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The Assistant Judge has held that the document is inadmissible in evidence, because it is not registered; and we are of opinion that this decision is right. The plaintiff wishes to use the document as an acknowledgment of a right, title and interest in immoveable property, which is admittedly of a higher value than one hundered rupees. If admitted, it will "operate to declare" such a right, title and interest, and it thus appears to come within the terms of s. 17 of Act XX of 1866 It also seems to us to come within the mischief contemplated by the Act. Used as evidence of title (and this is the only use which can be made of it under the old Limitation Acts) such a document indirectly prevents the extinction of that title through the operation of the law of limitation. Under the new Limitation Act (No. XV of 1877) it would directly produce the same effect; for by s. 20 of that Act it would create a new period of limitation from the date of the acknowledgment. If an instrument, having this effect, could be kept secret, it is clear that the intention of the registration laws would be liable to be defeated. A purchaser or encumbrancer, dealing with a person who had, apparently, acquired a good title by twenty-years' possession, would have no security that there might not be in existence a written acknowledgment [594] by such person, containing a declaration of the title of some previous owner, and thus effectually preventing the acquisition of any title by himself.

We are, therefore, of opinion that the document Ex. No. 3, if used as evidence of title, comes within the letter and the spirit of those provisions of the Registration Acts which require declarations of title to be registered; and we, accordingly, confirm the decree of the Assistant Judge with costs.

Decree affirmed.

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4 B. 594=5 Ind. Jur. 527.

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Before Mr. Justice M. Melvill and Mr. Justice Kemball.

PAKSU LAKSHMAN (*Original Plaintiff*), *Appellant v.* GOVINDA KANJI AND ANOTHER (*Original Defendants*), *Respondents.**

[3rd August, 1880.]

Mortgage—Sale—Evidence—Oral evidence, when admissible, to prove that an apparent sale is a mortgage—The Indian Evidence Act (I of 1872) ss. 91, 92 and 115.

A party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement as showing that an apparent sale was really a mortgage, should not be permitted to start his case by offering direct parol evidence of such oral agreement; but if it appear clearly and unmistakeably, from the conduct of the parties, that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage, and not as a sale, and, therefore, if it be necessary to ascertain what were the terms of the mortgage, the Court will for that purpose allow parol evidence to be given of the original oral agreement.

Dinoddee Paik v. *Kaim Taridar* (1) dissented from.

Although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties, and if it clearly appears from such conduct that the apparent vendee treated the

* Second Appeal No. 95 of 1880.

(1) 5 C. 300.

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transaction as one of mortgage, the Court will give effect to it as a mortgage and nothing more.

It is a mistake to reject evidence of the conduct of parties to a written contract on the ground that it is only an indication of an unexpressed unwritten contract between them. Conduct is, no doubt, evidence of the [595] agreement out of which it arose; but it may be very much more. In many cases it may amount to an estoppel. In such a case it is clear that evidence of conduct would be strictly admissible under s. 115 of the Indian Evidence Act (I of 1872). And, even when conduct falls short of a legal estoppel, there is nothing in the Evidence Act which prevents it from being proved, or, when proved, from being taken into consideration.

Courts of Equity in England will always allow a party (whether plaintiff or defendant) to show that an assignment of an estate, which is, on the face of it, an absolute conveyance, was intended to be nothing more than a security for debt, and they will not only look to the conduct of the parties, but will admit mere parol evidence, to show or explain the real intention and purpose of the parties at the time. The exercise of this remedial jurisdiction is justified on two grounds, *viz*, part-performance and fraud.

The Courts in India are not precluded by the Indian Evidence Act from exercising a similar jurisdiction. The rule of estoppel, as laid down in s. 115, covers the whole ground covered by the theory of part-performance. That section does not say that, in order to constitute an estoppel the acts which a person has been induced to do, must have been acts prejudicial to his own interest. Its terms are sufficiently wide to meet the case of a grantor who has simply been allowed to remain in possession, on the understanding and belief that the transaction was one of mortgage, and thus every instance of what the English Courts call 'part-performance' would be brought within the Indian rule of estoppel.

But the ground upon which this jurisdiction of the Courts in India may most safely be rested, is the obligation which lies upon them to prevent fraud. The Courts will not allow a rule or even statute, which was passed to suppress fraud, to be the most effectual encouragement to it, and accordingly, in England the Courts, for the purpose of preventing fraud, have in some cases set aside the common-law rules of evidence and the statute of frauds. The Courts in India have the same justification in dealing similarly with the obstacles interposed by the Indian Evidence Act. In thus modifying the rules laid down by ss. 91 and 92 of that Act, the Courts will not be acting in opposition to the intention of the Legislature, which by enacting the provisions of s. 26, cl. (c) of the Specific Relief Act (I of 1877) has shown an intention to relax the rules of the Indian Evidence Act, so as to bring them into conformity with the practice of the English Courts of Chancery.

Quære—Whether proviso (1) to s. 92 of the Indian Evidence Act is not large enough to let in evidence of such subsequent conduct as in the view of the Court of Equity would amount to fraud, and would entitle a grantor to a decree restraining the grantee from proceeding upon his document.

[Diss., 3 L.B.R. 100 (F.B.); F., 2 L.B.R, 1; R., 21 B. 704 (708); 9 C. 528=12 C. L.R. 267; 9 C. 898; 10 C. 764; 13 M. 494; 16 M. 80; 2 Bom.L.R. 1058; 12 C.L.J. 25 (34)=6 Ind. Cas. 346; 2 C.P.L.R. 125; 10 Ind. Cas. 1004=27 P. R. 1911=191 P.L.R. 1911,=118 P.W.R. 1911; L.B.R. (1872—1892) 588; L.B.R. (1893—1900) 154; 3 N.L.R. 19; 72 P.R. 1901=114 P.L.R. 1901; U.B.R. (1908), 2nd Qr. Evi., 94, p. 15; D., 3 C.W.N. 178 (183).]

THIS was a second appeal from the decision of Rao Bahadur Mahadev Govind Ranade, First Class Subordinate Judge of [596] Khandesh, at Dhulia, with appellate powers, reversing the decree of the Second Class Subordinate Judge of Yaval.

The plaintiff sued to recover possession of two houses with appurtenances, and some lands, situated in the village of Moregaon, of the Savda Taluka. He alleged that the defendants Nos. 1 and 2 conveyed the properties, mentioned above, by a deed of sale dated the 6th of August, 1874. He also alleged that defendants Nos. 1 and 2 sold some of the properties to defendants Nos. 3 and 4, who were in occupation of them.

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Defendants Nos. 1 and 2 contended (*inter alia*) that the plaintiff induced them to execute the deed of sale; that the original understanding between the plaintiff and themselves was that the plaintiff should hold the properties as security for the sums advanced by him, and that the plaintiff gave a written agreement to the defendants by which he undertook to pay to the defendants Rs. 200 a year penalty in the event of his failing to observe the agreement; that, in further pursuance of the said understanding and agreement, the plaintiff did not take possession of any part of the properties in question till June, 1876, when an account was made up between them and the plaintiff, and in accordance with the settlement then arrived at, the said defendants made over to the plaintiff temporary possession of certain of the properties in full satisfaction of the balance due to the plaintiff.

Defendants Nos. 3 and 4 set up their ownership.

The Subordinate Judge held it proved that, though the defendants Nos. 1 and 2 executed the deed of sale, the counter agreement set up by the defendants was also entered into by the plaintiff, and that it was not intended by the parties that the plaintiff should have possession of the properties as full owners of the same. He, however, rejected the counter-agreement, as it had not been registered, and passed a decree in favour of the plaintiff, referring the defendants Nos. 1 and 2 to their remedies, if any, under the agreement by a separate suit.

The chief issue raised in appeal was, "what was the real character of the transaction represented by the deed of sale?" The Court held it to be a mortgage, and, therefore, reversed the decree of the lower Court, and rejected the plaintiff's claim.

The plaintiff appealed to the High Court.

[597] *Shantaram Narayan*, for the appellant.

Rao Saheb *V. N. Mandlik*, for the respondents.

JUDGMENT.

The authorities cited on either side are mentioned in the following judgment delivered by

M. MELVILL, J.—This suit was brought to eject the defendants from certain lands and houses which the plaintiff claimed by virtue of an instrument of sale executed by the defendants. The defence was that, although the instrument, relied on by the plaintiff, was, upon its face, an absolute conveyance, yet the consideration was, in reality, a loan, and it was agreed between the parties that the property should be treated as security for the debt, and that the plaintiff should reconvey whenever the debt should be discharged.

It appears that, simultaneously with the conveyance, a written agreement of some kind was executed by the plaintiff to the defendants. This document is not in evidence, having been rejected for want of registration. But, from the description of its contents contained in the defendants' written statement, it would seem that it was not in itself an agreement in defeasance of the conveyance, but merely a promise to pay damages in the event of the plaintiff failing to act up to the understanding between the parties. What we have, therefore, to deal with, is a written conveyance accompanied by an alleged oral agreement, on the part of the vendee that the contract should be treated as one of mortgage, and not of sale.

The learned Subordinate Judge in the Court below has held the oral agreement to be proved, partly by direct parol evidence of the agreement,

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and partly by the conduct of the plaintiff, which was consistent with the character of a mortgagee, but inconsistent with that of a purchaser. The Subordinate Judge has found that the so-called purchase-money was far below the value of the estate; that, for two years after the conveyance, the defendants remained in possession, not as tenants, but as owners; and that although the plaintiff was ultimately put in possession of a portion of the lands, this was done, not in pursuance of the original conveyance, but in consequence of an adjustment of accounts, [598] and a fresh arrangement between the parties for the repayment of the balance.

There is no doubt that, under the circumstances stated by the Subordinate Judge, the Court of Chancery would admit parol evidence of the oral agreement, and would restrain the plaintiff from prosecuting his action of ejectment: *Lincoln* v. *Wright*(1). The question which we have to determine is whether the provisions of ss. 91 and 92 of the Indian Evidence Act preclude a Court of Equity in this country from exercising the same remedial jurisdiction.

The result of the most recent decisions of this Court appears to be that, although parol evidence will not be admitted to prove directly that, simultaneously with the execution of a bill of sale, there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties(2); and if it clearly appear, from such conduct, that the apparent vendee treated the transaction as one of mortgage, the Court will give effect to it as a mortgage, and nothing more. The same distinction, between direct parol evidence of an oral agreement and evidence of subsequent conduct, was drawn, and given effect to, by the Calcutta High Court in the Full Bench case, *Kashinath Chatterji* v. *Chandi Churn Bannerji* (3). The case was decided before the Indian Evidence Act became law; but the majority of the Court insisted upon the application of the common-law rule of evidence, that a written contract cannot be varied by parol evidence. But, having insisted upon that rule, Sir Barnes Peacock went on to say: "If possession did not accompany or follow the absolute bill of sale, it would be a strong fact to show that the transaction was a mortgage, and not a sale; and it, therefore, becomes material to try whether the plaintiff was ever in possession, and [599] forcibly dispossessed, as alleged by him, and whether, having reference to the amount of the alleged purchase-money advanced, and to the value of the interest alleged to be sold, and the acts and conduct of the parties, they intended to act upon the deed as an absolute sale or to treat the transaction as a mortgage only: for I am of opinion that parol evidence is admissible to explain the acts of the parties, as, for example, to show why the plaintiff did not take possession in pursuance of the bill of sale, if it be found that the defendant retained possession, and that the plaintiff never had possession, as alleged by him, and was never forcibly dispossessed." The case was, accordingly, remanded to the lower Court to try the following issue, *viz.*:—Whether, having regard to the acts and conduct of the parties, and having reference to the amount of the alleged purchase-money, and the real value of the interest alleged to be sold, the parties

(1) 4 De G. and J. 16.

(2) *Banapa* v. *Sundardass*, 1 B. 333. *Hasha Khand* v. *Jesha Premaji*, S.A. 309 of 1877, Printed Judgments for 1878, p. 24; and see *infra*. note p. 609. S.A. 353 of 1878, 23rd January, 1879; S.A. 429 of 1879, 25th February, 1880. See, also, *Bapuji Apaji* v. *Senavaraji*, 2 Bom. 231.

(3) 5 W. R. 68 = Full Bench Rulings, Sup. Vol. p. 333.

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intended the deed to operate as an absolute sale, and treated the transaction as an absolute sale, or as a mortgage only.

In a very recent case in the Calcutta High Court, *Daimoddee Paik* v. *Kaim Taridar* (1), which was a case on all fours with the present case, Mr. Justice Jackson has criticised the decision in the Full Bench case, (which he characterised as a judgment of three Judges against two,) and made the following remarks:—"We have no doubt that the Judge is in error in thinking that the parties are at liberty to rely upon the evidence furnished by the conduct of parties for the purpose of varying, adding to, or subtracting from the terms of a written contract. The evidence so given, can only be evidence of an agreement which, as it was not written, must have been oral; and that is in distinct violation of the terms of s. 92 of the Evidence Act." And then, referring to the case of *Madhab Chunder Roy* v. *Gangadhar Shamant* (2), he says: "I observed in that case—'I confess that I have some difficulty in comprehending the distinction between the admissibility of evidence of a verbal contract to vary a written instrument, and the admissibility of evidence showing the acts of the parties, which, after all, are only indications of such unexpressed unwritten agreement between the parties;' **[600]** and Mr. Justice Markby said: 'It seems to me very difficult to understand the distinction, there drawn, between evidence of a parol agreement contradicting the terms of a written contract being inadmissible, and evidence' [of the conduct?] 'of the parties contradicting the terms of such a contract being admissible.'" Mr. Justice Jackson then goes on to refer to the Registration Act, and remarks on the extreme inconvenience of allowing parties to show by evidence of conduct that what had been registered as a bill of sale was really only a mortgage.

This decision is directly opposed to the current of decisions in this Court and to the Calcutta Full Bench case referred to. It is true that two out of five Judges dissented from the judgment in the Full Bench case; but the difference of opinion was not as to the relevancy of evidence of conduct, but as to the admissibility of parol evidence of the original oral agreement. The minority was in favour of the admission of such evidence; and, having regard to the practice of the Court of Chancery, (though it was not on this that the Judges relied,) I am disposed to think that the minority was right: see *Bholanath* v. *Kaliprasad* (3). At any rate, the opinions of the dissenting Judges, far from supporting the view taken in *Daimoddee Paik* v. *Kaim Taridar* (1), was even more strongly opposed to it than was the view taken by the majority. The objections to this view, in so far as they are founded on the Registration Act, do not appear to me of much weight; for, of course, a purchaser from the apparent vendee, who had no notice of any oral agreement modifying the original bill of sale, would take an absolute title. Finally, I must observe, in regard to *Daimoddee Paik's* case, that it seems to me a mistake to say that the acts of the parties "are, after all, only indications of the unexpressed unwritten agreement between the parties. Conduct is, no doubt, evidence of the agreement out of which it arises; but it may be very much more. In many cases it may amount to an estoppel. If the holder of an absolute bill of the sale were not only to allow the vendor to remain in possession, but were to take interest from him on the alleged purchase-**[601]** money, or allow him to go on improving the property, I conceive that any Court would hold that the so-called vendee was estopped from

(1) 5 C. 300. (2) 11 W.R. C.R. 450. (3) 8 B.L.R. 89.

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enforcing his bill of sale. The answer to him would be, not that his conduct was evidence of an oral agreement converting the sale into a mortgage, but that, whether there had been such an agreement or not, he had by his conduct led the defendant to believe that he would treat the transaction as a mortgage, and that, on the strength of such belief, the defendant had been induced to pay money which he would not otherwise have paid, and that under such circumstances the plaintiff was estopped from denying that the original transaction was one of mortgage. In such a case it is clear that evidence of conduct would be strictly admissible under s. 115 of the Indian Evidence Act. And, even when conduct falls short of a legal estoppel, there is nothing in the Evidence Act which prevents it from being proved, or, when proved, from being taken into consideration. On what grounds, and to what extent, it should be taken into consideration, I shall presently proceed to consider.

I may here, in passing, remark that it is not only in cases of mortgage that this Court has drawn a distinction between parol evidence of a transaction and evidence of conduct indicating such a transaction; and while compelled by law to reject the one has not felt itself precluded from admitting, and acting upon, the other. Section 206 of the Civil Procedure Code (Act VIII of 1859) provided that no adjustment of a decree should be recognized by the Court, unless such adjustment were made through the Court, or certified to the Court by the decree-holder. This was equivalent to a prohibition against receiving parol evidence of an adjustment made out of Court. But in *Chango* v. *Kalaram* (1), Couch, C. J., while insisting on the necessity of the strictest compliance with s. 200, decided that, when a decree-holder had once removed an attachment placed by him, or discharged his debtor from prison, the presumption from his conduct was that his decree had been satisfied, and that, unless he could explain away his conduct, he was precluded from proceeding further in execution.

[602] These considerations prevent me from attaching so much weight to the judgment in *Daimoddee Paik's* case as to be induced by it to depart from the line laid down by the previous decisions of this Court and of the Full Bench at Calcutta. Before I can hold those decisions to be wrong, I must be satisfied that they are opposed to the doctrine of Courts of Equity in England, or, if not, that Courts of Equity in India are prevented by the statute law from applying the same principles which regulate the practice of the Court of Chancery.

Now, nothing can be clearer on the cases than that the Court of Chancery will allow a party, (whether he be plaintiff or defendant), to show that an assignment of an estate, which is, on the face of it, an absolute conveyance, was intended to be nothing more than a security for debt. And, in order to establish this, it will look, not only to the conduct of the parties, but will admit mere parol evidence to show or explain the real intention and purpose of the parties at the time.

In *Murphy* v. *Taylor* (2) it was stated that "the control which the Court exercises in cases of this nature, is exercised in order to prevent a creditor from oppressing a distressed debtor." And Mr. Spence (3) places the jurisdiction upon the same ground. "The principle," he says, "on which evidence is admitted in these cases against the import of the deed, appears to be, that from the relative helplessness of the borrower it is

(1) 4 B.H.C.R. 120. (2) 1 Ir. Ch. Rep. 92. (3) 2 Eq. Jur. 619, (620).

likely that the lender may have omitted to cause the deed to be so prepared as to represent the real nature of the transaction." I need hardly say that, if this consideration be sufficient to induce the Court of Chancery to extend its power of protection to the farthest possible limits, the same motive must operate, even more strongly, upon the Courts in this country. There is no country in which distressed and illiterate debtors are, relatively, so helpless and so much at the mercy of their better educated creditors. I have been informed that, since the Deccan Agriculturists Relief Act became law, the money-lenders in the Deccan have, with a view to evade the inquiry into mortgage transactions which the law prescribes, been generally insisting, as a condition of further advances, that the cultivators should sign instruments purporting [603] to be absolute transfers of their lands. If this be so, and if (as is likely) the understanding of the cultivators is that they are only assigning their lands as security for their debts, it is specially desirable at this moment that our Courts should not part with their protective jurisdiction, unless it be very clear that the law has taken the power out of their hands.

In order to determine this, it becomes important to consider upon what principles the Court of Chancery has assumed to exercise this remedial jurisdiction: and, if the same principles be found to be applicable to this country, then to determine whether the restrictions imposed by our statute law are so much more stringent than in England, that our Courts cannot, like the Court of Chancery, hold themselves free to do what justice and equity require.

The jurisdiction in question has, in England generally, been made to depend upon two grounds: the first, part-performance; the second, fraud. Mr. Justice Story (1) treats the subject thus: "It is upon the ground of part-performance," he says, "and to prevent fraud, that the Courts of Equity are enabled to treat an absolute deed, given to secure a debt, as a mortgage, where the conditions of defeasance rests on parol merely. And the American cases rest upon the same ground, although the point is not so distinctly brought out, by the Judges, in illustrating their judgments. The leading case in this country is put upon the ground of fraud merely, in attempting to pervert a loan into a sale. The other cases have followed mainly the same ground of argument. But it is obvious that, where the grantor continues in the occupancy and use of the premises, as owner, taking products and making improvements, which, but for the deed being a mere mortgage, would be a naked tort, and this is acquiesced in by the grantee, through a course of years, it is but fair and just to treat this as part-performance, and sufficient to take the case out of the operation of the Statute of Frauds, in equity, and thus to charge the party with fraud who subsequently attempts to put a different construction upon the contract."

[604] I dot not propose to refer at any length to the English cases which make the jurisdiction to depend upon part-performance only. The doctrine of part-performance, in many of those cases, appears to me to have been stretched to an extreme tension; and probably would not have been applied, if the Court of Chancery had not thought it desirable to build upon foundations which had been already laid. The case put in Mr. Justice Story's illustration, in which a grantor has been not only left in possession, but has been induced to spend money in making improvements, comes, as I have already said, within the rule of estoppel. But

(1) Story's Eq. Jur. s. 1522*a*.

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when the grantor is merely left in possession (which is a circumstance in itself beneficial to him), and is not induced to do any act to his own detriment, it appears to me somewhat fanciful and far-fetched to say (as the Courts in England have in some cases said) that the grantor's continued possession amounts to a part-performance of the grantee's parol promise, and that on this account the grantor is entitled to be relieved from the Statute of Frauds. I will only further observe upon this point that, if any one is inclined to adopt the doctrine of part-performance to the full extent to which it has been carried in the English cases, he need have no difficulty in holding that the rule of estoppel, as laid down in s. 115 of the Indian Evidence Act, covers the whole ground which is covered by the theory of part-performance; and under that view the difficulty of the question which I am now considering at once vanishes. Section 115 does not say, in so many words, that, in order to constitute an estoppel, the acts, which a person has been induced to do, must have been acts, prejudicial to his own interests. It merely says that "when one person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief," he shall be estopped from denying the truth of that thing. The terms of the section are sufficiently wide to cover the case of a grantor who has simply been allowed to remain in possession, on the understanding and belief that the transaction was one of mortgage; and, thus every instance of what the English Courts call part-performance would be brought within the Indian rule of estoppel. I am not, however, myself inclined either to adopt the English doctrine of part-performance to the [605] furthest extent, nor to push the Indian rule of estoppel to the same limit.

The basis on which I prefer to rest the jurisdiction of our Courts is the second of the two grounds which I have mentioned, *viz.*, that of fraud. This view of the question is very clearly put by Lord Justice Turner in *Lincoln* v. *Wright* (1). In that suit, which was brought to restrain an action of ejectment by Wright, there had been an absolute conveyance by Lincoln to Wright, and the question was whether a parol agreement, in defeasance of the sale, could be proved by Lincoln. Lord Justice Knight Bruce rested his judgment on the ground of part-performance, holding that the naked fact, that Lincoln was allowed to remain in possession, was a part-performance sufficient to take the case out of the Statute of Frauds. This, as I have already said, appears to me to have been an extension of the doctrine of part-performance to an extreme limit; and Lord Justice Turner evidently felt this, and, accordingly, preferred to base his judgment upon other grounds. He said: "Without reference to the question of part performance, on which I do not think it necessary to give any opinion, I think that the parol evidence is admissible, and is decisive upon the case. The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that, as between the plaintiff and Wright, the transaction should be a mortgage transaction, it is, in the eye of this Court, a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud. Assuming the agreement proved, the principle of the old cases as to mortgages seems to me to be directly applicable. Here is an absolute conveyance, when it was agreed there should be a mortgage; and the conveyance is insisted upon in fraud of the agreement. The

(1) 4 De G. & J. 16.

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question, then, as I view it, is whether there was such an agreement as this bill alleges; and upon the evidence I am perfectly satisfied that there was. * * * * Besides, the agreement for the mortgage was only part of an entire transaction; and the appellant cannot, as I conceive, adopt one part of the transaction, and repudiate the other."

[606] The principle on which the jurisdiction is in this judgment made mainly to depend, and on which the American Courts have, as Mr. Justice Story says, made it exclusively to depend, is the obligation laid upon Courts of Equity to prevent the perpetration of fraud. It is hardly necessary to observe that this obligation presses upon Courts in India with, at least, as much weight as upon Courts in England and America.

It being thus established that the motive and the principle which have led the Court of Chancery to insist on this jurisdiction, have, at least, the same force in this country as in England, it remains to consider whether the fetters imposed by the Indian Evidence Act are so much more stringent than those from which the Court of Chancery has shaken itself free, that our Courts may not (to use Lord Cottenham's expressive term in *Mundy* v. *Jolliffe* (1) "struggle to prevent" the great injustice which would arise from permitting a party to escape from the engagements which he has entered into.

Now, it is quite true that there is no English statute which contains provisions exactly corresponding with those of ss. 91 and 92 of the Indian Evidence Act. But the rule of evidence at the common law is precisely the same. The provisions of the Statute of Frauds, which prevent the operation of parol contracts, are in their nature analogous and not less stringent. Yet, in their determination to prevent advantage being taken of distressed borrowers, the Court of Chancery has set aside, not only the rule of evidence but the Statute of Frauds, and in one case *Langton* v. *Horton* (2), even such special statutes as the Ships Registry Acts. The justification of its action has been that a Court will not allow a rule, nor even a statute, which was introduced to suppress fraud, to be the most effectual promotion and encouragement of fraud: *Lincoln* v. *Wright* (3); *Booth* v. *Turle*(4). Our Courts have the same justification: and the obstacle interposed by the Indian Evidence Act is certainly not more formidable than those which the Court of Chancery has pushed out of its path. I would not, therefore, myself hesitate to follow [607] the example of that Court, and, if necessary, in a matter in which justice, equity and good conscience so strongly require it, to take the case out of the operation of ss. 91 and 92 of the Indian Evidence Act. For, as was observed by the Madras High Court (*Krishnaji* v. *Subbaraya*(5), when dealing with s. 206 of Act VIII of 1859, to which I have already had occasion to refer, "rules of procedure are applicable to all ordinary legal means, and in such application cannot be modified by equitable considerations: this results from their being rules of public law. They by no means, however, exclude those extraordinary legal means which are the offspring of the principle, that fraud cannot be permitted to prevail."

I should, no doubt, feel greater difficulty in modifying any of the rules contained in the Indian Evidence Act if I saw reason to think that, in so doing, I was acting in opposition to the intention of the Legislature. But I see no such reason, but rather the contrary. The Indian Evidence Act contains, in the sections referred to, the rule of the English

(1) 5 My & Cr. 167 (177). (2) 5 Beav. 9. (3) 4 De. G. &. J. 16.
(4) L.R. 16 Eq. 182, and see Story's Eq. Jur. s. 154. (5) 7 M. 387.

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common law, very slightly modified by equitable considerations. But, when subsquently dealing with the equitable jurisdiction of our Courts, the Legislature has shown the clearest intention to relax the provisions of those sections, so as to bring them into conformity with the practice of the Court of Chancery. Section 26, cl. (*c*), of the Specific Relief Act would undoubtedly enable a defendant in a suit for specific relief to prove an oral agreement for re conveyance, in bar of the plaintiff's conveyance, and would thus let in the rule enunciated by a Full Bench of this Court in *Dada Honaji* v. *Babaji*(1). If our Courts are to exercise this equitable jurisdiction in one description of action, it is hardly to be supposed that the Legislature does not intend them to exercise it in the other cases, merely because the form of action is different. It may be hoped that, whenever the Transfer of Property Bill is passed into law, the Legislature will deal with this matter in such a manner as to remove all possibility of doubt.

In what I have said, I have assumed, rather than decided, that, in order to establish the equitable jurisdiction claimed, it is necessary to trench upon the provisions of the Evidence Act. **[608]** Those whose scruples would prevent them from doing this (and I admit that we should be very scrupulous in such a matter) may persuade themselves that, for reasons on which I have already touched, the case may be brought within the section of the Act which relates to estoppel. Or they may think, and this is a view which is certainly capable of being supported by argument, that the case may be made to fall within proviso 1 to s. 92, which admits parol evidence of fraud to invalidate a document. It is true that it was held in *Banappa* v. *Sundardas*(2) that the fraud mentioned in the section, must be fraud contemporaneous with, and not subsequent to, the making of the document, and the Court refused to entertain the argument, which is suggested by Mr. Dart in his work on Vendors and Purchasers (p. 954, 4th ed.), that the refusal to fulfil a promise may be taken to show that the promise was originally fraudulent. But admitting that such an argument can hardly be maintained, I must still say that the words of the first proviso to s. 92 are very wide, and declare that any act of fraud may be proved which would entitle any person to any decree relating to a document; and it is not quite clear to me that these words are not large enough to let in evidence of such subsequent conduct as, in the view of a Court of Equity would amount to fraud, and would entitle a grantor to a decree restraining the grantee from proceeding upon his document.

I have discussed this subject at a length which to those who are familiar with the practice of the Court of Chancery may appear unnecessary. But the subject is one of great importance, and the provisions of the Evidence Act do, undoubtedly, import into it considerable difficulty. Moreover, the decisions of this Court and of the Calcutta High Court may well appear to the Mofussil Courts to be not easily reconcilable. It seemed to me, therefore, very desirable that those decisions should be compared and considered with reference, not only to each other, but to the established practice of Courts of Equity in England; and that some clear and definite rule should be laid down, which may serve as a guide to the Mofussil Courts in dealing with a question which they are very frequently called upon to decide. The rule **[609]** which, on a consideration of the whole matter, appears to me most consonant both to the statute law and to equity and justice, is this, namely,

(1) 2 B. H. C. R. 36. (2) 1 B. 333.

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that a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement; but, if it appear clearly and unmistakeably, from the conduct of the parties, that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage, and not as a sale; and thereupon, if it be necessary to ascertain what were the terms of the mortgage, the Court will, for that purpose, allow parol evidence to be given of the original oral agreement. As was observed by Wigram, V.C., in *Dale* v. *Hamilton* (1), and also by Jessel, M.R., in *Ungley* v. *Ungley* (2), the conduct of the parties shows unequivocally that *some* contract, reconcileable with such conduct, must have taken place between the litigant parties; and the Court is, consequently, compelled to admit evidence of the terms of the contract, in order that justice may be done between the parties.

Some of the *indicia*, from which a Court may infer that a transaction must have been of the nature of a mortgage and not a sale, are enumerated in *Bapuji* v. *Senavaraji* (3). That enumeration is, of course, not exhaustive; but I see no use in attempting to add to the number of illustrations. Every case, as it arises, must be decided on its own merits; and the instances given, ought to furnish a sufficient guide to the principle of decision.

4 B. 609-N. = 5 Ind. Jur. 534-N.

NOTE.—In the case of *Hasha Khond* v. *Jesha Premaji*, WESTROPP, C.J., and M. MELVILL, J., on the 11th February, 1878, gave the following judgment:—

In such cases as the present, where one party alleges a transaction to be a mortgage and the other alleges it to be a sale, the question which presents itself for consideration is, whether or not there continued to be a debt from the former to the latter—see *Goodman* v. *Grierson* (4); *Bapuji Apaji* v. *Senavaraji* (3); *Murphy* v. *Taylor* (5); *Subabhat* v. *Vasudevbhat* (6). The Exs. 8 and 9 are relied upon by the defendant Jesha Premaji as deeds of sale, whereby the lands therein respectively mentioned were conveyed [610] to him absolutely. But the form of the instruments is not conclusive. If it appear *aliunde*, as, for instance, by the conduct of the apparent vendee himself, that the deeds were intended as mere securities for money, and that he so treated them, a Court of Equity will deal with them as such accordingly. Now, the books of the defendant Jesha Premaji have been produced by him on the requisition of the plaintiffs, and they contain entries (see Exs. 50, 51 and 52) which treat the respective consideration moneys named in the alleged deeds of sale as continuing debts due to the defendant Jesha Premaji from Hasha, through whom his sons, the plaintiffs, claim. Of these entries, Exs. 51 and 52 show, also, that, although Ex. 9 was executed by Krishnaji Vishvanath as nominal vendor and only attested by Hasha, yet the transaction was really that of Hasha Krishnaji Vishvanath, being merely a trustee for him, as appears from the fact that Jesha Premaji treated the consideration money for that deed (Ex. 9), namely, Rs. (199) one hundred and ninety-nine, as a debt due from Hasha to him Jesha Premaji. These entries, Exs. 50, 51 and 52, when put in evidence, were, at the very least, sufficient to shift the burden of proof from the plaintiffs to the defendant Jesha Premaji, but he has not attempted to give any evidence to contravene their effect. On the contrary, he admitted the genuineness and truth of those entries, and neither at the time of their production by himself, or of copies of them as extracts being filed in Court, or subsequently, although opportunities were afforded to him to put in evidence, did he give either oral or documentary evidence, which in anywise neutralized or explained away their effect, or showed that they related to other transactions than those to which Exs. 8 and 9 related. It was incumbent on him to do this, but he permitted the case to proceed to judgment without attempting to do so. It must be distinctly understood that we do not deem it necessary to deal with the question as to whether the *pote-chitti* (unproduced and unstamped as it is found to have been) might be proved by other documentary or oral evidence, or with the applicability of s. 170 of the Civil Procedure Code of 1859 to this

(1) 5 Hare 381. (2) L.R. 5 Ch. Div. 887. (3) 2 B. 231.
(4) 2 Ball and Beaty 274. (5) 1 Ir. Chan. Rep. 92. (6) 2 B. 113.

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case. We rest our decision on the conduct of the defendant Jesha Premaji himself, who treated the sums of Rs. (351) three hundred and fifty-one and Rs. (199) one hundred and ninety-nine, which coincide with the consideration moneys mentioned in Exs. 8 and 9, as debts due to himself from Hasha, and offered no explanation or evidence to the contrary. For these reasons we reverse the decree of the Assistant Judge, and restore that of the Subordinate Judge, with costs of suit and both appeals to be paid by the defendant Jesha Premaji to the surviving plaintiff Mahadev bin Hasha. The Subordinate Judge should have named a reasonable time (say six calendar months) within which the redemption money should be paid; but, as we are informed by the pleaders on both sides that the redemption money mentioned in the decree of the Subordinate Judge has been paid, and possession of the lands given to the plaintiff, we deem it unnecessary to make any amendment in the Subordinate Judge's decree.

[This case is also referred to in 4 B. 594; 9 C. 528 (533).]

4 B. 611.

[611] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

KRISHNAJI VITHAL (*Original Defendant No. 2*), *Appellant v.* BHASKAR RANGNATH AND OTHERS (*Original Plaintiffs*), *Respondents** [17th August, 1880.]

Civil Procedure Codes, Act VIII of 1859, *s.* 246, *and Act X of* 1877, *ss.* 280, 281, 282—*Limitation Act, IX of* 1871, *sch. II, arts.* 14 *and* 15, *and Act XV of* 1877, *sch II.* 11.

V (defendant No. 1) obtained a decree against Waman, and, in execution thereof, attached certain immoveable property as belonging to his judgment-debtor. The plaintiffs, who were Waman's five brothers, thereupon applied for the removal of the attachment under s. 246 of the Civil Procedure Code (VIII of 1859), but their application was rejected on the 24th July, 1875, and the property was sold by the Court to K (defendant No. 2) on the 16th and 17th February 1876. The sale was confirmed on the 18th March 1876. The plaintiffs brought a suit on the 17th March, 1877, against V and K (the judgment-creditor and auction-purchaser), alleging that the property was the joint ancestral property of themselves and their brother Waman, and was not liable to attachment and sale for his separate debt. They prayed that the sale should be set aside. The Subordinate Judge dismissed the suit as barred by art. 15, sch. II of the Limitation Act (IX of 1871). His order was reversed in appeal, by the District Judge, who held that art. 14, sch. II of the Limitation Act applied to the case. K thereupon appealed to the High Court.

Held, that art. 15, and not art. 14, of sch. II of Act IX of 1871 applied to the case, and that the suit was barred.

The intention of the Legislature in passing s. 246 of the Civil Procedure Code (Act VIII of 1859) was that the order made under that section should be a final bar to the plaintiff's right, unless, such a suit as that section prescribed, was brought to retry the question of that right; and if, on such action being brought, the Court on the trial held that the plaintiff had established his right, its ruling would amount to a reversal of the order made under s. 246, and the suit would fall within art. 15 of sch. II of the Limitation Act (IX of 1871), which is substituted for the limitation provided by the twelve repealed words in s. 246 of Act VIII of 1859.

Settiappan v. *Sarat Singh* (1) concurred in.

Koylash Chunder Paul v. *Preonath Roy* (2) referred to and discussed.

[R., 9 B. 35 (38); 18 B. 260 (262); 22 B. 640; 9 C. 220 = 11 C.L.R. 263; 11 C. 673 (676); 8 M. 506; D., 10 C. 444 (449).]

THIS was a miscellaneous second appeal from the order of F. [612] Mactier, Judge of the District Court at Satara, reversing the order of Ramrav Subaji, Second Class Subordinate Judge at Wai.

* Miscellaneous Second Appeal No. 5 of 1880.

(1) 3 M.H.C.R. 220.

(2) 4 C. 610.