
(1888) 04 AHC CK 0001
In the Allahabad High Court

Madho Ram

APPELLANT

Vs

Mulchand and Another

RESPONDENT

Date of Decision : 25-04-1888

Acts Referred:

Citation : (1888) ILR (All) 421

Hon'ble Judges : Tyrrell, J;Brodhurst, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Brodhurst and Tyrrell, JJ.—We had heard this appeal out on the merits on both sides, and were proceeding to remand some issues or questions of fact to the Lower Appellate Court, which had determined the single question of payment of the sale price only, when a legal plea in bar of the action was raised by the learned vakil for the defendants. It is based on the rule of Section 92 of the Indian Evidence Act, which excludes evidence of an oral agreement as between the parties to any instrument of the kind contemplated in that section, for the purpose of contradicting, varying, adding to, or subtracting from its terms. It was contended that the inquiries which we propose to make will involve the consideration of oral evidence, which may have the effect of varying the terms of the sale deed under which the plaintiff and defendants jointly acquired the premises in suit. We heard argument and gave careful consideration to this proposition, and we have had the advantage of conferring with the learned Chief Justice and our brother Straight on the point. We are of opinion that the answer to the learned Pandit's contention is to be found in the proper interpretation of the phrase, "as between the parties to any such instruments," the words "the parties" being rightly read to imply the persons who on one side and on the other came together to make the contract. In the case before us, the "parties" in this sense would be the vendor on the one part and the two vendees on the other part. "As between" the vendor and themselves, neither of the vendees would be heard to plead, or would be allowed to offer, oral evidence to show that both

were not parties to the buying of his house. Neither vendees could resist the vendor's claim for the price, or for any other relief properly arising to him out of the contract, on a plea intended to show that one of the two was a nominal party only to the contract. Similarly one of the several obligors of a bond or bill of exchange would not be allowed in answer to the obligee's action on the joint instrument to maintain a plea that he was a surety only; except of course in a case where a money-lender made advances on the security of a joint and separate note, being well aware at the time that one of its makers was a surety only. In such a case, notwithstanding the form of the note, the surety has been allowed to plead, as an equitable defence and prove that he was known by the lender to be a surety when the note was made, and that without his consent, the principal had had time given to him by the lender. (See the cases cited in note 6, para. 1054, p. 1004, Taylor on Evidence vol., ii, ed. 1872). Such a case as this would fall probably under proviso 1 to Section 92. But on the other hand, we think that this section would not apply to questions, like that of the present case, raised by the parties on one side inter se, and not affecting the other party to the contract, touching their relations to each other in the transaction. The evidence in this respect would be offered not to vary, contradict, add to or subtract from the terms of the vendees' joint liability under the contract of purchase and sale from their vendor, but only to show as between themselves, the two vendees to wit, which was the real purchaser, or rather whether Mulchand was not the trustee only of his brother Ganga Prasad. Analogously in the case of the promisors of a joint note, it is competent to one of them, who has had to pay the entire debt, to show in variation of the terms of the note, as against a co-promisor, that the payer was a surety only, and proving this to get a decree for indemnification against his co-promisor. If we were to give to the terms of Section 92 a more extended interpretation, and to read them as excluding the admission of oral evidence to vary the terms of an instrument as between the parties on one side only thereto, as much and in the same way as the section certainly excludes the admission of such evidence as between the parties on both sides to the instrument, we should have, we fear, to close our Courts to many applications, no matter how justly founded, for equitable relief in cases such as we noticed passingly above: cases between co-promisors, co-obligors, co-debtors of accommodation bills, and the like, in which our Courts daily interfere to relieve parties in variation or even in contradiction of the written terms of an instrument of contract, to which they were parties on the one side together.

2. Taking this view, we over-rule the contention of the appellants on this point, and we must dispose of the appeal of Mulchand on the merits. The Court of First Instance on a review of all the evidence found, that he was not a real but was a nominal party only to the purchase of the house property in question, and it gave the plaintiff a decree. The Lower Appellate Court confirming this decision, has left several important issues undetermined. It has decided in uncertain terms, and on somewhat inconclusive grounds, that the sale price, Rs. 800, was found by Ganga Prasad, no part of the fund having been contributed, at the time of the

sale at least, by Mulchand. But obviously this finding does not conclude the question. The brothers were apparently joint purchasers, with joint interests, and the payment by one may have been for both, or may have been open to subsequent adjustment inter se. To enable us to decide whether Mulchand was a substantial party to the purchase or nominal only, whether he stands in the sale-deed as a beneficial owner, or merely as a trustee for Ganga Prasad, we must have findings on certain other questions, namely:

1. If Mulchand had no substantial interest in the contract, why was he associated with Ganga Prasad, in the making, execution, and registration thereof?
2. At the date of the contract, were Ganga Prasad and Mulchand associated as joint in any respect, in living, in estate, or in particular business?
3. When did Mulchand get possession of any part of the premises?
4. In what way did he enter?
 - (a) By right in the ordinary course of things as beneficially interested.
 - (b) By license of Ganga Prasad or by trespass?

Ten days will be allowed for objections.