

(1938) 09 PAT CK 0020
In the Patna High Court

Sheikh Budhu

APPELLANT

Vs

Sital Singh and Others

RESPONDENT

Date of Decision : 12-09-1938

Acts Referred:

Evidence Act, 1872 — Section 92, 92(1)

Citation : AIR 1939 Patna 142

Hon'ble Judges : Wort, Acting C.J.

Bench : Division Bench

Judgement

Wort, Ag. C.J.

1. In my judgment Section 92, Evidence Act, clearly disposes of this case. The short facts are that the plaintiffs with another person had a holding which they granted by way of usufructuary mortgage to the defendant, who is the appellant before me. Under the ijara the defendant ijaradar was liable for rent. The ijara was of the year 1336 corresponding to 21st August 1928. The plaintiffs brought this action stating that they had been sued by the landlords for the years 1337 and 1338, that is 1929 and 1930, the years following the year in which the ijara transaction was entered into. They therefore sought to recover the rent they were made liable to pay for the defendant. The defendant set up this defence in substance:

You may have paid for the years 1337 and 1338, but you cannot recover from me. By an agreement made subsequent to the ijara transaction you had agreed to pay rent for those years and I in consideration of that had agreed to pay the arrears (which you were already liable for) for the years 1334 and 1335.

2. If that oral agreement had been established, the only sum which the plaintiffs could have claimed on the terms of the agreement (and I might add in parenthesis that the learned Judge in the Court below sets out these terms) was the balance between the sum that they paid and that which the defendant paid. This is of course under the oral agreement. But the plaintiffs contend that such a

contract was not made and they say further that in any event Section 92, Evidence Act, makes an oral agreement of that kind inadmissible in evidence. Now, this is a registered document and therefore quite clearly comes within the mischief of Sub-section 1 of Section 92 and Proviso (4) to the Section which runs thus:

The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing.

3. It is obvious that even if Proviso (4) does not apply as referring to immovable property and this subsequent oral agreement refers to the payment of rent, yet, it would come under Sub-section (1), because it is a contract which varies, adds to or subtracts from the terms of the written agreement. It varies the terms by reason of the fact, that, whereas under the written agreement the defendant was liable, under the oral agreement the plaintiffs were liable. That being so, the plaintiffs could prove the facts which established their cause of action with, out being successfully met by the defence which was set up by the defendant.

4. The question is what are the rights of the defendant? The learned Judge in the Court below has entirely misconceived the law and I fail to discover where he got the proposition which he purported to lay down. He seems to be under a complete misapprehension and states that unless a sum is unliquidated, it is irrecoverable by way of set-off. It is just the very reverse, and the learned Judge was confusing the old jurisdiction of the Court of Chancery with the principles which apply, in the present day. Under the jurisdiction of the old Court of Chancery in some cases although a sum was unliquidated, it might be dealt with by way of set-off. What is the position of the defendant if the agreement which he set up had been proved? It would not be a question of set-off at all. A similar case is, *Edward Dalgirish v. Ramdin Singh* 14 C.W.N. 170 which by the bye is not an authority for the statement that there are set-offs other than statutory ones. The set-off known to the law in India is the one laid down in and provided for by the Civil Procedure Code.

5. If the oral agreement goes, then the defendant in any attempt to recover money from the plaintiff is limited to his rights apart from the agreement; and what are they? He says (and this part of the agreement may be proved: I am assuming in his favour), "at the request of the plaintiff I paid these arrears of 1334 and 1335; I therefore seek to recover them." Apart from the agreement, of course, the rights of the defendant are such as he would not be entitled to anything as a set-off, because as.

6. I say and repeat the oral agreement is gone. He can only recover by way of set-off if the amount is legally recoverable. As far back as 1850 in *Walker v. Clements* (1850) 15 Q.B. 1046 it was decided that in order that a set-off might be pleaded, it would have to be within the period of limitation at the time the

action of the plaintiff was brought. It really is immaterial in this case because whether we take the latter period, that is to say the date of the defence or the written statement, or the former, namely the time the action was brought by the plaintiff, in any event it was barred by limitation. In those circumstances unfortunately for the defendant he was not entitled to recover the sum either by way of set-off or under the agreement for the reasons which I have stated.

7. The appeal of the defendant therefore fails and is dismissed with costs. Leave to appeal is refused.