1921.

Present : Bertram C.J. and De Sampayo J.

APPUHAMY *v.* DISSANAYAKE.

379—D. C. Negombo, 14,233

Evidence—Informal agreement to lease land—Action to recover money advanced—Defence that defendant was not in default—Averment that defendant guaranteed a certain crop, and that land would not yield that—Can plaintiff lead oral evidence to establish the guarantee and show that defendant was in default ?—Condition precedent—Escrow.

By a non-notarial writing defendant agreed to grant a lease to plaintiff and received a sum of money. Plaintiff sued for the recovery of the sum advanced, and defendant pleaded that plaintiff was in default. Plaintiff admitted that he refused to take the lease, as the defendant guaranteed to him that the lands to be leased would yield 72,000 nuts a year, but that the lands would not yield so great a quantity.

Held, that plaintiff was entitled to lead oral evidence on the question of alleged guarantee to prove that he was not in default.

The informal agreement, though not valid for the purpose of binding either party, was, nevertheless, receivable in evidence for the purpose of determining the equitable claim set up by the plaintiff.

THE facts appear from the judgment.

E. W. Jayawardene, for defendant, appellant.

Pereira, K.C. (with him *M. W. H. de Silva* and *Jayatileke*), for plaintiff, respondent.

August 1, 1921. BERTRAM C.J.—

This was an action brought to recover a sum paid upon an agreement for a lease, which, not having been notarially executed, was not binding upon the parties. A promissory note was given at the same time, and the cancellation of this note is also demanded. The defendant opposed the claim on the ground that he was always ready and willing to perform his part of the agreement, and to grant the lease to the plaintiff. He maintains that it is the plaintiff who is in default, as he has refused to take the lease. The plaintiff on his side admits that he has refused to take the lease, giving as his reason the fact that the defendant guaranteed to him that the lands to be leased would yield 72,000 nuts a year, whereas he has discovered that they will not yield so great a quantity. I am not clear as to the precise terms of this guarantee which he alleges, but it was treated in the argument on the footing of a condition precedent.

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The law on the subject is clear, and has been settled by the case of *Nagoor Pitche v. Usoof*.[1] It was there decided that a party who advances money on an informal agreement void under section 2 of Ordinance No. 7 of 1840 is entitled to a refund only if he is not the party in default. The question therefore is, who is the party in default in this case? The learned District Judge proceeded to try the action, but when the time came for evidence to be given of the alleged guarantee, counsel for defendant objected to this evidence being received, on the ground that it purported to vary the terms of the contract which had been reduced to writing by the parties, and was consequently inadmissible under section 92 of the Evidence Ordinance. The learned Judge rejected the evidence, but after he had done so entertained certain misgivings as to the correctness of his judgment, and finally came to the conclusion that as he had shut out this evidence, and as under the circumstances it seemed impossible to decide who was in default, the plaintiff must recover the money paid.

The learned Judge here made a mistake. The informal agreement, agreement for the lease, though not valid for the purpose of binding either party, was, nevertheless, receivable in evidence for the purpose of determining the equitable claim set up by the plaintiff. The learned Judge had first to determine whether the alleged stipulation, sought to be annexed to the agreement, could be proved by oral evidence, and having determined that question in the negative, he ought to have determined the further question as to who was in default simply on the basis of this informal agreement. If, therefore, he had rightly determined the question of the admissibility of the evidence tendered, and if he was right in excluding that evidence, he ought to have given judgment for the defendant.

But the question arises whether he was, in fact, right in excluding the evidence. In so doing I think he was acting under a misconception. The plea set up was obviously one intended to be a plea under the third proviso to section 92. An issue had been framed for the purpose of trying that plea in the following terms: "Was the acceptance of the assignment conditional on the lands being such as would yield 72,000 nuts a year?" And the learned Judge should, I think, have heard evidence on that issue.

The case, therefore, must go back for that evidence to be taken, and for the learned Judge to determine: Firstly, was such a stipulation as is alleged actually made? Secondly, did it constitute a condition precedent to the attachment of any obligation under the contract? And thirdly, has that condition not been fulfilled?

It may be convenient that I should indicate the nature of the condition contemplated in the proviso. The best example of such a condition will, I think, be found in the case of *Wallis v. Littell*.[2]

[1] (1917) 20 N. L. R. 1.

[2] (1861) 31 L. J. C. P. 100.

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In that case the defendant agreed to transfer a farm to plaintiff. The agreement was in writing, but it was alleged that it was made subject to the condition that it should be null and void "if Lord Sydney (the defendant's landlord) should not within a reasonable time after the making of the agreement consent and agree to the transfer to the plaintiff." Earle C.J. there said, referring to previous cases: "It was decided that an oral agreement to the same effect as that relied on by the defendant might be admitted without infringing the rule that a contemporaneous oral argument is not admissible to vary or contradict a written agreement. It is in analogy with the delivery of a deed as an escrow; it neither varies nor contradicts the writing, but suspends the commencement of the obligation." A similar condition may also be found in the well-known case of *Bannerman v. White.*[1] Here there was no question of variation of a written agreement, but the illustration is, nevertheless, a very apt one. The agreement was for the sale of hops. Before commencing to deal defendant asked the plaintiff if any sulphur had been used in the treatment of that year's growth. The plaintiff said "No." The defendant said that he would not even ask the price if any sulphur had been used. On that basis the contract was concluded. It was subsequently found that sulphur had, in fact, been used in the treatment of a small portion of the hops sold. It was held that the agreement was not enforceable. Earle C.J. said (at page 860): "This undertaking was a preliminary stipulation; and if it had not been given, the defendant would not have gone on with the treaty, which resulted in the sale. In this sense it was the condition upon which the defendants contracted, and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used. . . . . Upon this statement of facts we think that the intention appears that the contract should be null if sulphur had been used; and upon this ground we agree that the rule should be discharged."

It will be necessary, therefore, for the plaintiff to show the precise terms of the condition which he alleges, and to explain in what way that condition was to be tested before any obligation attached under the agreement. Now that it has been explained to him exactly what he has to say, it will be no doubt easy for him to say it, and it will be correspondingly difficult for the learned Judge to ascertain whether he is telling the truth. The question will be a question of fact for the learned Judge to determine. The case will go back for that purpose. Costs of the appeal will be costs in the cause.

De Sampayo J.—I agree.

Sent back.

[1] *(1861) 10 C. B.; N. S. 844.*