

(1932) 01 CAL CK 0016
In the Calcutta High Court

Irpan Ali Laskar

APPELLANT

Vs

Jogendra Chandra Das Patni and Others

RESPONDENT

Date of Decision : 14-01-1932

Acts Referred:

Evidence Act, 1872 — Section 91, 92

Citation : AIR 1932 Cal 708

Judgement

1. This is an appeal by defendant 1 from a decree passed by the Subordinate Judge at Silchar. The suit was instituted by the plaintiffs for recovery of the unpaid consideration for a Kobala after deducting certain payments which were admitted, The facts necessary to be stated are the following: One Kanak Ram Patni died leaving a widow Kunja Patni, two daughters of the name of Fula Patni and Neridi Patni and the two plaintiffs, his grandsons being the sons of a third daughter who had predeceased the said Kanak Ram Patni.

2. The plaintiffs' case was that the properties which belonged to Kanak Ram Patni devolved on his death in life interest to Kunja, that Kunja in 1914 sold her interest to Fula Patni and the plaintiffs. Fula having died without issue, the plaintiffs alleged and they had become the owners of the properties. Their case was that their father Nayan, defendant 6, had been appointed their guardian by the Court and that defendants 2, 3 and 4 had stood surety for the purpose of the said appointment. Their case further was that on 27th February 1922, defendant 6, as such guardian, sold to defendant 1 certain immovable properties and the right to realize the dues under five bonds, for a consideration of Rs. 7,000. Their case also was that this amount had not been paid by defendant 1, the vendee, but that the latter had made only certain payments aggregating Rs. 866-8-0. They sued to recover the balance. The defence of defendant 1 was that the allegation that Nandi was insane, on the basis of which allegation it was that the plaintiffs alleged that they had title to the properties under purchase from Kunja and on the death of Fula, was not true; and that therefore the sale which defendant 6 had made on the footing of the plaintiffs being the sole owners of the properties did not pass a good title to the vendee and consequently the

plaintiffs were not entitled to recover in this suit. The further defence taken on behalf of defendant 1 was that the consideration of Rs. 7,000 was made up of two items, viz., of Rupees 3,500 each, that Rs. 3,500 which was the consideration for the lands had been paid, and that as regards the balance of consideration Rs. 3,500 which was on account of the bonds it was not paid because there was a certain agreement between the parties.

3. This agreement was set out in the written statement in these words:

That the vendor was not in possession of the bonds but he handed over certified copies thereof and it was agreed between the parties that notices would be served on the debtors and in case the debtors admitted the debts and the amounts on those mortgage bonds were realized from the debtors amicably or by suit at the expense of defendant 1 then defendant 6 would get the said amount of Rs. 3,500.

4. The defence further was that such notices were given but that the debtors produced the original bonds and alleged that the dues under them had been paid up and the bonds had been redeemed, and because the lawyer's advice was that no useful purpose would be served by instituting suits upon those redeemed bonds and costs would be incurred for no purpose, defendant 1 did not institute any suit thereon and that consequently he was not liable to pay the said amount of Rs. 3,500. The Subordinate Judge decreed the suit for the full amount claimed holding that the defence set up was not true. Defendant 1 has then preferred this appeal. The first ground taken in support of the appeal is that no good title passed under the transaction because the representation that was made, namely, that Nandi was insane and of unsound mind, was not in fact true. So far as this matter is concerned, it appears that in the Kobala itself there is the statement that Nandi Patni was insane and of unsound mind. It further appears from the evidence of defendant 1 himself that the vendor, defendant 6, came with him to the house of the pleader and showed him all papers and that he was satisfied with the plaintiffs' title on inquiry but only found that defendant 6 was out of possession. Upon the evidence therefore of defendant 1 himself it would require a very strong case to be made out in order to show that he was in point of fact misled. He says that he made an inquiry and was satisfied and there is no reason to suppose that he relied only on what was alleged on behalf of defendant 6. In any case, the question in our opinion, requires no further consideration, because it is quite clear that defendant 1 cannot possibly be permitted to approbate and reprobate. He has not taken the defence that he is prepared to give up the properties which he had purchased and that on that ground he was not obliged to pay the consideration money for the Kobala if it remained unpaid. And indeed it is now beyond his own powers to restore the properties to defendant 6, or for the matter of that to the plaintiffs, because it appears that some of the lands and also the dues under the five bonds had already been transferred by him to a third party under a Kobala dated 27th August 1923. This third party is defendant 5 in the suit. This transfer appears to have been made for a consideration of Rs.

4,200. In these circumstances we are of opinion that defendant 1 is estopped from alleging that he was not obliged to pay the balance of the consideration money for the reason that no title had been acquired by him under the purchase.

5. The second ground taken relates to the question of payment of the consideration of Rs. 3,500 on account of the lands, which, it is alleged on behalf of the defence, was paid when the Kobala was executed. In para. 20 of the written statement of defendant 1 it is stated generally that defendant 6 executed and registered in favour of defendant 1 the Kobala for the sale of the lands and the mortgage bonds on 27th February 1922 and received in cash Rs. 3,500 as the price of the lands sold. From this statement it would seem to appear that defendant 1's case at the time was that the sum of Rs. 3,500 was paid on 27th February 1922. This however is not clear beyond doubt but that seems to be the meaning of the statement that was thus made in the written statement, In the evidence a more definite case appears to have been attempted to be made out. The Kobala, it may be mentioned here, was executed at Silchar on 27th February 1922 and it was registered at the Sub-Registry Office at Hailakandi on 8th April 1922. A good long period therefore intervened between the execution and the registration of the Kobala and the places of these transactions were not the same. Irpan Ali, defendant 1, in his evidence said that he paid Rs. 8,500 to defendant (6 at the verandah of the Sub-Registry Office at Hailakandi on the date of registration. An attesting witness to the Kobala, one Sajid Raja, examined on behalf of the defendant as D. W. 4, in examination-in-chief said:

Irpan Ali, that is to say, defendant 1 paid Rs. 3,500 to Nayan Patni (defendant 6) in the verandah, but on a chawki in the west part of the north verandah of the Registration Office.

6. As already stated he was an attesting witness to the Kobala, which was executed not at Hailakandi but at Silchar. In cross-examination he stated that he was not present when the Kobala was written. Therefore he wanted to make out that although he was not present at the time of the execution of the Kobala he came to be an attesting witness at Hailakandi and put down his signature at the Registry Office there. Witness 5 for the defendant, one Indin Mia, in his examination-in-chief said that Irpan paid Rupees 3,500 to Nayan as consideration for a Kobala which was registered on the same day, and in cross-examination said that Shajid attested at Hailakandi. He therefore wanted to corroborate Shajid by saying that Shajid attested the Kobala at Hailakandi and the consideration of Rs. 3,500 was paid on the date it was registered. The explanation why he did not become an attesting witness to the Kobala was given by him in these words:

I did not attest as there was no space in the Kobala which was already written out, executed and attested by some witnesses.

The Subordinate Judge has pointed out that this explanation is not true because there was enough space for a signature of an attesting witness to have been

made before the document was registered. Another attesting witness, Israil Ali, was examined as witness 6 for the defendant. He said that he was present at Silchar at the time when the document was executed, that he became an attesting witness and that it was arranged that Rs. 3,500 would be paid at Hailakandi before registration. In cross-examination he said that all the four attesting witnesses including Shajid Raja signed their names in the office room of Abanti Babu, that is to say, at Silchar. He therefore gives the lie to the case which Shajid Raja made and which was supported by Indin. The pleader Abanti Babu has not been examined in the case. This is all the evidence on which the appellant relies and on which we are asked to hold that Rs. 3,500 was paid at the Registration Office at Hailakandi. We are unable to say that this evidence establishes the fact of such payment. On the other hand, there is the evidence of defendant 6 who says that he did not receive the money and he did not mind the nonpayment because of the fact that he was not in possession, at the time when the document was executed. As a further reason for the omission on his part to make demands for the money he says that defendant 1 thought that though

it was not possible for him to get the lands out of the hands of defendant 5, it would be an easy affair for defendant 1 to get the lands from defendant 5 if he would get the lands by Kobala from him.

7. We are therefore in agreement with the view which the learned Subordinate Judge has taken, namely, that it has not been proved that the sum of Rs. 3,500 was paid to defendant 6 as alleged on behalf of defendant 1.

8. The third contention that has been urged on behalf of the appellant relates to the agreement which was alleged on behalf of defendant 1 the purport of which has already been set out above. The learned Judge was of opinion that Section 91, Evidence Act, was a bar to the reception of evidence relating to this agreement. This is not a case in which the terms of a contract, grant or disposition which had been or was required by law to be reduced to the form of a document were sought to be proved by oral evidence, substituting such oral evidence for the document itself or for such secondary evidence of its contents as was receivable under the law. It is a case in which an alleged contemporaneous oral agreement separately entered into was sought to be proved. The question therefore is whether the agreement alleged on behalf of the defence is one which comes under, and if so whether it is allowed by any of the provisos to Section 92 of the Act, Now the statement in a deed relating to its consideration may be either a mere recital of a fact, namely, that such consideration has been received or it may conceivably be regarded as a recital of a term of the contract, grant or disposition. Regarded as recital of the fact that consideration money was received the position is that where one party alleges that the recital is not true and that in fact no consideration was paid or received, and the other sets up an agreement that consideration was not to be paid until the happening of a particular contingency, the agreement does not contradict vary, add to or subtract from the terms of the contract; the agreement is sought

to be proved to contradict the statement of fact in the written statement that no consideration passed. In the case before us that is the exact position, In the case of *Sah Lal Chand v. Indrajit* [1900] 22 All. 370 their Lordships of the Judicial Committee said that it was settled law that notwithstanding an admission in a sale deed that the consideration has been received it is open to the vendor to prove that no consideration has actually been paid and that if this was not so facilities would be afforded for the grossest frauds, and further that it was no infringement of Section 92 for a Court to accept proof that by a collateral arrangement between the vendor and purchaser the consideration money remained with the purchaser for the purposes and under the conditions agreed upon between them. If the statement in the deed is regarded as the recital of a term of the contract, grant or disposition and the agreement is looked upon as supplementing it and it is taken that Section 92 of the Act applies, the question would arise whether the agreement would come under any of the provisos to the section. Now, so far as this matter is concerned, the only provisos, which may conceivably be of any application to the present case, are provisos 1, 2, and 3. The agreement, as already set out, is said to have been to the following effect: although it was stated in the document that the consideration of Rs. 3,500 was being paid by the vendee to the vendor still in point of fact it was not so paid and the oral agreement was to the effect that it would be paid only if the debtors under the bonds admitted the debts and the amounts due on them were realized amicably or by suit.

9. It is plain upon a reading of pro. 2 that such a matter does not come within it, because it being stated in the document that the money was paid and received, the agreement would be inconsistent with its terms. As regards prov. 3 which states that the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved, that proviso also has no application because as has been held in several decisions some of which are noticed in the recent judgment of this Court in *Radhakissen Chamarla Vs. Durgaprasad Chamarla*, that the true meaning of the words "any obligation" in prov. 3 Section 92 is "any obligation" whatever under the contract and not some "particular obligation" which the contract may contain. It is nobody's case that the document, that is to say the *kobala*, was not to come into force until a certain condition was fulfilled. The question is as regards prov. 1. Want of consideration was alleged on behalf of the plaintiffs. That being so, the proviso came into play, and once it was so it was quite open to defendant 1 to say that although the statement in the *kobala* that money was paid and received was not a true statement, the true facts were that there was an agreement under which the money was to be subsequently paid only in the event of a subsequent contingency happening. It is well settled that in circumstances such as these, that is to say when one party to a document alleges that the consideration which is stated in the document as having passed in connexion with it did not actually pass, the other party is entitled to give evidence for the purpose of showing what

the real nature of the transaction was. Reference, for instance, may be made to the case of *Shah Mukhun Lal v. Baboo Sree Kishen Singh* [1869] 12 M. I. A. 157. In that case which was decided before the Indian Evidence Act came into being, their Lordships of the Judicial Committee dealing with this precise question said:

The rules of evidence, and the law of estoppel, forbid any addition to, or variation from, deeds or written contracts. The law however furnishes exceptions to its own salutary protection; one of which is, when one party, for the advancement of justice, is permitted to remove the blind which hides the real transaction, as for instance, in cases of fraud, illegality and redemption, in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief and insist on its apparent character to per-judice his adversary.

10. In *Bal Kishen Das v. Legge* [1900] 22 All. 149 their Lordships of the Judicial Committee have laid down that questions regarding the admissibility of evidence should be decided only by reference to the Evidence Act and that the decisions of the Courts of Chancery have no application to the law of India as laid down by the Acts of the legislature. But the principle enunciated in *Shah Mukhun hall v. Baboo Sree Kishen Singh* [1869] 12 M. I. A. 157 appears to have been applied by Courts in this country in construing prov. 1, Section 92, Evidence Act, and its application is said to be supported by a later decision of the Judicial Committee. An elaborate discussion of this principle will be found in the case of *Pachkauri Raut and Another Vs. Ram Khilawan Chaube*, . It has been observed in that case that in the decision of the Judicial Committee in *Hanifunnissa v. Faizunnissa* [1911] 33 All. 340 the same principle has been upheld. In the case last mentioned, the facts of which will be found reported in *Faizunnissa v. Hanifunnissa* [1905] 27 All. 612 what happened was that the plaintiff:" who had executed a document which on the face of it was a sale-deed for Rs. 60,000 sought to have it cancelled on various grounds and in the alternative claimed Rs. 60,000. The defendants alleged that the transaction was in point of fact a gift and not a sale as it purported to be. The High Court of Allahabad held that the defendants were precluded by the provisions of Section 92, Evidence Act, from proving that the transaction was different from that which it purported to be and that it was in reality a gift. Their Lordships of the Judicial Committee reversed this decision and remitted the case to be dealt with on the evidence. In *Chuni Bibi's* case it has been pointed out that the principle of this ruling must be that in such circumstances oral evidence could be given by the defendant to prove the real nature of the transaction. This view however has been doubted in *Lodd Govindoss Krishnadas Varu Vs. P.M.A.R.M. Muthiah Chetty*, . But whether prov. (1), Section 92, Evidence Act, is to be construed in this way or not, the decision of the Judicial Committee in *Shah Lal Chand v. Indrajit* [1900] 22 All. 370 is in our opinion sufficient authority to show that the learned Subordinate Judge was not right in the view which he took, namely, that the agreement set up on behalf of defendant 1 was not provable under the law. As regards the evidence relating to this agreement, such of it as there is on the record has been placed before us.

The evidence is this. Defendant 1 says:

As to the bonds the arrangement was that I would sue you on the bonds and if moneys were realized from the debtors I would then pay the consideration of Rs. 3,500 to Nayan.

11. His witness, D. W. 4, Shajid says:

Irfan said that Rs. 3,500 would be paid to Nayan on recovery of amounts from the debtors.

12. We have already observed that Shajid is a not witness of truth. D. W. 5, Indan Mia, whose explanation as regards his not having put down the signature as attesting witness to the kobala is, in our opinion, not acceptable, says that the consideration of Rs. 3,500 was paid as it had to be paid after money was recovered from debtors. Witness 6 for the defendant only says that as to the balance of Rs. 3,500 there was some arrangement with regard to some bond. This evidence does not prove anything. Defendant 1 himself in his evidence went a little further than what his case actually was in the written statement. He purported to say that he told Nayan that the suit against the debtors would serve no useful purpose, that he had taken pleader's opinion before and that he had spoken of it to Nayan and Nayan forbade him to sue. The evidence of D. W. 8, Tahir Ali, goes still further and wants to make out that Nayan gave up his claim against defendant 1. He says, Nayan said:

How can you then pay me as Kanak realized money. I then give up my claim against you.

13. Upon evidence of this unsatisfactory character we think it must be held that the agreement which is alleged on behalf of defendant 1 has not been proved. Amongst the debtors under these bonds, three have come forward as witnesses and have said that they have actually paid up their dues and. that therefore the amounts said to be due under them were not realizable. It is also true that these bonds were produced by the respective debtors in a suit which had been instituted prior to the purchase by defendant 1 and that in that suit it had been found that the bonds had been redeemed. The circumstances connected with this suit are not above suspicion and do not satisfy us that the statements which these debtors made in connexion therewith were true. Any way, the fact remains that the property in these bonds was transferred by defendant 1 to defendant 5 under the kobala of 1923 to which we have already referred. We are of opinion therefore that the defence taken in this case has not been proved at all and on the other hand there is no reason why the plaintiffs should not be held to be entitled to the decree which they have obtained from the Court below. The result is that in our opinion the appeal fails and must be dismissed. There will be no order as to costs.