

APPELLATE CIVIL.

(36)

Before Mr. Justice Melville and Mr. Justice West.

HUKUMCHAND (ORIGINAL PLAINTIFF), APPELLANT, v. HIRALAL
(ORIGINAL DEFENDANT), RESPONDENT.*

1876
March 29.

Evidence Act (I of 1872), Section 92—Oral evidence—Variance—Custom.

Section 92 of the Evidence Act (No. 1 of 1872) prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract but does not prevent a party to a contract from showing that there was no consideration or that the consideration was different from that described in the contract. Where, therefore, a deed of sale described the consideration to be Rs. 100 in ready cash received, but the evidence showed that the consideration was an old bond for Rs. 63-4-0 and Rs. 36-4-0 in cash... *Held* that there was no real variance between the statement in the deed and the evidence as to consideration having regard to the fact that it is customary in India, when a bond is given wholly or partially in consideration of an existing debt, to describe the consideration as being ready money received."

THIS was a special appeal from the decision of M. B. Baker, Acting District Judge of Khandesh, reversing the decree of Naro Balkrishna, Second Class Subordinate Judge of Erandol.

The plaintiff brought this suit for a declaration of his right to a field and for the removal of an attachment placed thereon by the defendant as the property of his judgment-debtor, one Vithal Mukund. The plaintiff alleged that the said Vithal Mukund had sold the field to him and given him possession. The defendant contended that the plaintiff's deed of sale was collusive. The Subordinate Judge held the plaintiff's deed of sale (No. 3) proved and gave a decree in his favour. The District Judge, in appeal, reversed the decree of the first Court, holding that the deed was not executed for valuable consideration. The following extracts from his judgment set forth his reasons :—

"The deed of sale under which plaintiff claims (No. 3) is dated November 23rd, 1868, and under it Vithal sold the field in dispute for Rs. 100. The evidence goes to show that the deed was written at Chansur and was attested at Zulkuda, and that the consideration for it was an old bond (No. 22) for Rs. 63-12-0 and Rs. 36-4-0 in cash. The deed is registered, and its execution is admitted, so that the only point for consideration is whether it

* Special Appeal, No. 366 of 1875.

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represents a *bond fide* transaction." The Judge then reviewed the evidence, and observed: "Again the deed is said to have been executed for cash, and under no circumstances can it be said that the bond (No. 22) is cash. It was argued that the expression was a mere matter of form ; but I am of opinion that a creditor has no right, under section 92 of the Evidence Act, when the consideration for his deed is said to be cash, to bring other evidence to show that the consideration was wholly or in part of a different nature."

Manekshah Jehangirshah for the appellant.

Shantaram Narayan for the respondent.

MELVILL, J.—The Acting District Judge has found that the deed of sale (No. 3) was not executed for valuable consideration. By this finding he seems to mean, (though the words of the finding do not necessarily involve such meaning), that the sale by Vithal to the plaintiff was merely a colourable transaction, and this, no doubt, was the real issue in the case. In giving the reasons for his finding the Acting District Judge has reviewed the evidence : and though the reasons given by him for reversing the decree of the Subordinate Judge appear to this Court to be generally weak and unsatisfactory, yet the Court could not interfere merely on the ground of an apparent misappreciation of evidence. But the Acting District Judge's conclusion, that the deed (No. 3) was not executed for valuable consideration, vitiated by his misapplication of section 92 of the Evidence Act, by which the Acting District Judge considered that the plaintiff was debarred from showing that the real consideration was in any way different from that stated in the deed. Section 92 of the Evidence Act prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract, but does not prevent a party to a contract from showing that there was no consideration, or that the consideration was different from that described in the contract. In the present instance the Court does not consider that there is any real variance between the statement in the deed and the statement of the plaintiff as to the consideration ; for it is, no doubt, customary in this country, when a bond is given wholly or partially in consideration of an existing debt, to describe the

consideration as being "ready money received." For these reasons the Court reverses the decree of the Acting District Judge, and remands the case for a new judgment. Costs to follow the final decision.

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Order accordingly.

ORIGINAL CIVIL.

(37)

Before Mr. Justice Green.

RUSTOMJI BURJORJI AND OTHERS, PLAINTIFFS, v. KESSOWJI NAIK
AND ANOTHER, DEFENDANTS.*

1878
July 29.
August 13.

Practice and procedure in suits pending at date of enactment of Civil Procedure Code, 1877—Power of Commissioner for taking accounts to grants certificates—Appeal from decision of Commissioner—Decree, meaning of—Civil Procedure Code (Act VIII) of 1859, Section 181—Civil Procedure Code (Act X) of 1877 Section 2, 3, 394, 395—Supreme Court Rules (Equity), 371 and 456.

The effect of the proviso to Section 3 of the Civil Procedure Code of 1877 taken in connection with the definition of the word 'decree' in section 2 is, that in all suits pending when that Code came into force the practice and procedure to be followed down to the final result of such suits (*i. e.*, when nothing remains to be done but to execute the decree or to appeal from it) are the same as previously existed, but that in all subsequent proceedings in execution of the decree or in appeal from it the practice and procedure provided by the Civil Procedure Code of 1877 are to be observed.

The word 'decree' in section 3 of the Civil Procedure Code, 1877, means an order final in its nature, and does not include an interlocutory order, such as an order of reference to take accounts, although such order may, in general, be properly termed a 'decree,' and, therefore, a suit which has been referred by the Court to the commissioner to take accounts is still in a stage "prior to decree" within the meaning of section 3 of the Civil Procedure Code of 1877.

Hirji Jina v. Narran Mutji (1) distinguished.

The general nature of a certificate or report—whether general or separate—by the Commissioner for taking accounts, is, that it should, in the case of a general certificate, comprise the result of all the proceedings under the decree or order of reference, or, in the case of a separate certificate or report, that it should comprise the result of some or one of such proceedings, and the Court is not bound to consider a certificate granted by the Commissioner unless he has certified what may be regarded as the result either of the whole inquiry referred to him or of some branch or part of it.

The power of the Commissioner to grant certificates, and of the Court to deal with motions made with reference thereto, considered.

*Suit No. 461 of 1869.

(1) 12 Bom. H. C. Rep. 129.