APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Marten.

1918. *January* 21.

GANU WALAD RAMJI PATIL (ORIGINAL PLAINTIFF), APPELLANT *v.* BHAU WALAD BAPUJI PATIL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Evidence Act (I of 1872), section 92—Written document—Oral evidence to vary its terms—Plea of fraud—Section applies only to parties or their representatives.

In 1892, certain property was purported to be sold to S by its owners, the plaintiff and his cousin. In 1898, S sold a moiety of the property to defendant No. 1, who was plaintiff's sister's son; and he sold the other moiety to the same person in 1904. The plaintiff sued in 1913 for a declaration that the transaction of 1892 was a mortgage. The trial Court came to the conclusion that the original transaction with S was a mortgage, and that in 1898 and 1904 the property was conveyed by S to defendant No. 1 with full knowledge of the fact that S was only a mortgagee and with the understanding that defendant No. 1 was to hold the property subject to the liability to reconvey the same to the plaintiff and his cousin on payment. The trial Court held the plaintiff entitled to redeem a moiety of the property. On appeal, the lower appellate Court came to the same conclusion on facts; but dismissed the plaintiff's claim on the ground that the evidence to show that the conveyance of 1898 was a mortgage was inadmissible. The plaintiff having appealed,

Held, that so far as the transactions of 1898 and 1904 were concerned, section 92 of the Indian Evidence Act (I of 1872) had no application, for the plaintiff was not a party to either of them.

Held, by Shah, J., that as regards the transaction of 1892, the oral evidence was admissible under proviso 1 to section 92, the plaintiff's allegation in substance being one of fraud, namely, that though defendant No. 1 entered into these transactions with the full knowledge of the fact that S was really a mortgagee and not the owner of the property, he later turned round and said that he had no such knowledge.

Held, by Marten, J., that assuming the transaction of 1892 must be taken to be a sale, there was nothing in section 92 to prevent oral evidence of a subsequent agreement in 1898, to treat the 1892 deed as a mortgage and to enter into the 1898 deed as a transfer of that mortgage.

Held, therefore, that the plaintiff was entitled to recover the property comprised in the 1898 transaction on payment of the moneys then paid by defendant to S and subsequent interest.

* Second Appeal No. 404 of 1916.

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SECOND appeal from the decision of K. H. Kirkire, First Class Subordinate Judge, A.P., at Nasik, reversing the decree passed by D. M. Mehta, Joint Subordinate Judge at Nasik.

Suit for declaration.

The plaintiff and his cousin Bala owned certain property. They purported to sell the same to one Shankar in 1892 by a deed Exhibit 21. Shankar sold in 1898 a moiety of the property to defendant No. 1, who was the plaintiff's sister's son, for Rs. 100 by a deed Exhibit 44. In 1904, Shankar sold the remaining moiety to the same person for Rs. 161 by a deed Exhibit 45. The plaintiff remained for long in possession of the property; but later defendant No. 1 went into possession. The present suit was filed in 1913, for a declaration that the property was of the ownership and in possession of the plaintiff.

The trial Court held that as regards Bala's moiety, the plaintiff was not entitled to any relief as he was not Bala's heir. As regards the other moiety, it was of opinion that the deed of 1892 was a sale with a condition to repurchase; that this was known to defendant No. 1 when he took the sale deeds in 1898 and 1904. The plaintiff was accordingly held entitled to a moiety on payment of Rs. 130-8-0.

On appeal, the lower appellate Court was of opinion that the three transactions were in the nature of sales with an agreement to reconvey; but it held that section 10A of the Dekkhan Agriculturists' Relief Act, 1879, did not apply, and therefore the real nature of the transaction could not be shown. The suit was dismissed.

The plaintiff appealed to the High Court.

K. H. Kelkar, for the appellant:—It is open to us to prove the real nature of the transactions. Section 92 of the Indian Evidence Act does not render such evidence

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inadmissible. The appellate Court considers the evidence and comes to the conclusion that these transactions though ostensibly sales are really mortgages but adds that such evidence is inadmissible.

[SHAH J. referred to *Maung Kyin* v. *Ma Shwe La*[1].]

It entirely supports me. The facts here are exactly similar. The parties to the second transaction were Shankar and Bhau and they knowingly dealt with third person's property. Evidence of acts and conduct is also admissible to prove the real nature of the transaction.

D. C. Virkar, for respondents Nos. 1–7 :—The lower appellate Court has made out a new case in appeal. Shankar's contention in the trial Court was that he redeemed the mortgage but the reconveyance was taken in the name of Bhau as he (the plaintiff) was a simpleton, i.e., the reconveyance was a *benami* transaction and Bhau now fraudulently asserts ownership over the property. Both the Courts held that Shankar's debt was paid off by Bhau and it was not a *benami* transaction. The appellate Court further states that it is not precluded from finding what the real state of things must have been and concludes that the transactions are in the "*nature of sales with agreement to reconvey.*"

Fraud is neither alleged nor proved. There was no issue in the trial Court. Further, fraud must be antecedent to the execution of the documents and not subsequent so as to invite the application of section 92: see *Dattoo* v. *Ramchandra*[2] ; *Dagdu valad Sadu* v. *Nana valad Salu*[3] and *Maung Kyin* v. *Ma Shwe La*[4]. Particulars of fraud have not been given by the plaintiff as required by Order VI, Rule 4. The conveyance to Bhau is attested by the plaintiff. The Courts hold that

(1) (1917) L. R. 44 I. A. 236.
(2) (1905) 30 Bom. 119.
(3) (1910) 35 Bom. 93.
(4) (1911) L. R. 38 I. A. 146.

consideration was paid by Bhau who thus became a grantee under a deed of absolute conveyance: see *Maung Kyin* v. *Ma Shwe La*[1]. According to plaintiff's version Bhau was a mere *benamidar* and, therefore, the grantee under the conveyance would be the plaintiff himself, i.e., a party to the deed. There is not third party here as in *Maung Kyin* v. *Ma Shwe La*[1].

No evidence of acts and conduct is admissible: see *Balkishen Das* v. *Legge*[2] and *Dattoo* v. *Ramchandra*[3].

Kelkar was not called upon to reply.

SHAH, J:—The facts which have given rise to this appeal are briefly these.

Bala and Ganu, who were originally natural brothers, and became first cousins in consequence of Ganu's adoption by their uncle, and each of whom was entitled to a moiety of certain property purported to sell the property to one Shankar in 1892. On the 18th of August 1898, Shankar purported to convey some of these lands for Rs. 100 to Bhau Patil who is defendant No. 1. On the 17th September 1904, Shankar conveyed certain other properties for Rs. 161 to defendant No. 1. The properties conveyed in 1898 have been described before us as roughly representing the moiety owned by Ganu and the properties conveyed in 1904 by Shankar as representing the moiety owned by Bala.

The present suit was brought by Ganu to have it declared that the plaint properties, that is, the properties first conveyed, or mortgaged by Bala and Ganu to Shankar belonged to and were in possession of the plaintiff. The defendants, Bhau Patil and his two brothers, are the sons of the plaintiff's sister. They pleaded that the properties were conveyed absolutely to

(1) (1917) L. R. 44 I. A. 236. (2) (1899) L. R. 27 I. A. 58,

(3) (1905) 30 Bom. 119.

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Shankar in 1892 and subsequently by Shankar to Bhau in 1898 and 1904 as stated above. The plaintiff's case in substance was that the first conveyance in favour of Shankar was really a mortgage, and that the subsequent conveyances in favour of Bhau by Shankar were the result of an arrangement between Bhau, Shankar, Ganu and Bala to the effect that Shankar was to be paid the dues under the mortgage of 1892, and that the defendant Bhau was to have the properties conveyed to him on the understanding that they would be reconveyed to Ganu and Bala, when the latter would pay the sums paid by Bhau to Shankar in 1898 and 1904.

The trial Court came to the conclusion that the original transaction with Shankar was a mortgage, and that in 1898 and 1904 the properties were conveyed by Shankar on his being paid Rs. 100 and Rs. 161 by Bhau with the full knowledge of the fact that Shankar was only a mortgagee and not the owner thereof and with the understanding that Bhau was to hold the properties subject to the liability to reconvey the same to Ganu and Bala on their paying him the sums paid by him to Shankar. The trial Court passed a decree in favour of the plaintiff on the basis of his being entitled to a moiety of the properties, conveyed in 1892 to Shankar and of his being liable to pay Rs. 130-8-0 with interest to the defendants.

The lower appellate Court came to the same conclusion on facts; but dismissed the plaintiff's claim on the ground that the evidence to show that the conveyance of 1898 in favour of Bhau (Exhibit 44) was a mortgage was inadmissible and that the plaintiff was not entitled to any relief with reference to the properties conveyed in 1904 to Bhau and referred to in Exhibit 45, as the plaintiff was not the heir of the deceased Bala. The lower appellate Court was of opinion that section 10A

of the Dekkhan Agriculturists' Relief Act did not apply to Exhibit 44, and was applicable to Exhibit 45.

The plaintiff has appealed to this Court, and it is conceded by Mr. Kelkar for the plaintiff that section 10A of the Dekkhan Agriculturists' Relief Act has no application to either of these transactions (Exhibits 44 and 45). It clearly does not apply to Exhibit 44, and I express no opinion as to its applicability to the transaction evidenced by Exhibit 45. It is not necessary for the purpose of this case to do so.

It is urged, however, on behalf of the plaintiff that apart from section 10A of the Dekkhan Agriculturists' Relief Act it is open to him to prove the real nature of these transactions that section 92 of the Indian Evidence Act does not render such evidence inadmissible, and that he is entitled to the properties mentioned in Exhibit 44 on his paying the proper amount to the defendants. It is urged by way of reply that in view of section 92 of the Indian Evidence Act it is not open to the plaintiff either to establish that the transaction of 1892 in favour of Shankar was a mortgage or that either of the transactions between Shankar and Bhau was a mortgage.

As regards the two later transactions, that is, the transactions between Shankar and Bhau, it is enough to say that section 92 has no application as the present plaintiff was not a party to either of these two documents. Section 92 applies only to the parties to these documents or their representatives in interest.

As regards the earlier transaction in favour of Shankar, it seems to me that under proviso (1) to section 92, it is open to the plaintiff to adduce evidence to prove any fact which would entitle him to a decree or order relating thereto such as fraud. His allegation in substance is one of fraud, namely, that though Bhau

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entered into these transactions with the full knowledge of the fact that Shankar was really a mortgagee and not the owner of the property, he now turns round and says that he had no such knowledge. Further, though in fact the transactions between him and Shankar were really in the nature of mortgages entered into with the consent and practically at the instance of the present plaintiff and his brother Bala, he fraudulently maintains that the conveyances are really sales as they in form are. The claim of Shankar under the deed of 1892 has been satisfied long ago. Whatever difficulty or doubt there may be as to the admissibility of the oral evidence to prove the real nature of the transaction between Shankar and Bala and Ganu, I think that it is removed by the recent judgment of their Lordships of the Privy Council in *Maung Kyin* v. *Ma Shwe La*[a]. Having regard to the facts and the decision in that case, I do not see how it can be contended in the present case that as between the plaintiff and the defendants, section 92 of the Indian Evidence Act is a bar to the admissibility of oral evidence to show that the transaction between the plaintiff and his brother on the one hand and Shankar on the other was a mortgage and not an out-and-out sale, and to show further that the transactions between Shankar and Bhau were really mortgages and not sales.

The further contention of the defendant No. 1 that there is no case of fraud set up in the plaint, and that it is not open to the plaintiff to make out a case of fraud contrary to his pleadings must be disallowed. As I read the pleadings, I think that the case, which he has succeeded in establishing to the satisfaction of the lower Courts, is consistent with, and sufficiently set forth in, the pleadings. The lower appellate Court has appreciated the evidence which I hold to be admissible and

[a] (1917) L. R. 44 I. A. 236.

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has recorded its findings. On those findings the defendants are entitled to the sums which they advanced at the time of obtaining the conveyances from Shankar and they are bound to convey the properties either to Ganu or to Bala on the sums being paid to them. Bala, however, is dead and his heirs are not parties to the present suit. It is found by the lower Courts and not disputed now that the present plaintiff is not the heir of Bala. Besides as between Bala and the present defendant No. 1 there was suit No. 302 of 1905 in which the present defendant No. 1 obtained a decree in respect of the properties which are mentioned in Exhibit 45. It is unnecessary for the purpose of this case to say anything as to the rights between the present defendants and Bala's heirs in respect of the properties mentioned in Exhibit 45. I express no opinion as to the effect of the decree in the suit of 1905 upon such rights. We are concerned with the adjudication of the rights of the present plaintiff and the defendants. Mr. Kelkar has confined his claim in the argument before us to the properties mentioned in Exhibit 44. In view of the facts which I have already stated, it seems to me that the proper decree under the circumstances would be to allow the present plaintiff possession of the properties mentioned in Exhibit 44 on his paying Rs. 200 to the defendants. I do not think that the defendants are entitled to interest exceeding the sum of Rs. 100 according to the rule of Damdupat. This is practically admitted by the pleaders before us. There will be no further order as to interest in view of the fact that the defendants have dispossessed the plaintiff in virtue of a decree of the Mamlatdar's Court.

I would, therefore, set aside the decree of the lower appellate Court, and allow the plaintiff's claim for possession of the properties mentioned in Exhibit 44 on

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his paying Rs. 200 to the defendants. Each party should bear his own costs in the trial Court and the plaintiff should have his costs in this Court and in the lower appellate Court from the defendants.

MARTEN, J. :—As we are differing from the Judge of the lower appellate Court, I wish to add this. At page 3 he held on the facts as follows :—" I hold that at the execution of Exhibits 44 and 45[1], there *was* an oral agreement with defendant No. 1 whereunder the lands were not sold to the latter out-and-out; but they were agreed to be reconveyed to plaintiff and Bala or his heirs. I find that Exhibits 44 and 45 were in the nature of ostensible sales or mortgages by conditional sale ". Then the Judge of first instance on page 9 finds as follows :—" The plaintiff does not appear to be a man of average intelligence ". Then lower down he says : "The evidence on the record goes to show that defendant No. 1, the astute nephew, seems to have taken advantage of the simple plaintiff and his wife who also being perhaps indebted at the time consented to the arrangement. Everything seems to have gone on smoothly until defendants' mother, i.e., plaintiffs' sister, who formed a connecting link between the parties, died. On her death the idea seems to have caught hold of defendant's mind to set themselves up as owners absolute ".

I think it is clear from the judgment of the lower appellate Court that the learned Judge would have found in favour of the plaintiff if he had not thought himself precluded from so doing by the authorities on the effect of section 92 of the Indian Evidence Act. At any rate it is clear on the dates that the recent decision of the Privy Council which my brother Shah referred the parties to, namely, *Maung Kyin* v. *Ma Shwe La* [2].

[1] The conveyances of 1898 and 1904 to defendant No. 1.

[2] (1917) L. R. 44 I. A. 236.

could not have been cited to the learned Judge. The effect of that decision is stated on p. 244 where Lord Shaw says: "The language of the section (viz., section 92) in terms applies, and applies alone, 'as between the parties to any such instrument or their representatives in interest'. Wherever, accordingly, evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case, accordingly, the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions".

Now it is clear that here as far as Exhibit 44 is concerned or for the matter of fact Exhibit 45, the plaintiff was not a party to it. He did not execute that deed nor I think can it be said that he was a representative in interest of the party who did execute it, namely, the original mortgagee, Shankar. That being so, the case would seem to fall within the principles laid down by their Lordships of the Privy Council, and accordingly section 92 would not prevent the real facts being known in this case as found by both the lower Courts.

Then one of the arguments of the respondent was that you cannot do this because at any rate as regards Exhibit 21 [1] the plaintiff was a party to that deed, and therefore you cannot show that Exhibit 21 was a mortgage and consequently you cannot go into the subsequent transactions, Exhibits 44 and 45. That seems to me to be a fallacy. Even assuming for the sake of argument that Exhibit 21 must be taken to be a sale-deed I see nothing to prevent evidence being given as to an agreement entered into some six years later to treat Exhibit 21 thenceforth as a mortgage and to enter into Exhibit 44 as a transfer of that mortgage. Accordingly I

[1] The conveyance of 1892 to Shankar.

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think that as regards Exhibit 44 the judgment of the lower appellate Court must be reversed.

Now Mr. Kelkar for the appellant is content to confine his claim to the property in Exhibit 44 and not to go into Exhibit 45.* The lower appellate Court finds on page 2 that at some time prior to Exhibit 45 there must have been a separation between the brothers. It also appears to be clear that Bala's heir is his widow and not the plaintiff. I think, therefore, our decision must be confined to the lands in Exhibit 44, i.e., the property mortgaged by Exhibit 44, but it should be without prejudice to any question arising or that may arise under Exhibit 45.

As regards the principal sum due under the mortgage, I think the decree in effect though not in form should be for redemption of the mortgaged property on payment of the principal sum paid on the execution of Exhibit 44, viz., Rs. 100, with interest not exceeding the sum of Rs. 100.

I accordingly agree with the order which my brother Shah proposes to make including his order as to costs.

Decree set aside.

R. R.

APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Acting Chief Justice, and Mr. Justice Shah.

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DHONDIRAM CHATRABHUJ MARWADI (ORIGINAL PLAINTIFF), APPELLANT *v.* SADASUK SAVATRAM MARWADI (ORIGINAL DEFENDANT), RESPONDENT.*

Promissory note—Promissory note executed in Hyderabad State but stamped with British India Stamp—Hyderabad State Stamp Act, section 35—Suit on the promissory note in British Indian Court—Maintainability of suit in British India—Lex Fori—Lex Loci Contractus.

* Second Appeal No. 696 of 1916.