(1866) 02 CAL CK 0005

Calcutta High Court

Case No: Special Appeal No. 870 of 1865

Kashi Nath Chatterjee		APPELLANT
	Vs	
Chandi Charan Banerjee		RESPONDENT

Date of Decision: Feb. 5, 1866

Judgement

Sir Barnes Peacock, Kt., C.J. and Bayley, J.

I am of opinion that verbal evidence is not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import. If a man writes that he sells absolutely, intending the writing which he executes to express and convey the meaning that he intends to sell absolutely, he cannot, by mere verbal evidence, show that, at the time of the agreement, both parties intended that their contract should not be such as their written words express, but that which they expressed by their words to be an absolute sale should be a mortgage. It is said that there is no Statute of Frauds, and therefore parties may enter into verbal contracts for the sale of lands in the Mofussil without writing. Does this apply to Hindus or Mahomedans only, or does it extend also to Europeans? If the rule depends merely upon the absence of the Statute of Frauds, it applies to Europeans as well as to Hindus and Mahomedans. If it depends upon Hindu or Mahomedan law, it would not extend to Europeans in the Mofussil, whether the deeds of sale are between European and European, or between an European and a Native, whether Hindu or Mahomedan. Regulation IV of 1793, s. 15 enacts:-- "In suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindu laws with regard to Hindus, are to be considered as the general rules by which the Judges are to form their decisions. In the respective cases, the Mahomedan and Hindu Law Officers of the Court are to attend to expound the law." These words are not the same as those used in s. 17 of 21 Geo. iii., c. 70, with reference to the late Supreme Court, which extended the rule to contracts between Mahomedans and Hindus, nor does it direct that the rules of evidence of the Mahomedan or Hindu law shall be acted upon. In all other cases, by

Regulation III of 1793, s. 21, the case is to be determined "according to justice, equity, and good conscience." But, admitting that the law allows sales of land, or other contracts relating to land, to be made verbally, it does not follow that, if the parties choose to reduce their contract into writing, they can bring forward mere verbal evidence to contradict the willing, and to show that they intended something different from that which the writing expresses and was intended to express. That would be contrary to a well-known rule of evidence of the English law; see Starkie on Evidence (4th edition), pages 648, 651, 655, 656, 659, 660. The following are the words of the passages referred to:--

Page 648.--"It is likewise a general and most inflexible rule, that wherever written instruments are appointed, either by the requirements of law, or by the compact of parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy; of principle, because such instruments are, in their own nature and origin, entitled to a much higher degree of credit than parole evidence; of policy, because it would be attended with great mischief if those instruments upon which men''s rights depended were liable to be impeached by loose collateral evidence." Page 651.-- "The same principle applies where private parties have, by mutual compact, constituted a written document the witness of their admissions and intentions." Page 655,-- "Where the terms of an agreement are reduced to writing, the document itself, being constituted by the parties as the expositor of their intentions, is the only instrument of evidence in respect of that agreement, which the law will recognize so long as it exists, for the purposes of evidence." Page 658.�"Where A granted an annuity for his own life to B, which was secured by a bond and warrant of attorney, and judgment was entered, the Court would not, after the death of B, permit the attorney of B to prove a parole agreement that A should be at liberty to redeem the annuity on terms." Page 659.-- "So in an action on a bond conditioned for payment absolutely, the defendant cannot plead an agreement that it should operate merely as an indemnity." Page 660.-- "Upon the same principles, evidence is inadmissible of a parole agreement prior to or contemporary with the written instrument, and which varies its terms; as to show that a note made payable on a day certain was to be payable upon a contingency only, or upon some other day, or not until the death of the maker.
See also Taylor on Evidence (5th ed.), page 993. Para. 1049 says:-- "It is almost superfluous to observe, that the rule is not infringed by proof of any collateral parole agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject-matter."

2. Without holding that every rule of the English law of evidence is to be applied to transactions in the mofussil, I have no hesitation in saying that a rule of evidence allowing a contract expressed in writing in words which the parties intended to use,

and of which they knew the import, could be varied by mere verbal evidence that the parties did not intend that which they expressed in writing but something very different, would lead to the grossest fraud, and would open the widest door to perjury in support of fraud. None of the cases, which have been cited, show that effect was ever given to such a verbal agreement, or that such a verbal agreement ever in fact existed for in every case in which such a verbal agreement was attempted to be proved, the Court found that no such verbal contract existed. In the case of Jadub Sirdar v. Kishenhuree Chatterjee S.D.A. Rep., 1861, 189 the Court does not admit that verbal agreements such as that contended for are usual or customary, for they say:-- "The Court cannot see why there was not the usual written ikrarnama or agreement. My remarks apply to mere verbal agreements, and not to a contemporaneous written ikrarnama. In such a case the rule of evidence would not prevent the reception of the ikrarnama. According to the Common Law of England, a deed under seal could not be varied or altered by a written contract not under seal; but such a rule is not applicable in the Mofussil in this country, and a contract under seal might be varied by a contemporaneous contract in writing not under seal. If mere verbal evidence is admissible in this case to contradict a written contract, it would apply to every other case, and a man who writes "one thousand" intending to write "one thousand" might prove that, by a verbal agreement, the words "one thousand" were not intended to mean "one thousand" but only "one hundred." Nothing could be more dangerous than the admission of such evidence. Further, if it be held that such evidence is admissible, the whole effect of the new Registration Act would be frustrated. If an absolute deed of sale of land is registered, it could not be controlled or proved to be conditional by an unregistered ikrarnama, because both are instruments relating to land within the meaning of Act XVI of 1864, s. 13: but a mere verbal contract would not be an instrument within the meaning of that section. If an absolute deed of sale could be controlled or modified by a contemporaneous verbal agreement, showing that it was intended to be a mortgage, an absolute deed of sale of land registered could be modified by an unregistered verbal agreement, as a verbal agreement cannot be, and is not required to be registered. This does not necessarily show what the law is; but it behaves us, in deciding this case, not to admit a principle which must necessarily lead to such results, unless we find it clearly and unequivocally established. A European British subject cannot make a will without writing by reason of the Will''s Act, but a native may [(3)]. If the rule be laid down that that which is expressed and intended to be expressed in writing may be varied by verbal evidence, it may be shown that a native who intended to declare by his written will, executed in the presence of witnesses, that he gave 10,000 rupees to a particular individual, expressly stated in the presence of other witnesses that, though he intended to write 10,000 rupees as the legacy, he intended it merely to be 100 rupees. He may make a verbal will if he pleases, but, if he chose to write his will, he cannot alter it by a contemporaneous verbal expression. It would be roost dangerous to testators, it would be fraught with the greatest danger to the community at large, to admit such

a doctrine. I do not know that the Hindu or Mahomedan law allows a written document to be altered by contemporaneous verbal statements. It is unnecessary to enter into that question here. It is sufficient to say that, if they did, we are not bound by the Mahomedan or Hindu rules of evidence, and that they are far more stringent than ours.

3. I agree with the decision in Rychund Bunik v. Greeshchunder Goho S.D.A., 1859, 362, which has been cited. That was a case in which an absolute deed of sale was attempted to be controlled by verbal evidence against a purchaser from the original vendee, and it was held that parole testimony was not admissible to alter or contradict a valid written instrument. The case of Mohunt Joyram Gir v. Lall Bungshee Adhur 2 Hay''s Rep., 328 laid down the same rule as between the original parties to the contract. The case of Nundkishore Koomar v. Zureefer Beebee Leg. Rem., 140 is not in point. In the case of Kassim Mundul v. Sreemutty Noor Beebee 1 W.R., 76 it was held that verbal evidence was admissible to prove fraud or mistake, but not to prove that an absolute deed of sale was intended to operate merely as a mortgage. If persons will write things in unmistakeable language intending that the writing shall convey a meaning by which they do not intend in reality to be bound, they must have some improper, or underhand object, and they cannot be surprised, or with any reason complain, if the Courts refuse to allow them to contradict their writing by mere verbal evidence. The case of Hidayut Ali and Qiadar Ali v. Prem Sing 3 Sel. Rep., 250 merely held that parol evidence was admissible to prove the contents of a written ikrarnama which had been accidentally burnt, and which controlled another written contract contemporaneously executed. There is no doubt that such evidence was admissible. In the case of Doorgadoss Roy v. Ramjeebun Doss 2 Hay''s Rep., 209 the verbal evidence was disbelieved. The same remark applies to the case of Ramcoomar Roy Chowdhry v. Kashee Chunder Sein 1 Hay''s Rep., 325. In the latter case, the verbal evidence seems to have been admitted to explain a written document; but the evidence was not believed, and the written document was construed without reference to the verbal evidence. It is therefore no authority on the question now under consideration. It can scarcely be supposed that, in either of the two last mentioned cases, the Court intended to act in opposition to the rule laid down in the first two cases which I have above cited, viz., Rychund Bunik v. Greeshchunder Goho S.D.A., 1859, P. 362 and Mohunt Joyram Gir v. Lall Bungshee Adhur 2 Hay''s Reports, 328, as two of the Judges in the case of Tarahinkar Roy v. Kashichunder Sein 1 Hay''s Rep., 325 were Trevor, J., who was one of the Judges in the case of Rychund Bunik v. Greeshchunder Goho S.D.A., 1859, P. 362 and Seton-Karr, J. who was one of the Judges in the case decided on the 16th March 1863, and as one of the Judges in the case of Doorgadoss Roy v. Ramjeebun Doss 2 Hay''s Rep., 209 was Seton-Karr, J.

4. The case of Muttyloll Seal vs. Annundochunder Sandle was cited, but that case did not lay down the broad rule now contended for. It was decided upon the documents themselves and the acts of the parties. In that case the appellant, Muttyloll Seal,

agreed to lend money to Madhusudan Sandle at 17 per cent, interest. He lent Rs. 5,000, and he took an absolute bill of sale of certain property, stating that it was in consideration of Rs. 25,000 paid; and, by lease of the same date, he let the property to Madhusudau Sandle at a rent of Rs. 425 per month, which was equal to the precise amount of interest on Rs. 5,000 and Rs. 25,000, amounting to Rs. 30,000 at 17 per cent, per annum. One question in determining the case would necessarily be to ascertain whether the Rs. 25,000 was a loan or purchase-money. Part of the money was afterwards paid off by Madhusudan, and then the rent under the lease was, in pursuance of an agreement to that effect, reduced in the proportion of 17 per cent., on the money paid off; and there were other circumstances in the case tending to show that the Rs. 25,000 was a loan only. There can be no doubt that the whole was a colorable transaction to secure the money lent with usurious interest. The Supreme Court held that the transaction was a mortgage. The Privy Council concurred. Lord Langdale, in delivering the judgment, said:--- "In this appeal, although we think it is not without difficulty, and our opinion, if given in detail, might not have been altogether in accordance with the decision of the Court below, yet, giving our best consideration to the whole matter, we do not find any reason which appears to be sufficient to alter that decision. Under these circumstances we must dismiss the appeal with costs." This case, as I have observed, shows merely that the Judicial Committee of the Privy Council upheld the decision of the Supreme Court, but we cannot say for what reasons. There were ample reasons for upholding it, without introducing or upholding such a rule as that now contended for, which was never laid down in the judgment in the Supreme Court or ever contended for in the arguments of Counsel. In Taylor on Evidence, (5th edn.), page 985, para. 1039, it is said:-- "Parole evidence may also, under the proper plea, be offered to show that the contract was made for the furtherance of objects forbidden, either by statute, or by common law." In the case above cited from the Privy Council, it was alleged, at the time of the transaction therein referred to, to lend money at 17 per cent., and it was therefore quite in accordance with the rules of evidence to show that the transaction was really a usurious loan, colorably represented as a sale for the purpose of avoiding the usury laws then in force.

5. The plaintiff in the present case alleged that he took possession in 1266 (1859) and that in 1270 (1863) the defendant forcibly dispossessed him. The defendant says, that the plaintiff never took possession, and that he was never forcibly ousted. If possession did not accompany or follow the absolute bill of sale, it would be a strong fact to show that the transaction was a mortgage and not a sale; and it therefore becomes material to try whether the plaintiff was ever in possession and forcibly dispossessed as alleged by him, and whether, having reference to the amount of the alleged purchase-money advanced, and to the value of the interest alleged to be sold, and the acts and conduct of the parties, they intended to act upon the deed as an absolute sale, or to treat the transaction as a mortgage only; for I am of opinion that parole evidence is admissible to explain the acts of the

parties, as for example to show why the plaintiff did not take possession in pursuance of the bill of sale, if it be found that the defendant retained possession, and that the plaintiff never had possession as alleged by him, and was never forcibly dispossessed.

6. I would remark that, although evidence of the acts and conduct of the parties is admissible in suits in which third parties are not concerned, the rights of a third party acting bona fide upon the faith of an absolute sale, such for instance as those of a bona fide purchaser for value from the apparent vendee, would not be affected even by the acts or conduct of the original parties, and the third party would not be precluded by such acts or conduct from having effect given to the contract as expressed by the writing.

7. A second issue was raised by the Moonsiff, viz., whether a verbal contract subsequently entered into by the parties could nullify the previous written one. There can be no doubt that a prior written contract may be varied by a subsequent verbal one in cases in which the law does not require the contract to be in writing; see Taylor on Evidence (5th edn.), page 925, para. 1043: it is there stared that "the rule under discussion does not exclude verbal evidence, when adduced to prove that the written agreement has been totally waived or discharged." It turns out that no subsequent verbal contract was set up in the present case; it was merely alleged that, in Aswin 1270 (September 1863), the defendant went to repay the money with interest, but that the plaintiff refused to accept it on the plea of other dues and accounts. This fact, if proved, will be an important one to be considered when the acts and conduct of the parties come to be taken into consideration, for the purpose of determining whether they by their own acts treated the transaction as a sole or mortgage; for why should the plaintiff refuse to accept the money and interest upon the ground of other dues and accounts, if the transaction was really an absolute sale. The case must be remanded to the first Court, not for the purpose directed by the Principal Sudder Ameen, but to try the following issue, viz., whether having regard to the acts and conduct of the parties and having reference to the amount of the alleged purchase-money, and the real value of the interest alleged to be sold (which were matters taken into consideration in the case of Muttyloll Seal vs. Annundochunder Sandle to which reference has already been made), the parties intended the deed to operate as an absolute sale and treated the transaction as an absolute sale or as a mortgage only.

Norman, J.

8. I agree with the Chief Justice that this case must be remanded. But I do not agree in the reasons for the judgment delivered by him. I am of opinion that the Principal Sudder Ameen was right in holding that evidence is admissible to show that the bill of sale, though absolute in its terms, was a mortgage; in other words, that it was made subject to a contemporaneous verbal agreement that the vendee should reconvey on payment of the money. The point seems to me to have been expressly

decided by the late Supreme Court, and by the Privy Council on appeal, in the case of Muttyloll Seal vs. Annundochunder Sandle in accordance with the decision of Morgan and Pundit, JJ., in Kashinath Roy v. Nowcowry Koondoo 1 W.R., 22. The cases from the earliest date show that it is a common practice in this country, upon the occasion of a mortgage, for the borrower to convey the estate absolutely to the vendee; the latter engaging by a contemporaneous agreement, which is sometimes in writing, and sometimes merely verbal, that, on the repayment of the money lent, he will reconvey the property to the borrower; see Hidayut Ali v. Prem Sing 3 Sel. Rep., 250; Beharee Lal v. Mussummaut Sookhun 4 Sel. Rep., 174; Sarupchand Sarkar v. Raja Gris Chandra 5 Sel. Rep., 139. The custom is as old as the days when the Mahomedans ruled in this country. In Baillie''s Mahomedan Law of Sale, page 302, it is said:-- "It is then to be considered, if the two parties have mentioned a condition of cancellation in the sale act, if so, the sale is valid. And even if they should not have mentioned this in the sale, but have both in expressing themselves used the word ''sale'' with a condition of ''wafa'' or have expressed themselves as in the case of a lawful sale, but with the meaning that the same is not to be binding or obligatory, the result is the same. When, again, sale is mentioned without any condition, and the stipulation is there mentioned after the manner of a mutual promise, the sale is lawful, and the ''wafa'' binding as a promise." There is no rule of law that I am aware of, which, in the case of Hindus, requires either the conveyance or the contract for re-conveyance to be in writing; and I see no reason on principle why the former should not be in writing and the latter verbal or the reverse. In Ramcoomar Roy Chowdhry v. Kasheechunder Sein 1 Hay''s Rep., 325, at p. 327 the Court says:-- "It is simply contended that, in this country, we have no Statute of Frauds; that one transaction is sometimes partly in writing and partly oral; that, consequently, in such cases, both parts must be considered together, and if the oral part be clearly proved, it must be duly considered and accepted by the Court. Doubtless, there is truth in this contention, and the Courts in this country have never refused to listen to pleas of the nature of that now advanced; but they have always shown a disinclination to admit such pleas, and this disinclination increases with the length of the period which has elapsed since the date of the transaction." The Court then proceeded to try the case on that footing. I think that one ground on which such evidence may be admitted, where the question arises between the immediate parties, is much the same as that on which evidence is admissible to show that one, who, on the face of an instrument, appears simply as a co-contractor did in reality contract as a surety; as to which see Lord Cottenham''s judgment in Hollier v. Eyre 9 Cl. &. Fin., 1; pp. 45 to 51, in the House of Lords and Pooley v. Harradine 7 E. & B., 431. It appears to me that evidence of a verbal agreement for defeasance does not contradict a written conveyance. It is or may be entirely consistent with, and in accordance with the usual practice relating to such transactions. It is not easy to find in the books cases in which a verbal contract for re-conveyance has been allowed to prevail against a conveyance absolute in its terms. But I am satisfied that such cases are very numerous in the Courts of Justice in this country. As I understand it, Rai

Ram Bullubh S.D. Summary Cases, 79 is a reported case in which such a verbal contract was established by proof. In Starkie on Evidence, 4th edition, page 716, note 4th, it is said that the existence of a deed or other written instrument does not exclude parol evidence as to a collateral transaction, citing Fletcher v. Gillespie 3 Bing., 635. In Harris v. Rickett 4 H. & N., 1, the Court of Exchequer held that where it is shown that the written agreement does not contain, and was not intended to contain, the whole agreement between the parties, the rule that parol evidence is not admissible to add to a written agreement has no application. Of the cases opposed to the view which I take, that of Rychand Bunik v. Greeshchunder Goho S.D.A. Rep., 1859, 362 is a case between a purchaser from the mortgagee, who had apparently been misled by, and had acted on the faith of, the representation contained in a deed purporting to be one of absolute sale. As a bona fide purchaser for value without notice, he would of course have a right to hold the mortgagor bound by the representation contained in that deed, in reliance on which he had paid his money: and I think that the case should have been tried on that footing. That of Mohunt Joyram Gir v. Loll Bunyshee Adhur 2 Hay''s Rep., 328 appears to be a case of fraud, and was found to be such by both the High Court and the lower Appellate Court. The High Court say more than is necessary for the decision. It appears to me that it would be very desirable, particularly with reference to the provisions of the Registration Act, that the Legislature should provide by enactment that, after some future date, no parol defeasance made after that date should be given in evidence. But sitting as a Court of Justice, I think, we ought not to lay down a rule of evidence which may have the effect of invalidating a large number of contracts in a form which is very commonly adopted in this country and which, so far as I see, are blameless in themselves.
Pundit, J.

9. It is admitted by the special appellant that, in this part of India, in cases of conditional sales, it is often found that a deed of out-and-out purchase in favour of the mortgagee is executed, and a separate agreement acknowledging the right of redemption is given to the mortgagor. Generally, possession is made over to the mortgagee, but it is sometimes retained by the mortgagor. It cannot, however, be denied that in many cases no such ikrar is taken, and for a transaction known and understood by the parties to it to be merely a conditional sale, no other deed except one of an out-and-out sale is executed, and a verbal promise made to return the property or the deed of sale after the money advanced is paid off with interest. I admit this custom is rather dangerous, and that the Legislature should soon try to set it aside. But as long as it is in existence, Courts of Justice are required to take it into consideration. There can be no difficulty in a case where there is an ikrar. As to those cases in which merely a verbal promise is pleaded, it is certain that it is one thing to disbelieve parol evidence produced to contradict the written terms of a deed, and another to deny to receive such evidence at all. The rule adopted by the English Courts with reference to the rejection of parol evidence to vary and

contradict a deed is undoubtedly based on sound principles: but, with reference to the circumstances of this custom with regard to conditional sales, it will be unfair for a Court of Justice to adopt that rule of evidence in transactions made when it was not recognized as any part of the law in force. Practically, such parol evidence, though received by our Courts, was not generally believed, as the Judges trying such cases were always disinclined to countenance such a dangerous custom. The Judges could not, however, ignore the existence of the custom, and so did not refuse to hear evidence, which, in many cases, might turn out to be credible. In one sense the additional verbal agreement is not perhaps inconsistent with the deed of sale. The deed, as worded, is intended to be one for a sale out-and-out, and the transaction is a sale, but conditional so far that there is an additional promise for the return of the property if the money paid is returned with interest within a period fixed. The law has, however, construed these transactions to be mortgages, and which cannot be foreclosed merely on the failure of the mortgagor to pay within the time fixed in the deed. I wish the Legislature may pass a law to the effect that, in future transactions of this kind, no parol testimony shall be received to prove that, at the time of writing a deed of sale, it was agreed that the transaction is to be one different from the terms of the deed. The Legislature may even, if it think proper, order the rule to apply retrospectively. Rules of evidence have, from time to time, been passed by our legislature in the form of laws. In the absence of such a law, by following the rule as adopted in English Courts, we are likely to injure many who might have executed deeds of sale when the contracts made by them were simply mortgages, and were known to be so by the ostensible vendees. The supposed vendors, viz., the mortgagors, who may never have originally received the full value of their property, are, by the terms of the original contract, entitled to redeem, and were hitherto quite assured that, if the mortgage be denied, they have a right to prove the real nature of the transaction by parol evidence regarding what had passed at the time of the contract.

10. One or two of the earlier decisions of the late Sudder Court, quoted by the Counsel for the respondents, show that the Judges trying those cases had considered that such conditional sales are usually supported by ikrars from mortgagees. But the records of our Civil Courts might, if searched, show the existence of numerous cases in which, for such conditional sales, simply deeds of absolute sale were executed, in which the creditor, not denying the nature of the transaction, litigated with his debtor on other grounds. There might also be found several cases in which, on the fact of the mortgage being denied, and an absolute sale pleaded, both the parties were allowed to bring evidence to support their respective assertions, and were not prevented on such occasions from producing parol evidence as to what passed at the time of the execution of the deed. As the application of the rule of exclusion of this evidence was never pleaded before, there was no opportunity to overrule it. As a question of fact I can state from personal experience that I have seen and known of many deeds of conditional sales executed

as of absolute sale not followed by any written agreement by the mortgagee to return the property. I now notice the argument that this misnaming of the transaction of a mortgage must be from some fraudulent motive. Fraud may not have anything to do with the original introduction of the custom. It is not denied that, in many cases, the written ikrars taken from the mortgagee were registered simultaneously with the deed of sale. From this it would appear that the form of writing a deed of sale, and accompanying it with a written or verbal promise to return, appears to have been generally considered as the one adapted for these transactions of baibil-waf&#65533;. It may also be that, as the selection of this form is not always invariably a voluntary act of the mortgagor, but is the condition dictated by the creditor to a person pressed hard for money, the design of a cunning creditor to take advantage of the possibility of the failure of the mortgagor to prove, by parol evidence, the fact of the transaction being merely a mortgage, or vain hope of getting rid of the tedious proceedings of foreclosure under Regulation XVII of 1806, might have given rise originally to the custom of keeping the promise merely verbal. Ordinarily persons so mortgaging their property are not actuated to execute deeds of sale with a view to protect their rights of redemption from any other creditor. In many cases the mortgagor may not have any other debts, or may not have in contemplation to incur any from any other person besides the advance he is receiving from the mortgagee.

11. As to the mortgages altogether fraudulent, where there is no bona fide sale or mortgage at all, the fact of fraudulent debtors executing such deeds cannot justify the adoption of a rule which will injure many who had never heard or thought of it Further, if the meaning of the rule in question is allowed to be what the Court of first instance has held it to be, it would go beyond what it is according to the English authorities. It would give an undue advantage to many creditors, and make over to them, on the bare wording of deeds, property which was never intended to be conveyed absolutely, which they might all along have held only in trust, and from the proceeds of which, as originally agreed, they may have fully paid themselves. It is only since 1862, that the rule in question has begun to be adopted in this Court with regard to these cases of conditional sales. The case of Rychund Bunik v. Greeshchunder Goho S.D.A. Rep., 1859, 362 was rightly decided, as it related to the rights of a third party to whom different rules apply. I would, therefore, in this case allow the parol evidence to be taken even to prove the exact nature of the original transaction, and therefore reject the special appeal. The English rule of evidence does not appear to have been disallowed in any other transaction except that of conditional sales in which the deeds are drawn as for out-and-out sales. I myself would not exclude the operation of this rule, except from cases of conditional sales with verbal promise to return. I also would not make any such consideration in favor of a party, who, by a voluntary or forced adoption of the custom of misnomer, may have been the cause of leading a third person to purchase out-and-out a property from the ostensible vendee, believing him, on the wording of the deed executed, to

be a purchaser under the same. In the present case, even if the English rule is adopted, it will simply prevent the respondent from proving by parol evidence that, at the time of the execution of the deed of sale, it was contracted by verbal agreement; that the transaction is not to be what it is described in the deed. It cannot prevent the reception of parol evidence regarding other matters mentioned in the defence of the special respondent, which, if proved, might legally and satisfactorily prove that the deed of sale is simply a mortgage-- Muttyloll Seal vs. Annundochunder Sandle . There is no such law in English Courts, or in Courts where English law prevails, which declares that when a deed is in the form of an absolute sale, it is to be considered as such, irrespective of all legal evidence which the party executing it may have in his power to produce to show that it was not a sale. If a party can prove, as is alleged in this case, that the value of the lands is higher than the consideration paid when the deed was written, or that the plaintiff had never held possession of the property, these and other facts connected with the dealings of the parties with the property might prove that the transaction was a mere mortgage, and not one of absolute sale.

12. The order of the lower Appellate Court in this case is a remand to the Court of first instance for trying the statements of the defendants I would therefore reject this special appeal with costs.

Campbell, J.

13. It seems to me clear that, in a case of this kind, we are not to administer Hindu or Mahomedan law, but only the law of equity and good conscience applicable to all Natives and Europeans alike. That being so, on so broad a question as that before us, the decisions of the Courts must come very near in character to legislation, and in this matter I should think that we were bound to follow any uniform and well established series of decisions. When I referred the case to a Full Bench, and when the argument in this Court commenced, I was certainly under the impression that the decisions had, during many years, gone to establish the admissibility of parol evidence in such a case as that before us. I have been surprised to find how little this view can be supported in argument by the citation of cases. The cases cited, when examined, are either not properly in point, or are of doubtful effect, down to the decision of 15th August 1864--Kashinath Roy v. Nowcowry Koondoo 1 W.R. 22. On the other hand, the opposite doctrine has been several times laid down, and on the whole the balance of authority seems to be on that side.

14. I also think that the rule, which excludes parol evidence contradictory of the plain and intentional terms of a written and published document such as that before us, is consonant to equity, good conscience and public policy. It is not equitable or right that parties should be allowed by a formal instrument to place on record one thing when they mean another.

15. There can, in no case, be any doubt that a third party, acting on the faith of the written instrument, could not be affected by any parol engagement; and, even as between the parties themselves, I think that, if in any case there really is any understanding or expectation contrary to the terms of a deed which has been acted on, this can only result from one of two things, i.e., either the object is (as is commonly the case in this country) to deceive others, and to retain the means of cheating others; or the vendor, whatever hope of re-conveyance he may retain, deliberately puts himself as it were out of the pale of the law, and cuts off from himself all legal right or remedy. If it were otherwise, what additional security would a mortgage in this shape give to the lender as compared to a mortgage in the ordinary form? And an additional security is the only object suggested. But then comes the decision of the Privy Council cited tons. That case, when examined, seems, I think, as shown by the learned Chief Justice, to amount in brief to this, that when there are actions of the parties at variance with the written instrument, and especially when possession of the property has not been transferred, not full value paid, then parol evidence to explain those facts may be admitted. I would hold that, although parole evidence may not he admitted purely and simply to contradict the terms of a formal and public written instrument duly acted on, it may, as between the original parties themselves, be admitted in support of substantial acts and facts which negative or detract from the effect of the instrument. In this case, then, the question whether the possession was transferred to the purchaser is most material. If it was not--if possession was retained by the vendor, then I think he may be permitted to show (there being no third party in the case) that the transaction was merely of the nature of a deposit of title deeds as security for a loan. I concur in the decision of the learned Chief Justice.

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(1) See Bholanath Khettri v. Kaliprasad Agurwalla, 8 B.L.R., 89, and the authorities collected there. See also Sheikh Parabdi Sahani v. Sheikh Mahomed Hossein 1 B.L.R., A.C., 41; Manohar Das v. Bhaghati Dasi, 1 B.L.R., O.C., 30 & 32 and Madhab Chandra Roy v. Gungadhur Samant, 3 B.L.R., A.C., 83.

(2) See s. 92 of Act I of 1872.

(3) As to this see the Hindu Wills Act XXI of 1870, incorporating s. 50 of the Indian Succession Act, X of 1865, which prescribes the mode in which wills should be executed.