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the Railway company were well within their powers in closing the level-crossing at the point A, and they had fulfilled all the requirements which the law imposed on them by providing another level-crossing at point D. The appeal, therefore, is dismissed with costs.

CRUMP, J.:—I concur.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

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GANPATRAO APPAJI JAGTAP (ORIGINAL PLAINTIFF), APPELLANT *v.* BAPU BIN TUKARAM AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 AND 2), RESPONDENTS*.

Indian Evidence Act (I of 1872), section 92, proviso 6—Sale-deed—Old document—Intention of parties—Extrinsic evidence, admissibility of—Such evidence can only be allowed if the terms of the document require explanation.

In 1865, a possessory mortgage deed was passed in favour of the father of defendant No. 1. In 1867, the mortgagors sold by a document purporting to be a sale-deed the equity of redemption to the plaintiff's assignor. The plaintiff having sued for redemption of the mortgage of 1865, an issue was raised whether the transaction of 1867 was a mortgage or sale. Both the lower Courts were of opinion that on the wording of the document itself viewed in the light of certain surrounding circumstances as to the value of the property, inadequacy of consideration, &c., under proviso (6) of section 92 of the Evidence Act, 1872, the parties intended that the transaction was a mortgage. On appeal to the High Court,

Held, that the document of 1867 was termed a sale-deed and on the face of it it was anything except a sale-deed and the Courts should not have taken into consideration extrinsic evidence in construing the document.

On general principles it would be extremely undesirable, after the document had stood more than fifty years to allow evidence to be led to show that the document is not what appears on the face of it.

* Second Appeal No. 711 of 1918.

Where the document itself is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required, and it will therefore be admitted. But it can only be in cases where the terms of the documents themselves require explanation, that extrinsic evidence can be led within the restrictions laid down by provisio (6) of section 92, Evidence Act, 1872.

Dattoo v. *Ramchandra*[1], relied on.

Jhanda Singh v. *Wahid-ud-din*[2]; *Maung Kyin* v. *Ma Shwe La*[3]; *Balkishen Das* v. *W. F. Legge*[4], referred to.

SECOND appeal against the decision of C. N. Mehta, Joint Judge at Poona, reversing the decree passed by D. L. Mehta, Second Class Subordinate Judge at Baramati.

Suit for redemption.

The land in suit, a two-third portion of Survey No. 120, belonged to three brothers, Balvantrao, Namdeo, and Tatya.

On the 8th August 1865, the three brothers mortgaged the land in favour of defendant No. 1's father Balushet, by a possessory mortgage deed for Rs. 700.

In 1867 the three mortgagors sold their interest in the land to one Ramji for Rs. 200. The plaintiff became the assignee of the equity of redemption from Ramji's heirs.

In 1871, one Ganu obtained a decree against the mortgagor Balvantrao and in execution of the said decree, Balvantrao's right in the equity of redemption was put up for sale and bought by defendant No. 1.

In 1879, the two brothers Tatya and Namdeo sold their rights in the equity of redemption to two persons

(1) (1905) 30 Bom. 119.
(2) (1916) 38 All. 570.
(3) (1917) 45 Cal. 320.
(4) (1899) 22 All. 149.

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Savlya and Pandu, who in the same year brought a suit for redemption. Redemption was decreed but the land was not redeemed in time.

In 1905, the father of defendant No. 1 brought a suit against Namdeo and Tatya on a rent-note for possession of land and possession was given.

In 1912, the plaintiff sued for redemption of the mortgage of 1865.

Defendants contended that sale of 1867 in favour of Ramji was purely nominal; that they had become owners of the equity of redemption as Savlya's and Pandu's right to redeem was barred and they had become purchasers of Balvantrao's right in the equity of redemption in execution of the decree of 1871.

At the first trial, the Subordinate Judge held that the assignment in favour of the plaintiff was of a champertous character and decreed the plaintiff's suit for redemption on payment of Rs. 466-10-8. On appeal, the case was remanded to the trial Court on the following issue "was the sale to Ramji in 1867 really a mortgage". On this issue, the Subordinate Judge found that the intention of the parties was to create a mortgage and this finding was arrived at on a consideration of surrounding circumstances: (*a*) inadequacy of price, (*b*) creation of debt, (*c*) transfer of the whole estate to a close relative and on the recitals in the document, viz., the use of the terms Dhanko (creditor) and Rinko (debtor) and the endorsement of the Sub-Registrar on the deed that Balvantrao admitted having passed the deed as *Gahan* Kharedi (mortgage sale). It was, therefore, decreed that the plaintiff was to recover Rs. 133-5-4, i.e., two-thirds of the mortgage amount (Rs. 200) remaining unsatisfied, from the defendants as secured on Survey No. 120.

On appeal, the District Judge upheld the Subordinate Judge's finding as to the mortgage nature of the transaction but reversed the decree allowing Rs. 133-5-4, and dismissed the plaintiff's suit on the ground that the plaintiff did not sue for the sum and that his claim in respect of it was barred under Article 132, Limitation Act 1908.

The plaintiff appealed to the High Court.

G. S. Rao and *B. K. Mehendale*, for the appellant:—The document (Exhibit 71) is quite clear in showing that it is a sale out and out. The document being clear and plain in its terms, evidence of intention cannot be allowed under proviso 6 to section 92 of the Indian Evidence Act. We submit the case is governed by the decision in *Dattoo* v. *Ramchandra*[1]. The lower appellate Court was, therefore, wrong in holding that the evidence of the conduct of the parties and their successors was admissible to show that Exhibit 71 was a mortgage. The lower appellate Court also erred in law in viewing the document, Exhibit 71, in the light of the surrounding circumstances and in holding that it was a mortgage. The Privy Council case of *Jhanda Singh* v. *Wahid-ud-din*[2] does not help the respondents. Even in that case their Lordships base their decision upon the construction of the documents alone which were before them. The earlier Privy Council case of *Balkishen Das* v. *W F. Legge*[3] shows that when a document is perfectly clear and plain, extrinsic evidence is not admissible to show in what manner the language of the document is related to existing facts. We further submit that Exhibit 71 has stood for fifty years and that therefore it would be quite unjust at this distance of time to allow evidence to show that the document is not what it appears on the face of it:

(1) (1905) 30 Bom. 119. (2) (1916) 38 All. 570.

(3) (1899) 22 All. 149.

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Jhanda Singh v. *Wahid-ud-din*[1]. We also submit that defendants are estopped from contending that the document (Exhibit 71) does not embody a genuine transaction of sale.

Jinnah with *S. R. Bakhale*, for the respondent:—The construction put upon (Exhibit 71) by the lower appellate Court that it was a mortgage was correct in view of the subsequent conduct of the parties and the surrounding circumstances. The Privy Council decision in *Jhanda Singh* v. *Wahid-ud-din*[1] lays down the correct test which is that the intention of the parties to the deed must be gathered from the language of the document viewed in the light of the surrounding circumstances. Section 92, clause 6, of the Indian Evidence Act supports our contention. The case of *Dattoo* v. *Ramchandra*[2] is no longer good law in view of the recent Privy Council decision in *Jhanda Singh* v. *Wahid-ud-din*[1]. I also rely on *Maung Kyin* v. *Ma Shwe La*[3] and upon *Balkishen Das* v. *W. F. Legge*.[4] In the present case there are almost all the indicia of a mortgage. Defendant is not in any way estopped from challenging the *bona fides* of the transaction in question.

MACLEOD, C. J.:—The plaintiff brought this suit to redeem the plaint land which had been mortgaged to the father of the 1st defendant by three brothers Balvantrao, Namdeo and Tatya by a deed of mortgage for Rs. 700 on the 8th August 1865. One Ramji purported to buy the equity of redemption by a sale-deed in 1867, and the present plaintiff is an assignee from Ramji. After the three brothers had executed the deed in favour of Ramji in 1867, two of them Tatya and Namdeo purported to sell to two persons Savlya and Pandu their right in

(1) (1916) 38 All. 570.
(2) (1905) 30 Bom. 119.
(3) (1917) 45 Cal. 320.
(4) (1899) 22 All. 149.

the equity of redemption, and thereafter in execution of a decree against Balvantrao his right in the equity of redemption was put up for sale and bought by the 1st defendant. The 1st defendant also alleges that as Savlya and Pandu filed a redemption suit and after getting a decree for redemption failed to redeem the property, their right to redeem was barred, and therefore the 1st defendant became entitled absolutely to the mortgaged property.

The proceedings have gone through various phases in the lower Courts. In the trial Court the plaintiff was granted a redemption decree which appears at page 19.

On appeal the case was remanded to the trial Court for findings on the following issues:—Was the sale-deed to Ramji in 1867 really a mortgage; if it was a mortgage to what relief is the plaintiff entitled?

The case on remand came before another Subordinate Judge, and he after referring to the facts already recorded, came to the conclusion that what purported to be a sale to Ramji in 1867 was really a mortgage, and on that finding he held that the plaintiff was entitled to recover Rs. 133-5-4 as secured on Survey No. 120 out of the plaint land.

The case then came back to the lower appellate Court, again before another Judge, who dismissed the suit on the ground of limitation.

We are of opinion that both Courts have taken into consideration evidence which they ought not to have taken in construing the document of 1867, which is Exhibit 71 in the case. That is clearly a sale-deed looking at the language of the document. There can be no two words about that. It is difficult to see how any discussion could have arisen, and how any decision

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could have been arrived at, that the document on the face of it was anything else except a sale-deed, and as far as I can gather from the judgments, both Courts refer to it as a sale-deed. An attempt was made by the defendant to show that the transaction evidenced by that document was a sham transaction, but he failed entirely to prove that allegation. But the appellate Court has come to the conclusion that Exhibit 71 must be read as a mortgage. The learned Judge has rightly excluded the evidence of intention. But he has admitted exactly the same evidence that would have been admitted if evidence of intention had been allowed, under Proviso 6 to section 92 of the Indian Evidence Act, and he has come to the conclusion really that when the parties executed the sale-deed, they intended that it should be a mortgage transaction. The only circumstance upon which the defendants could possibly rely for their contention is the statement made by Balvantrao when acknowledging execution before the Registrar in which he referred to the document as a sale by way of a mortgage. I cannot see myself how a party who has put his signature to a document, which is clearly a sale-deed, can alter the nature of the document by writing on it when the document is registered that it means something else than it really appears to be. Then the learned Judge has considered various facts with regard to the value of the property and the inadequacy of consideration, all which may be evidence that the three brothers when they executed a sale-deed intended that it should be a mortgage.

We think the case clearly comes within the decision in *Dattoo* v. *Ramchandra*[1]. Sir Lawrence Jenkins, Chief Justice, said :—

"If we look to the deed alone, it is clear that the decree is correct, and that the plaintiff's father parted with his interest in the property. But it is

(1) (1905) 30 Bom. 119.

said that the circumstances to which we have alluded require that we should draw an inference that the document is not what it appears to be. We can only understand that as meaning that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from these several circumstances. But it has been pointed out by the Privy Council in *Balkishen Das* v. *W. F. Legge*[1] that in questions of this kind the Courts in India must be guided by section 92 of the Evidence Act."

The defendant has relied upon a dictum of the Privy Council in *Jhanda Singh* v. *Wahid-ud-din*[2] where their Lordships say :—

"It was not disputed that the test in such cases is the intention of the parties to the instruments. That intention, however, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances."

That is evidently a reference to Proviso 6 to section 92 of the Indian Evidence Act which states that "any fact may be proved which shows in what manner the language of a document is related to existing facts." That is one of the Provisos which is the despair of the Judge and the joy of the lawyers. It may be read in many ways. But it is not easy to see in what sort of a case this proviso would be directly applicable. If you have to look at surrounding circumstances in order to ascertain the intention of the parties, which has already been clearly expressed in the deed, it seems to me it would be very easy to go over the line and attempt to prove from the surrounding circumstances that the intention of the parties was not what it appears to be. A very general statement no doubt is made by the Proviso, and what their Lordships say in the passage I have just read is merely a repetition of the Proviso. But on reading the whole of the judgment in that case, it seems clear that they had not applied that Proviso to the facts of that case, as they

(1) (1899) 22 All. 149. (2) (1916) 38 All. 570 at p. 574.

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merely considered the two documents before them, and gave them the construction which they thought was the proper one from the consideration of what was written in the documents themselves.

We have also been referred to the decision in *Maung Kyin* v. *Ma Shwe La*[1]. But the facts of that case are entirely different because the interests of a third party were involved, and the head-note says :—

"The language of section 92 of the Evidence Act, 1872, with regard to a 'contract, grant or disposition reduced to writing', 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, therefore, the ordinary rules of equity and good conscience come into play unhampered by the Statutory restrictions... In this case both the grantor and grantee in transactions by deed regarding certain land were shown by the evidence to have dealt with it with the knowledge that it belonged to a third person who was not a 'party to the deeds or a representative in interest of a party' to them,...*Held*, that section 92 of the Evidence Act was no bar to the admission of evidence to show what was the true nature of the transactions : it did not prevent fraudulent dealing with a third person's property."

In *Balkisen Das* v. *W. F. Legge*[2], their Lordships said :—

"The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

That appears to me to show that where a document itself is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required, and it will therefore be admitted. But it can only be in such cases where the terms of the

(1) (1917) 45 Cal. 320. (2) (1899) 22 All. 149 at p. 159.

documents themselves require explanation, and then evidence can be led within the restrictions laid down by the Proviso.

Then I may refer to the case of *Jhanda Singh* v. *Wahid-ud-din*[1], where their Lordships, after dealing with the English cases on the subject, said :—

"There is one other remark of Lord Cranworth's in *Alderson* v. *White*[2], which is particularly applicable to the present case. He said :—'I think Court, after a lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be'".

So assuming in this case we are prepared to allow evidence to show that this document is not a sale-deed but something else, still on general principles it would certainly be extremely undesirable, after the document had stood more than fifty years, to allow evidence to be led to show that the document is not what appears on the face of it, unless it be demonstrated to our complete satisfaction that the Legislature entitled us to admit such evidence. The learned Appellate Judge seems to have been led away by the use of the words "creditor and debtor" in Exhibit 71 as showing that the position of the creditor and debtor continued after the document was executed. But from the contents of the document itself it appears that part of the consideration was the amount previously due, and that accounts for those words being used. In my opinion, therefore, the decree of the lower appellate Court must be set aside and the original order of the trial Court allowing the plaintiff to redeem on payment of Rs. 466-10-8 &c., must be restored. Up to 19th December 1913 the defendants are entitled to their costs After that the plaintiff is entitled to his costs.

Decree reversed.

(1) (1916) 38 All. 570 at p. 580. (2) (1858) 2 De. G. & J. 97 at p. 106