

into an offence against Indian Penal Code charged against the person arrested when brought before the Court; nor does it appear from the report that the question was argued. That has therefore no bearing upon the question now under consideration.

For the above reasons we hold that both under section 188 of the Criminal Procedure Code as regards offences committed in London and apart from that section as regards offences committed in British India neither the jurisdiction of the Magistrate to inquire into the case, nor the jurisdiction of this Court to try it, can be affected by any illegality in connection with the rearrest of Vinayak which may have occurred at Marseilles.

K. M. K.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

SOMANA BASAPPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* GADIGEYA
KORNAYA (ORIGINAL DEFENDANT), RESPONDENT.*

Evidence Act (of 1872), section 92, proviso I—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 10A⁽¹⁾—Redemption suit—Sale in reality a mortgage—Evidence of oral agreement varying the written document.

The plaintiff brought a redemption suit under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) alleging that the deed which he had

* First Appeal No. 215 of 1909.

(1) Section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879)—

10A. Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this chapter, the Court shall, notwithstanding anything contained in section 92 of the Indian Evidence Act, 1872, or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction and decide such suit or proceeding in accordance with such determination and shall be at liberty, notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or statement with a view to such determination and decision:

Provided that such agriculturist or the person, if any, through whom he claims was an agriculturist at the time of such transaction:

Provided further that nothing in this section shall be deemed to apply to any suit to which a *bond fide* transferee for value without notice of the real nature of such transaction or his representative is a party where such transferee or representative holds under a registered deed executed more than twelve years before the institution of such suit.

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executed to the defendant, though on its face a deed of sale, was in reality only a deed of mortgage, the defendant having promised at the time of the execution of the deed that he would allow redemption on payment of the money advanced. The defendant replied that the transaction was sale.

The First Class Subordinate Judge of the Dharwar District to which section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not extended found on the evidence, that the deed passed by the plaintiff was not proved to be really a mortgage and dismissed the suit.

The plaintiff appealed urging that the proper issue in the case was as to whether the sale-deed was not obtained or induced by the defendant by means of fraud or misrepresentation within the meaning of proviso I of section 92 of the Evidence Act (I of 1872) and prayed for a remand.

Held, confirming the decree, that the plaintiff sought to make a new case in appeal in so far as he endeavoured to base his case, not upon a separate oral agreement, but upon some fraud which would invite the application of proviso I of section 92 of the Evidence Act (I of 1872).

Held, further, that in the districts to which section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not extended, it was not open to the Court to enter upon a defence which consisted of an allegation of an oral agreement varying the written contract.

Dagdu v. Nana⁽¹⁾ and *Sangira Malappa v. Ramappa*⁽²⁾, followed.

Balkishen Das v. W. F. Legge⁽³⁾, referred to.

FIRST Appeal from the decision of R. G. Bhadbhade, First Class Subordinate Judge of Dharwar, dismissing Original Suit No. 383 of 1908.

The plaintiff sued to redeem the lands in suit under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) alleging that he passed the deed in the form of sale on the promise of the defendant that he would treat the transaction as mortgage.

The defendant answered that the transaction was sale and not mortgage.

One of the issues raised by the Subordinate Judge on the pleadings of the parties was, "Is the sale-deed passed by the defendant proved to be really a mortgage redeemable on the terms stated in the plaint?" The Subordinate Judge after having reviewed all the evidence and the circumstances and

(1) (1910) 85 Bom. 93.

(2) (1909) 34 Bom. 59.

(3) (1899) 22 All. 148.

having regard to the fact that section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not made applicable to the Dharwar District, found the issue in the negative and dismissed the suit. In support of his decision the Subordinate Judge relied on *Balkishen Das v. W. F. Legge*⁽¹⁾ and *Dattoo v. Ramchandra*⁽²⁾.

The plaintiff appealed.

Branson with *Nilkant Atmaram* for the appellant (plaintiff):—The issue raised by the Subordinate Judge was not the proper issue in a case like the present. The case should be remanded after framing a proper issue. Our case is that the simultaneous promise on the part of the defendant to reconvey on repayment without any intention of fulfilling it was a misrepresentation and proviso I of section 92 of the Evidence Act becomes applicable. In the absence of such promise the plaintiff would not have executed the document. We rely on *Abaji v. Laxman*⁽³⁾. The question of fraud should have been considered.

Coyaji with *G. S. Mulgavkar* for the respondent (defendant):—The frame of the issue in the lower Court was correct. Fraud was not alleged either in the plaint or in the plaintiff's deposition. The Subordinate Judge was at first under the impression that section 10A of the Dekkhan Agriculturists' Relief Act was extended to the Dharwar District. He, therefore, recorded all the evidence which the parties had to adduce in the case. The plaintiff executed the deed fully knowing that the transaction was sale, therefore, no evidence can be admitted to prove that the transaction was of a different nature: *Sangira Malappa v. Ramappa*⁽⁴⁾, *Dagdu v. Nama*⁽⁵⁾.

BACHELOR, J. :—The plaintiff here sued to redeem certain lands under the provisions of the Dekkhan Agriculturists' Relief Act, alleging that a deed (exhibit 16) which he had executed to the defendant, and which is on its face a deed of sale, was in reality only a deed of mortgage, the defendant having promised at the time of the execution of the deed that he would allow the lands

(1) (1899) 22 All. 149.

(3) (1906) 30 Bom. 426.

(2) (1905) 30 Bom. 119.

(4) (1909) 34 Bom. 59.

(5) (1910) 35 Bom. 93.

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concerned to be redeemed on payment of the money advanced. The defendant *inter alia* replied that exhibit 16 was in fact, what it is in appearance, a deed of sale.

The learned Judge of the Court below framed upon this point the second issue, which is in these terms : " Is the sale-deed passed to defendant proved to be really a mortgage, redeemable on the terms stated in the plaint ? " On that issue the Judge went into all the evidence tendered, and found the issue in the negative.

It is now urged for the appellant, who was the plaintiff in the Court below, that the frame of this issue is incorrect ; and that we should remand the case for a decision upon a reformed issue as to whether exhibit 16 was obtained or induced by the defendant by means of fraud or misrepresentation, within the meaning of proviso I of section 92 of the Indian Evidence Act.

The only question before us is whether the suit should be remanded for retrial upon the suggested issue or not. We are of opinion that it should not be remanded. As we have said, the learned First Class Subordinate Judge went into all the evidence which was tendered before him on the case which the plaintiff then set up. That case, as the judgment shows, was based upon the applicability of section 10A of the Dekkhan Agriculturists' Relief Act, a section which has been subsequently added to that statute, with a view of getting rid of the difficulty created by section 92 of the Evidence Act. It was afterwards discovered, during the hearing, that section 10A of the Dekkhan Agriculturists' Relief Act had not been extended to the district from which the suit came. That, however, was the plaintiff's case, as it was made before the trying Court, and it seems to us that the plaintiff is now seeking to make a new case in so far as he endeavours to base his case, not upon a separate oral agreement, but upon some fraud, which would invite the application of proviso I to section 92 of the Evidence Act.

The material portion of the plaint upon this point is para. 2 which is in these terms :

" Plaintiff having hypothecated in writing the said lands as mentioned above to the defendant, about the 17th day of April 1905 A. D., asked the defendant to take in writing a possessory

mortgage of the said lands and on the security of the said lands to advance more money to him as the plaintiff was dunned for payment by creditors to whom sundry debts were due. The said defendant replied that he would advance more money if a sale-deed were given, in writing and that he would surrender the lands when the principal is paid by making an account on the basis that the sale-deed was a possessory mortgage-deed. Accordingly having made an oral agreement that the lands should be surrendered when the principal and interest were paid on making an account, defendant made as he liked an account of the principal and interest in respect of the dealings, and the defendant told me that he would advance to me a further loan of Rs. 1,100 and took from me a registered deed of sale intended to be treated as a deed of mortgage for the total amount of Rs. 6,500."

That is how the plaintiff put his case in the plaint. In his deposition, which is exhibit 14, he puts it in the same way by saying "defendant promised to allow redemption in the presence of the writer and the witnesses to the deed." The plaintiff's case then was that he signed the deed (exhibit 16) knowing it to be a deed of sale, but that there was at the same time an "oral agreement" made by the defendant that the defendant would treat it as a mortgage and he (the plaintiff) relied upon that "oral agreement." There was no allegation of any fraud or other circumstance which would invalidate the agreement.

It seems to us that upon these facts the case falls within the prohibition enacted by section 92 of the Evidence Act, which in such a case forbids the reception of evidence of any oral agreement or statement for the purpose of contradicting, varying, adding to, or subtracting from the written terms of the contract.

It may be that upon this point the earlier cases are somewhat difficult to reconcile, but the law has recently been discussed by this Bench in two decisions where previous rulings are examined. These two cases are: *Dagdu v. Nama*⁽¹⁾ and *Sangira Molappa v. Ramappa*⁽²⁾. We follow these decisions which in our view correctly interpret section 92 of the Evidence Act, as expounded by the Judicial Committee in the case of *Balkishen Das v. W. F. Legge*⁽³⁾.

(1) (1910) 35 Bom. 93.

(2) (1909) 34 Bom. 59.

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It seems to us that under the law, as it stands in such cases as this, it is not open to the Court to enter upon a defence which, in substance, consists of an allegation of an oral agreement varying the written document, and if it is the desire of the Legislature that such defences which are of a very common occurrence in these cases, should be investigated and decided by the Courts, then the only course to secure that end is to extend section 10A of the Dekkhan Agriculturists' Relief Act to the districts where it is desired that the Court's powers in this respect should be enlarged.

For these reasons we affirm the decree under appeal and dismiss the appeal with costs.

Decree confirmed.

G. B. R.

CRIMINAL APPELLATE.

Before Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR v. KALEKHAN SARDARKHAN.*

Bombay District Municipal Act (Bombay Act III of 1901), section 96†—Municipality—Permission of the Municipality—Building a wall which had fallen down—Absence of permission—Material reconstruction—Erecting a building.

1910.
November 17.

The accused applied to the Municipality on the 19th April 1910 for leave to reconstruct a wall of his house which had fallen down. Under sub-section 4.

* Criminal Appeal No. 391 of 1910.

† The material portion of section 96 runs as follows :—

96. (1) Before beginning to erect any building, or to alter externally or add to any existing building, or to reconstruct any projecting portion of a building in respect of which the Municipality is empowered by section 92 to enforce a removal or set-back, the person intending so to build, alter, or add shall give to the Municipality notice thereof in writing

(5) Whoever begins or makes any building or alteration or addition without giving the notice required by sub-section (1), or without furnishing the documents or affording the information above prescribed, or except as provided in sub-section (4), without awaiting, or in any manner contrary to, such legal orders of the Municipality as may be issued under this section, or in any other respect contrary to the provisions of this Act or of any by-law in force thereunder, shall be punished with fine which may extend to one thousand rupees.