Present : Ennis J. and De Sampayo J. **1917.**

KIRI BANDA *v.* MARIKAR.

222—D. C. Kegalla, 4,420.

Evidence—Recital in deed that land was sold for Rs. 4,000—Agreement signed at the time of execution of deed that the price was to be ascertained after survey—Admissibility of agreement in evidence—Evidence Ordinance, s. 92.

Plaintiff sold defendant some pieces of land "fixing (as the deed stated) the price thereof at Rs. 4,000, which amount I (plaintiff) have counted and received in full." The notary in his attestation certified that out of the consideration a sum of Rs. 1,500 was paid in his presence, and that "an agreement receipt was given to settle the balance afterwards." According to the "agreement receipt," which was a contemporaneous document signed by the defendant, the consideration for the deed was a sum to be determined after survey by the number of acres at the rate of Rs. 150 per acre. The plaintiff sued defendant for the balance sum of Rs. 2,500, and the defendant pleaded that the price as ascertained by survey was less than Rs. 1,500, and claimed the sum overpaid (Rs. 280.50) in reconvention.

The District Judge gave judgment for plaintiff, holding that the receipt could not be proved.

Held, that the defendant should have been allowed to prove the receipt.

"As a party to a contract could seek to prove want or failure of consideration, his opponent would not be bound by the recital in the contract either, and it was competent to him, in answer to the case made by the other side, to prove that the consideration was different from that recited in the contract."

THE facts are set out in the headnote.

Bawa K.C. (with him *Canakeratne*), for appellant.

Hayley, for respondent.

Cur. adv. vult.

August 7, 1917. ENNIS J.—

In this case the plaintiff sued for the recovery of Rs. 2,500, the balance due on the sale of certain land. The deed of conveyance declared that the parties had fixed the price at Rs. 4,000, and the plaintiff in the deed acknowledged that he had counted and received this amount in full. The notary in the attestation said that a sum of Rs. 1,500 was paid in his presence, and that "an agreement receipt was given to settle the balance afterwards." The receipt is said to contain a variation of the price, viz., Rs. 150 per acre, instead of Rs. 4,000.

1917.

Ennis J.

Kiri Banda v. Marikar

On a preliminary issue as to whether this receipt was admissible in evidence, the learned Judge gave judgment for the plaintiff holding that the receipt could not be proved.

I am of opinion that in the circumstances of the case the defendant should have been allowed to prove this document. Before the plaintiff culd succeed in his action, it was necessary for him to show that he had not received the Rs. 4,000, and to contradict the statement that he had counted and received the sum. In the case of *Mukhunlal v. Srikrishna Singh* [1] the Privy Council said: When one party . . . . . . is permitted to remove the blind which hides the real transaction . . . . . ., the maxim applies that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist upon its apparent character to prejudice his adversary . . . . The maxim is founded not so much on any positive law as on the broad and universally applicable principles of justice."

In the present case the plaintiff seeks to show that part of the sum of Re. 4,000 has not been paid in relief against his own statement that it had been paid, and he should not be permitted to stop the defendant from showing that no sum is, in truth, due.

I would set aside, with costs, the decree appealed from, and send the case back for hearing in due course.

De Sampayo J.—

I am of the same opinion. By deed No. 14,476 dated April 4, 1916, the plaintiff sold the defendant six contiguous allotments of land, " fixing (as the deed stated) the price thereof at Rs. 4,000 lawful currency of Ceylon, which amount I (the plaintiff) have counted and received in full. " The plaintiff, admitting the receipt of Rs. 1,500 only, has brought this action to recover from the defendant the balance sum of Rs. 2,500. The notary in his attestation certified that out of the consideration a sum of Rs. 1,500 was paid in his presence, and that " An agreement receipt was given to settle the balance afterwards." The " agreement receipt " here referred to was a contemporaneous document signed by the defendant. The extent of the allotments of land dealt with were given in the deed in terms of Sinhalese land measurement, and, according to the " agreement receipt, " the consideration for the deed was a sum to be determined by the number of acres, at the rate of Rs. 150 per acre, when the allotments of land shall have been surveyed. The defendant pleads that this was the real agreement between the parties, though the lump sum of Rs. 4,000 was mentioned in the deed, and that the lands have since been surveyed and found to contain 8 acres 2 roods and 35 perches, and accordingly, in answer to the plaintiff's claim, he says that he has in fact overpaid Rs. 230.50, which he claims in reconvention. At the

[1] *(1869) 12 Moore I. A. 157.*

trial the District Judge upheld an objection taken by the plaintiff to the production of the " agreement receipt " and the reception of parol evidence to prove that the consideration was different from that stated in the deed itself, and judgment was entered for plaintiff with costs of action.

Section 92 of the Ceylon Evidence Ordinance, 1895, now contains the law as to the admissibility of parol evidence, when the terms of any contract, grant, or other disposition of property have been reduced to the form of a document. In such a case it enacts, subject to certain provisos, that no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from the terms of the document. Proviso (1), however, allows any fact to be proved " which would invalidate any document, or which would entitle any person to any decree or order relating thereto, " and among the facts that may be so proved is " want or failure of consideration. " Under this proviso it is open to a vendor to prove that the consideration was not paid, though the deed may contain an acknowledgment of its receipt. But if he seeks to do so, and to go behind his own acknowledgment, the vendee must be allowed also to show the actual agreement between the parties. The principle as laid down by the Privy Council in *Mukhunlal v. Srikrishna Singh* [1] is that " a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. " Applying this principle to the operation of proviso (1) of section 92 of the Indian Evidence Act, of which our Evidence Ordinance is a copy, the High Court of Calcutta decided in *Lala Hiramath v. Llewhallen* [2] that, as a party to a contract could seek to prove want or failure of consideration, his opponent would not be bound by the recital in the contract either, and it was competent to him, in answer to the case made by the other side, to prove that the consideration was different from that recited in the contract. See also *Hukam Chand v. Hira Lal* [3] on the same point. The Privy Council said in *Mukhunlal v. Srikrishna Singh (supra)* that the maxim or rule to which they referred was " founded not so much on any positive law as on the broad and universally applicable principles of justice," and even if proviso (1) of section 92 of the Ordinance does not contain an express provision on this point, I think that, taking those principles of justice as a guide, we ought to hold, as the Indian Courts have done, that it is competent for a party in the position of the defendant in this case to prove the true consideration for the deed, and to set up any defence arising therefrom. It should, however, be noted that illegality, want of consideration, and certain other matters, with regard to which parol evidence is admissible, are mentioned in the proviso by way

[1] *(1869) 12 Moore I. A. 157.*
[2] *(1885) I. L. R. 11 Cal. 486.*
[3] *(1876) I. L. R. 3 Bom. 159.*

of illustration only, introduced as they are by the words " such as." These cases are not exhaustive. The fact of the parties having agreed upon a different consideration from that stated in the deed is one (to use the words of section 92) " which would entitle the defendant to a decree or order," and I think, therefore, that there is positive law as well as principle in support of the above holding.

I agree that the judgment should be set aside with costs, and that the case should be sent back for trial on the other issues.

Set aside and sent back.