

(1910) 11 BOM CK 0009**Bombay High Court****Case No:** None

Somana Basappa Bagvankar

APPELLANT

Vs

Gadigeya Kornaya Hiremath

RESPONDENT

Date of Decision: Nov. 15, 1910**Acts Referred:**

- Dekkhan Agriculturists Relief Act, 1879 - Section 10A
- Evidence Act, 1872 - Section 92

Citation: 9 Ind. Cas. 941**Hon'ble Judges:** Rao, J; Batchelor, J**Bench:** Division Bench**Judgement**

1. The plaintiff here sued to redeem certain lands under the provisions of the Dekkhan Agriculturists" Relief. Act, alleging that a deed (Exhibit No. 16), which he had executed to the defendant, and which is on its face a deed of sale, was in reality only a deed of mortgage, the defendant having promised at the time of the execution of the deed that he would allow the lands concerned to be redeemed on payment of the money advanced. The defendant inter alia replied that Exhibit No. 16 was in fact what it is in appearance, a deed of sale.

2. The learned Judge of the Court below framed upon this point the second issue, which is in these terms: "is the sale-deed passed to defendant proved to be really a mortgage, redeemable on the terms stated in the plaint"? On that issue the Judge went into all the evidence tendered, and found the issue in the negative.

3. It is now urged for the appellant, who was the plaintiff in the Court below, that the frame of this issue is incorrect; and that we should remand the case for a decision upon a reformed issue as to whether Exhibit No. 16 was obtained or induced by the defendant by means of fraud or misrepresentation, within the meaning of proviso 1 of Section 92 of the Indian Evidence Act.

4. The only question before us is whether the suit should be remanded for re-trial upon the suggested issue or not. We are of opinion that it should not be remanded. As we have said, the learned First Class Subordinate Judge went into all the evidence which was tendered before him on the case which the plaintiff then set up. That case, as the judgment shows, was based upon the applicability of Section 10A of the Dekkhan Agriculturists" Relief Act, a section which has been subsequently added to that Statute, with a view of getting rid of the difficulty created by Section 92 of the Evidence Act. It was afterwards discovered, during the hearing that Section 10A of the Dekkhan Agriculturists" Relief Act had not been extended to the District from which the suit came. That however, was the plaintiff's case, as it was made before the trying Court, and it seems to us that the plaintiff is now seeking to make a new case in so far as he endeavours to base his case, not upon a separate oral agreement, but upon some fraud, which would invite the application of proviso (1) to Section 92 of the Indian Evidence Act.

5. The material portion of the plaint upon this point is paragraph 2 which is in these terms:

Plaintiff having hypothecated in writing the said lands as mentioned above to the defendant, about the 17th day of April 1905 A.D. asked the defendant to" take in writing a possessory mortgage of the said lands and on the security of the said lands to advance more money to him as the plaintiff was dunned for payment by creditors to whom sundry debts were due. The said defendant replied that he would advance more money if a sale-deed were given in writing and that he would surrender the lands when the principal is paid by making an account on the basis that the said sale-deed was a possessory mortgage-deed. Accordingly, having made an oral agreement that the lands should be surrendered when the principal and interest were paid on making an account, defendant made as he liked an account on the principal and interest in respect of the dealings, and the defendant told me that he would advance to me a further loan of Rs. 1,100 and took from me a registered deed of sale intended to be treated as a deed of mortgage for the total amount of Rs. 6,500.

6. That is how the plaintiff put his case in the plaint. In his deposition, which is Exhibit No. 14, he puts it in the same way by saying "Defendant promised to allow redemption in the presence of the writer and the witnesses to the deed." The plaintiff's case then was that he signed the deed (Exhibit No. 16) knowing it to be a deed of sale, but that there was at the same time an "oral agreement" made by the defendant that the defendant would treat it as a mortgage and he (the plaintiff) relied upon that "oral agreement." There was no allegation of any fraud or other circumstance which would invalidate the agreement.

7. It seems to us that upon these facts the case falls within the prohibition enacted by Section 92 of the Indian Evidence Act, which in such a case forbids the reception of evidence of any oral agreement or statement for the purpose of contradicting,

varying, adding to, or subtracting from the written terms of the contract.

8. It may be that upon this point the earlier cases are somewhat difficult to reconcile, but the law has recently been discussed by this Bench in two decisions where previous rulings are examined. These two cases are: *Dagdu Sadu Nahavi v. Nama Salu* 12 Bom. L.B. 972 : 8 I. C. 644 and *Sangira Malappa v. Ramappa Sangappa* 11 Bom. L.R. 1130 : 4 I. C. 257. We follow these decisions which in our view correctly interpret Section 92 of the Evidence Act as expounded by the Judicial Committee in the case of *Balkishen Das v. W.F. Legge* 22 A. 149 : 27 I.A. 58 : 4 C.W.N. 153.

9. It seems to us that under the law, as it stands, in such cases as this, it is not open to the Court to enter upon a defence which, in substance, consists of an allegation of an oral agreement varying the written document, and if it is the desire of the Legislature that such defences, which are of a very common occurrence in these cases, should be investigated and decided by the Courts, then the only course to secure that end is to extend Section 10A of the Dekkhari, Agriculturists" Relief Act to the District where it is desired that the Court's powers in this respect should be enlarged.

10. For these reasons we affirm the decree under appeal and dismiss the appeal with costs.