APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

SANGIRA MALAPPA BIN AYAPPA (ORIGINAL DEFENDANT No. 1), APPELLANT, v. RAMAPPA BIN SANGAPPA PATTUR AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS*.

1909. August 27.

Evidence Act (I of 1872), section 92—Written agreement—Sale-deed—Contemporaneous oral agreement to treat it as mortgage—Absence of fraud, misrepresentation, &c.—Oral agreement cannot be pleaded.

Where parties enter into a sale-deed with a contemporaneous oral agreement to treat it as a mortgage, it is not open to either of them to plead the oral agreement in absence of fraud, misrepresentation or failure of consideration or the like reason rendering the sale void.

SECOND appeal from the decision of C. E. Palmer, Acting District Judge of Bijápur, reversing the decree passed by V. G. Sane, Subordinate Judge of Bágalkot.

On the 15th December 1886 the plaintiff sold his house to defendant No. 1 by a registered sale-deed. The latter sold it to defendant No. 2 by a registered sale-deed on the 13th October 1903.

The plaintiff filed this suit on the 14th October 1904 to recover possession of the house. He alleged that the sale was in reality a mortgage, for contemporaneously with the written deed of sale there was an oral agreement to treat the sale as a mortgage, and to restore the possession of the house on repayment of Rs. 200.

The defendant No. 1 denied the oral agreement.

The Subordinate Judge held that the plaintiff could not be allowed to prove the oral agreement set up by him; and he therefore dismissed the suit.

On appeal, the District Judge was not satisfied with the findings of the Subordinate Judge: he therefore remanded the case for determination of the following issues:—

1. Does plaintiff prove any fact which would invalidate the document or entitle him to any decree or order relating thereto?

* Second Appeal No. 593 of 1908.

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2. Is plaintiff entitled to any and what relief ?

The Subordinate Judge returned an affirmative finding on the first issue; and on the second he found that the plaintiff was entitled to recover the property on payment of the debt due. His reasons were as follows:—

Mr. Sane, who decided the suit in this Court, relied on the ruling in *Keshavrao* v. *Raya*(1) and excluded from his consideration the evidence of the circumstances which were supposed to be the existence of an oral agreement contemporaneous with the deed of sale. The case of *Keshavrao* v. *Raya*(1) was decided in January 1906. It seemed to follow the ruling in *Dattoo* v. *Ramchandra*(2) decided in 1905 and to ignore the decisions of the Bombay High Court prior to *Dattoo* v. *Ramchandra*(2). Then followed the case of *Abaji* v. *Laxman*(3) referred to by the District Court in the foregoing order. This case was decided in June 1906. By it, the effect of the ruling in *Dattoo* v. *Ramchandra*(2) was modified. In July 1906 followed the case of *Navalbai* v. *Sivubai*(4) and in August 1906 the case of *Krishna Bai* v. *Rama*(5). By these two last cases the ground lost by the decisions preceding them is greatly re-claimed.

In *Navalbai* v. *Sivubai*,(4) it is said: "So in this case if the plaintiffs were told that the document, which in form is a sale-deed, would not be enforced as such against them, and on the faith of that representation Hariba executed the document, then the sale-deed cannot be upheld as against him or the plaintiffs as a sale-deed."

The case of *Krishna Bai* v. *Rama*(5) pointedly calls attention to this statement of law. The effect, therefore, of the recent rulings would appear to be that evidence of contemporaneous representations or of conduct of parties may be admitted, not for the purposes of proving any oral agreement, contradicting, varying, adding to or substracting from the terms of the document but for the purpose of proving that the parties understood that the document was not intended to operate at all as a sale-deed though in form it bore that character. Mr. Justice Heaton's observations in *Krishna Bai* v. *Rama*,(5) seem to support this view.

In this view of the law on the subject I find that there are ample materials in this case to hold that the document was not intended to operate as a sale.

The witnesses for plaintiff, Exhibits 58 and 59, state that the sale transaction was only colourable and that the parties understood that the sale-deed in reality represented a mortgage. Even apart from this evidence, about the admissibility of which there may be yet some question, I think there are circumstances

(1) (1906) 8 Bom. L. R. 287.
(2) (1905) 30 Bom. 119.
(3) (1906) 30 Bom. 426.
(4) (1906) 8 Bom. L. R. 761.
(5) (1906) 8 Bom. L. R. 764.

which show that defendant No. 1 understood that the sale-deed obtained by him was not to operate as a sale-deed.

Firstly, there is the circumstance of the house and the land which had been sold only for Rs. 200, being really worth more than that. The house itself has been conveyed by defendant No. 1 to defendant No. 2 for Rs. 200. The land would appear from the rent notes produced capable of yielding rent of Rs. 26 to 40. This means that the land itself is worth Rs. 250 to 350. It is unlikely that property worth Rs. 400 to 500 was intended to be sold for Rs. 200 only.

Then there is the circumstance of the land and the house having continued in possession of the plaintiff ever since the sale-deed of 1886 till about 1902, that is, for 16 years. The khata of the land has been all along allowed to remain in plaintiff's name.

In rural parts of Deccan great importance is attached to the khata, and the omission to obtain a transfer of it from the vendor's to the vendee's name, in the absence of any satisfactory explanation, may be taken to be an indication of the ownership of the land not having been understood to have passed to the apparent vendee.

It is further significant that the assessment receipt books, Exhibits 51 and 52, show that during 1886 to 1891, that is, for 5 years after the deed of sale, the assessment was paid by the plaintiff. The receipt book for the years 1891 to 1897 is not in existence. The plaintiff says he has paid the assessment for those years also. Defendant No. 1 has got accounts. He has produced extracts of them. They do not show that the defendant No. 1 has paid the assessment for those years. It is not also explained by defendant No. 1 why plaintiff paid the assessment for those years, and why defendant No. 1 did not credit to plaintiff in those years the assessment paid by him for defendant's land. The payment of one year, that is, of 1896, is accounted for. It is provided in Exhibit 43 that plaintiff should pay the assessment for that year. But rent-notes Exhibits 37, 41 and 42 which are for the years 1889, 1890 and 1891, do not stipulate that plaintiff should pay the assessment for those years, yet the assessment for the years is paid by plaintiff. This could be only on the assumption that plaintiff was regarding himself as the owner of the land in spite of the deed of sale.

Lastly, the most significant fact is the following. From the extracts of accounts produced by defendant No. 1 it appears that in Exhibit 77 an item of rupee 1 annas 8 and in Exhibit 89 an item of Rs. 5, Re. 1 and of Rs. 21 annas 13 are debited to the plaintiff on account of outlay on improvements or watching of crops. If the plaintiff was only a tenant the outlay of Rs. 21 annas 13 made for removal of weeds from defendant No. 1's land would not in defendant No. 1's account be debited to plaintiff. This furnishes an almost unanswerable argument for holding that defendant No. 1 understood that the sale-deed was not to operate as a sale-deed at all.

All these facts prove that the plaintiff is entitled to an order relating to the sale-deed to the effect that the sale-deed was not understood by the parties to

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operate as a sale-deed transferring the rights of ownership from the plaintiff to the defendant No. 1.

The District Judge agreed with these conclusions and decreed the suit in plaintiff's favour.

The defendant No. 1 appealed to the High Court.

V. G. Ajinkya for the appellant.—The oral agreement contradicting, varying, etc., the written contract cannot be proved: see section 92 of the Indian Evidence Act (I of 1872); *Balkishen Das* v. *Legge*[1]. Here fraud or misrepresentation is neither alleged or proved. The cases relied upon by the lower Court are all cases where one party induces another to enter into a transaction by representations, etc., and who but for such representation, etc., would not have entered into it.

K. H. Kelkar for the respondent.—In this case the District Judge has found that there was an agreement to recover the property: and on remand, the Subordinate Judge has found that the sale-deed was not understood by the parties to operate as a sale-deed. These findings must mean that the defendant had represented to the plaintiff that the transaction was not to be enforced and on the faith of such representations or inducement the plaintiff passed the deed in question. See *Pertab Chunder Ghose* v. *Mohendra Purkait*[2].

CHANDAVARKAR, J.:—The learned District Judge has found upon the evidence that there was between the plaintiff and the first defendant an oral agreement, at the time the formal sale transaction was arranged, to reconvey the property on payment by the latter of Rs. 200; and he has held that the said agreement is a fact which, under the proviso to section 92 of the Indian Evidence Act, entitles the plaintiff to have the sale-deed executed by him in favour of the first defendant set aside and to recover the property on payment of Rs. 200. In support of this view the learned District Judge has relied on two decisions of this Court: *Keshavrao* v. *Raya*[3] and *Abaji* v. *Laxman*[4]. These decisions followed *Pertab Chunder Ghose* v. *Mohendra Purkait*[2]. In this last case the facts were that the plaintiff therein had induced his

(1) (1899) L. R. 27 I. A. 58.
(2) (1889) L. R. 16 I. A. 233.
(3) (1906) 8 Bom. L. R. 287.
(4) (1906) 30 Bom. 426.

tenants to sign certain *kabulayats* by representing that certain stipulations therein, to which they had objected before signing, would not be enforced. It was held that that "statement of the effect of the law was a misrepresentation." Their Lordships said:—

"Where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of equity, considered as having been obtained fraudulently. If such a representation had not been made the tenants might have refused to sign the *kabulayat*. Further, if there is any stipulation in the *kabulayat* which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the Kabulayat is not the real agreement between the parties, and the plaintiff cannot sue upon it."

The facts in the present case before us are entirely different. The plaintiff has never alleged either in his pleadings or in his deposition that he was induced to sign the deed of sale executed by him under any misrepresentation. His case throughout has been that by the agreement of both parties the transaction between them was reduced to writing as one of sale of the property to the first defendant with a contemporaneous oral agreement that it should be treated as a mortgage. That was his allegation in the plaint and that is what he and his witnesses, relied upon by both the Courts below, state in their depositions. To this state of facts neither the proviso to section 92 of the Evidence Act nor any of the decisions above cited, applies. There is no element of fraud, or misrepresentation or failure of consideration or the like in them to render the deed of sale invalid. Mr. Kelkar, the learned pleader for the respondent, in supporting the decree of the Court below, has argued that the first defendant's promise to enforce the deed of sale as a mortgage and his refusal now to abide by that promise, amounts to misrepresentation and brings this case within the principle of the Privy Council decision above mentioned. But that is not an accurate way of stating the principle. What their Lordships laid down is that where one party to a contract does not agree to any of its stipulations and the other party induces him, not indeed to agree to it, but to its formal insertion in the written contract, by representing that the stipulation in question would be in reality

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treated by him as a dead letter, it cannot be enforced, because the party induced had never assented to it, and its inclusion in the written contract was the result of misrepresentation. It was the result of a misstatement of the intention of the party inducing, and such a misstatement is one of fact and an action of deceit may be founded on it: *Edgington* v. *Fitzmaurice*[1].

In the present case there was no inducement of one party by the other; no want of assent at any time on the part of the plaintiff to the execution of a deed of sale and no misstatement of his intention by the first defendant which led the plaintiff to sign the deed of sale. According to the finding of the District Judge, and indeed according to the plaintiff's own pleadings, both parties from the beginning arranged the terms by mutual agreement; there was no misleading of the one by the other; and the intention to treat the deed as a mortgage rather than sale was not due to any misstatement by the first defendant. Such a case is governed by the decision of the Privy Council in *Balkishen Das* v. *Legge*[2].

For these reasons the decree of the District Court must be reversed and that of the Subordinate Judge restored with costs throughout on the respondent (plaintiff).

HEATON, J.:—It is now well understood that a contemporaneous oral agreement to vary the terms of a deed should not be allowed to be proved, for the purpose of varying or adding to the terms of a deed; that is, where, as in this case, section 10A of the Dekkhan Agriculturists' Relief Act does not apply. In this case, however, the only circumstance established by way of invalidating the deed, is proof of such an oral agreement. I cannot find from the judgments of the lower Courts that anything else is established. It is not found explicitly, or even, so far as I can see, impliedly, that the sale-deed did not represent the real agreement between the parties. If that had been found then the deed would have been invalidated: see *Navalbai* v. *Sivubai*[3]. What is found is that there was a sale-deed which both parties understood and considered to be a contract between them and

(1) (1885) 29 Ch. D. 459. (2) (1899) L. R. 27 I. A. 58.
(3) (1906) 8 Bom. L. R. 761.

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that by an oral agreement a subsequent reconveyance was provided for. The District Judge proceeded quite correctly in his order framing issues for trial, and had in mind what it is essential to remember in cases of this kind, *viz.*, that a sale-deed cannot be construed as or converted into a mortgage-deed (that is where section 10A of the Dekkhan Agriculturists' Relief Act does not apply) but that the person who executed the sale-deed may show, if he can, that the sale-deed did not represent the real agreement between the parties; or for some other reason is of no effect. This the plaintiff was allowed an opportunity of doing, but as indicated above it has not been found that he succeeded in doing it. Therefore, I agree that the decree of the first Court must be restored.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandāvarkar and Mr. Justice Heaton.

1909. *August* 24.

DAMODAR NANDRAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* MANUBAI, HUSBAND GOVINDRAO PATIL (ORIGINAL PLAINTIFF), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), *see.* 2† *—Agriculturist—Definition—Interpretation.*

Section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) gives two definitions of the term "agriculturist", one in clause 1 and the other in clause 2.

* Second Appeal No. 692 of 1907.

† The Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2—

1st.—"Agriculturist" shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend or who ordinarily engages personally in agricultural labour within those limits.

* * * * * * * *

2nd.—In Chapters II, III, IV and VI, and in section 69, the term "agriculturist" where used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law.