJEE and BRETT, JJ.) :—

MACLEAN, C. J.—The main objection to the decree appealed against is, that the Court below was wrong in admitting oral evidence to show the real intention of the parties to the *kobala* in question, or in other words to show that the *kobala* in question was not intended, as it purported to be, an out-and-out sale, but only a *kutkobala* or mortgage. If the evidence had been so directed, I should have held, having regard to the decision of the Privy Council in the case of *Balkishen Das v. Legge* (5) that the Court below was wrong in admitting it, but here it is reasonably clear that the evidence, which was admitted, was evidence as to the acts and conduct of the parties, and this Court following many other cases has decided in the Full Bench case of *Preonath Shaha v. Madhu Shudan Bhuiya* (6) that such evidence is admissible. There is a passage in the opinion of the Board in the Privy Council case to which I have referred, which would appear to give support to this view, for there their Lordships say : “The case must, therefore, be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of the surrounding circumstances as may be required to show in what manner the

(1) (1899) L. R., 27 I. A., 58; I. L. R., 22 All., 149.

(2) (1883) I. L. R., 9 Calc., 898.

(3) (1900) I. L. R., 28 Calc., 70.

(4) (1892) I. L. R., 16 Mad., 80.

(5) (1899) L. R., 27 I. A., 58; I. L. R., 22 All., 149.

(6) (1898) I. L. R., 25 Calc., 603.

1901 language of the documents is related to existing facts." The
 MAHOMED distinction between evidence as to the mere intention of the parties
 ALI HOSSEIN to the deed and as to the acts and conduct of the parties has
 v. been recently pointed out in an unreported case decided by Mr.
 NAZAR ALI. Justice Banerjee and Mr. Justice Pratt on the 12th of December
 last in special appeal No. 2633 of 1898. This disposes of the
 first point.

The second point is that the plaintiff being a *bonâ fide* purchaser for value without notice is entitled to rely on the *kobala* alone, and is not affected by any oral agreement between the defendants 4 and 6 changing the nature of the transaction between them. But no issue has ever been raised on this point. The plaintiff might have raised such an issue, but he has never raised it, and not having raised it, I do not see how we can fairly go into such a question now on second appeal. I may remark that there is a passage in the judgment of the Subordinate Judge to the effect that his opinion tended to the conclusion that the purchase by the plaintiff No. 1 from defendant No. 6 was a collusive transaction. The point of being a purchaser for value without notice, has never been raised and I am not disposed to remand this case at this late stage for an issue to be raised as to it.

I cannot, however, part with this case without taking the opportunity of expressing my dissent from the view taken by Mr. Justice Rampini and Mr. Justice Pratt in the case of *Makbul Ahmed v. Rakhal Das Hazra* (1), where they held that they were not bound to receive or treat as an authority binding on them, an unreported case or ruling, basing that view upon s. 3 of Act XVIII of 1875. That section was framed to constitute a monopoly, if the Judges so desired, for the authorised Law Reports. It only says that no Court shall be bound to have cited the *report* of any case, etc. ; it does not prevent the Court from looking at an unreported judgment of other Judges of the same Court. This has always been done and can and ought to be done. A judgment is none the less an authority, because it has not been reported. Otherwise the question of whether or not a judgment

(1) (1900) 4 C. W. N., 732.

could or could not be so regarded, would depend upon the mere whim of the Reporter. I, therefore, respectfully dissent from the view on this point expressed in the case of *Makbul Ahmed v. Rakhal Das Hazra* (1).

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BANERJEE, J.—I am of the same opinion. I only wish to add, with reference to the first point raised in the case, that I adhere to the view expressed by me in my judgment in S. A. No. 2633 of 1898, in which it has been pointed out that the Full Bench decision in *Preonath Shaha v. Mudhu Sudan Bhuiya* (2) has not been in any way overruled by the decision of the Privy Council in *Balkishen Das v. Legge* (3).

BRETT, J.—I agree with the learned Chief Justice.

S. C. G.

Appeal dismissed.

Before Mr. Justice Rampini and Mr. Justice Pratt.

JILLAR RAHMAN *alias* RAJAMIA (DEFENDANT) v. BIJOY CHAND MAHTAP, RAJAH OF BURDWAN, MINOR, BY HIS NEXT FRIEND AND MANAGER, BANBEHARI KAPUR (PLAINTIFF).^o

1900
August 2.

Cess—Dak cess—Zemindary dak, Maintenance of—Regulation XX of 1817, S. 10—Bengal Act VIII of 1862—Contract between Zemindar and Putnidar as to payment of dak charges—Liability of putnidar to pay dak charges—Construction of putni lease.

In a putni kabuliati executed in 1855, the putnidar stipulated to pay the salary and expense of amlahs of dak chowki houses, and to appoint them and superintend their work, under the system of zemindari dak then in vogue.

Held, that this stipulation imposed upon the putnidar the liability of paying dak charges recoverable from the zemindar; and although the system has since been changed, the liability of paying such charges must be taken to exist.

Saroda Soondury Debea v. Womvi Churn Sircar (4) followed.

^oAppeal from Appellate Decree No. 1697 of 1898, against the decree of Babu Durga Charan Ghose, Subordinate Judge of Burdwan, dated the 24th of June 1898, affirming the decree of Babu Govind Chandra De, Munsif of Cutwa, dated the 2nd of June 1896.

(1) (1900) 4 C. W. N., 732.

(2) (1898) I. L. R., 25 Cal., 603.

(3) (1899) L. R., 27 I. A., 58.

(4) (1865) 3 W. R., S. C. C. Ref., 17.