

(1901) 08 CAL CK 0004

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 887 of 1899

Radha Raman Chowdry, Minor by Saradindu Debi

APPELLANT

Vs

Bhowani Prosad Bhowmik

RESPONDENT

Date of Decision : 09-08-1901

Acts Referred:

Citation : (1901) 08 CAL CK 0004

Final Decision : Dismissed

Judgement

Rampini, J.—This appeal arises out of a suit for a declaration that the Plaintiff's rent is less than that stated in the registered kabuliyat executed by the Plaintiff's father, there having been, it is said, a contemporaneous oral agreement for the reduction of the rent. The District Judge has held that such a contemporaneous oral agreement cannot be proved and has dismissed the suit. The Plaintiff appeals. It would seem to me that the judgment of the Judge is perfectly correct. The Plaintiff is precluded from proving the contemporaneous oral agreement which he has set up in para. 3 of his plaint by the provisions of sec. 92 of the Evidence Act. The learned pleader for the Appellant argues that his client is entitled to give oral evidence of the subsequent acts and conduct of the parties. But in my opinion he cannot do so. The acts and conduct of the parties can only be, proof (1) either of a contemporaneous oral agreement varying the terms of the registered contract or (2) of a subsequent oral agreement having the same effect. In the former case the evidence is excluded by sec. 92, and in the latter case by proviso 4 to sec. 92, and by the fact that the Plaintiff in his plaint set up no subsequent oral agreement, but a contemporaneous oral agreement.

2. The Appellant's pleader relies on the cases of Satyesh Chander Sarkar v. Jhanput Singh I. L. R. 24 Cal. 20 (1896), Preonath Shaha v. Madhu Sudan Bhuiya I. L. R. 25. Cal. 603 (1898) and Khankar Abdur Rohman v. Ali Hafez 5 C. W. N. 351 : s. c. I. L. R. 28 Cal. 256 (1900). In the first of these cases, the oral agreement set up was a subsequent agreement, modifying the terms of the original registered agreement and the ratio decidendi was that the Plaintiff had

admitted this agreement and that therefore the Defendant did not require to prove it, and so the provisions of sec. 92 did not bar him. The latter two cases are cases of ostensible conditional sales, which it has always been permitted to be shown to be mortgages. As pointed out in *Rahiman v. Elahi Baksh* I. L. R. 28 Cal. 70 (1900), such cases are an admitted exception to the general rule laid down in sec. 92 of the Evidence Act. But there appears to be no ground for making any further exception to this rule embodied in the section or any further inroad upon the law. If the plea of the Appellant in this case were allowed, the provisions of sec. 92 might as well be erased from the Evidence Act.

3. The Respondent relies on the case of *Mayandi Chetti v. Oliver* I. L. R. 22 Mad. 261 (1898) which is exactly in point. The facts of that case are similar to those of the present, except that the agreement to reduce the rent sought to be proved was a subsequent agreement and not a contemporaneous one. The Madras High Court held that the agreement could not be proved and that the words "oral agreement" in the section include "all unwritten agreements whether arrived at by word of mouth or otherwise" by which latter expression the Madras High Court meant what is called "evidence of the acts and conduct of the parties."

4. I would, therefore, dismiss this appeal with costs.

Gupta, J.

5. I am of the same opinion. I have had considerable doubt as to whether the acceptance of a reduced rent for some years by the lessor did not amount to a waiver or release of a portion of the stipulated rent in favour of the tenant Appellant. But on careful consideration I have arrived at the conclusion that the mere acceptance of a reduced rent though, it may amount to a full acquittance of rent for the particular year or years for which the rent was paid, cannot operate as a binding contract between the parties without proof of the agreement which formed the basis of the reduction granted.

6. In the present case the allegation of such an agreement was distinctly denied in the written statement ; and though the Munsif found upon oral evidence and on a certain hisab or memorandum of account marked Exhibit II that there was such an oral agreement, the learned District Judge found on appeal "that there is no actual evidence and only scanty ground for inference as to the basis on which the rent was to be reduced." In other words, the alleged contemporaneous oral agreement was not proved; and the mere acceptance of rent at a reduced rate by the lessor, and after his death, by his widow, does not, in my judgment, amount to such an agreement or release of a portion of the rent as would bind their successor, the present Respondent. No doubt the Court of first instance found that the Defendant-Respondent also accepted rent at the reduced rate, but as regards that the finding of the lower Appellate Court is as follows :--"From evidence on the Plaintiff's side it appears that the Defendant thought himself bound by the will of the original lessor which has been set aside." For these reasons I agree with my learned brother in dismissing this appeal with costs.