Present : Jayewardene A.J. 1923.

KANAGARATNA *v.* BANDA.

161—C. R. Anuradhapura, 11,755.

Mortgage bond—Subsequent oral agreement that mortgagee should cultivate land and take produce in lieu of interest—Evidence Ordinance, s. 92—Ordinance No. 7 of 1840, s. 2—Use and occupation— Obiter dictum.

Plaintiff sued defendant to recover the principal and interest due on a bond. Defendant denied that any interest was due, as subsequent to the date of the bond under a verbal agreement, plaintiff cultivated the land mortgaged and took the produce in satisfaction of interest.

Held, that oral evidence was admissible to prove the agreement.

"The agreement pleaded does not contradict or vary the terms of the mortgage bond. The defendant can prove that the plaintiff received the rents and profits of his land in payment of interest that became due. The defendant cannot, of course, insist on his oral agreement being enforced, and cannot insist on the plaintiff continuing in possession of the property and receiving the rents in lieu of interest that may become due in the future, for that would be to vary the terms of the bond.

THE facts are set out in the judgment.

H. V. Perera, for the appellant.

James Joseph (with him *Rajakariar*), for the respondent.

August 23, 1923. JAYEWARDENE A.J.—

This case raises a small point, but a point of practical importance. The plaintiff sued the defendant on a mortgage bond dated July 11, 1917, to recover the principal, Rs. 100, and the interest due under it which was at the rate of 30 per cent. per annum. The defendant answered admitting that the principal sum alone was due, and stating that the interest had been paid. In the fourth paragraph of his answer he alleged "that in the month of November, 1917, it was agreed between the plaintiff and the defendant that the plaintiff should cultivate the land mortgaged to him and take the produce in satisfaction of the interest due on the said mortgage bond and on a loan of Rs. 20 for which a promissory note was given by the defendant to plaintiff on December 3, 1917. That from the said date the plaintiff got the said land cultivated by his son-in-law, Kiri Banda Arachchi, and took the produce, and thus paid himself the interest due upon the said bond and the said promissory note."

At the trial the proctor for the plaintiff raised the issue "whether oral evidence can be led to prove that plaintiff was allowed to possess

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the mortgaged land in lieu of payment of interest." He argued that an agreement such as is contemplated in the answer created an interest in land, and under section 2 of Ordinance No. 7 of 1840 was not valid without a notarial document. Defendant's proctor argued that " the plaintiff did not possess the land in lieu of interest, but that he paid himself the interest out of the produce of the land."

The Commissioner observed that this was a distinction without a difference, and decided the issue in the negative and gave judgment for the plaintiff. The defendant appeals. It is contended for him that the agreement referred to in the answer does not contradict, vary, add to, or subtract from the terms of the mortgage bond, and that, therefore, section 92 of the Evidence Ordinance does not prevent him from proving the agreement, and that as the agreement has been acted upon and the plaintiff has taken the produce of the defendant's land, it can be proved, notwithstanding the provisions of section 2 of Ordinance No. 7 of 1840. Counsel for respondent supports the judgment and relies very strongly on the local cases of *Mudianse v. Mudianse*,[1] which is a Full Bench decision. So that two points arise for decision in this case: First, whether the agreement contradicts or varies the terms of the bond ; and second, if not, whether it can be proved in view of section 2 of the Ordinance of Frauds. It seems to me that in its essence the agreement pleaded in the answer does not contradict or vary the terms of the mortgage bond. What the mortgagor desires to prove is that the interest payable under the bond has been paid in a particular mode. He does not attempt to supersede or vary the terms of the bond, he recognizes them, but wishes to prove that they have been fulfilled. This is the view taken of agreements of this nature by the Courts of India where section 92 of the Indian Evidence Act is identical with section 92 of our Evidence Ordinance. Thus, in *Ram Bakhsh v. Durjan*[2] which was an action upon a hypothecation bond payable by instalments, it was held that the defendant could prove an oral agreement that the obligee should possess the hypothecated property until the amount due on the bond had been liquidated from the rents. There Edge C.J. said—

> " In this case the only question is, the action being in respect of a bond payable by instalments, and the defendants in answer to the action saying that at the time of the giving of the bond it was orally agreed to let the creditor have possession in lieu of instalments, whether the evidence of that contract, which was not in writing, is admissible. I think it is. It was a contract which did not detract from, add to, or vary the original contract. It was only providing for the means by which the instalments were to be paid. The appellant got possession in accordance with the oral agreement.

[1] *(1895) 2 N. L. R. 86.*

[2] *(1887) 9 All. 392.*

This decision was followed in *Kamala Sahai v. Babu Nundan Main*[1] where Mookerjee and Richardson J.J., referring to a similar agreement, discussed the position more fully, and said—

" But it has been contended before us on behalf of the appellant that the subsequent arrangement by which the mortgagee was placed in possession and was authorized to receive the profits in satisfaction of his dues under the mortgage cannot be proved by oral evidence under section 92 of the Evidence Act. This contention in our opinion is not well founded . . . .

" In order to make section 92 applicable, it has to be shown that the oral agreement or statement was one which had the effect of contradicting, varying, adding to, or subtracting from the terms of the original contract. Now, in the case before us, the effect of the subsequent agreement was not to alter, contradict, add to, or subtract from the terms of the original agreement, but merely to provide means for the satisfaction of the bond.

" The learned vakil for the appellant contended that the effect of the agreement was to alter the term as to payment, because whereas under the instrument the mortgage money was payable on a prescribed date, the effect of the agreement was to substitute another mode of payment.

" In our opinion, the effect of the agreement was not to alter the terms of the contract between the parties. The learned vakil for the appellant conceded that if the mortgagor agreed with the mortgagees to pay money in instalments and did actually pay sums according to such agreement, section 92 would not debar the mortgagor from proving that payments had actually been made. But be contended that although in this case by analogy it might be opened to the mortgagor to prove that the mortgagee had received the profits of the mortgaged property, yet it was not open to the mortgagor to prove that it had been agreed upon between himself and his mortgagee that the value of the profits so received was sufficient to discharge the mortgage debt; or, in other words, although it was open to the mortgagor to prove that the mortgage money had been paid not in cash, but by the profits of the mortgaged property, the agreement, in so far as it provided that this profit during a certain term was to be received in full satisfaction of whatever was due upon the mortgage, could not be established. Obviously there

[1] *(1909) 11 C. L. J. Rep. 39 (41).*

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is no force in this contention, because the latter part of the agreement does not in any way effect the terms of the original contract. The view that we take was adopted by the learned Judges of the Allahabad High Court in the case of *Ram Bakhsh v. Durjan* (*supra*)."

The same view was taken in *Ramsakar v. Tulsi Prosad Singh.*[1] In *Kattika Bapanamma v. Kattika Krist amma*[2] cited by counsel for the appellant, the Madras High Court came to the same conclusion. In that case A had agreed by registered deed to give B for her life an annual amount by way of maintenance, and it was subsequently orally agreed that B should enjoy certain lands in lieu of such maintenance, and B was put in possession. It was held that the subsequent oral agreement to rescind or modify the original written agreement was not receivable in evidence, but that it was open to the defendant to prove that the arrears claimed were actually discharged by B taking possession, although the agreement to discharge cannot be proved. The Court there said—

> "In our opinion the settlement pleaded is an agreement to rescind or modify the original agreement within the fourth proviso to section 92 of the Evidence Act, and as such is inadmissible in evidence, and the plaintiff is entitled to future maintenance at the rate stipulated in the original agreement. But this being a suit for arrears of maintenance for certain years, it was open to the defendant to plead, as he has pleaded, that in discharge of the defendants obligation to pay maintenance for such years, she agreed to take and took possession of certain lands ; and it is immaterial that she is alleged to have taken possession of the land in pursuance of an agreement which cannot be proved. The case appears to be on all fours with *Karampalli Unni Kurup v. Thekku Vittil Muthora Kutti*,[3] and also to be governed by *Goseti Subba Row v. Varigonda Narasimham.*[4] The defendant cannot prove the agreement to discharge the claim for maintenance in the manner alleged, but he may prove that the arrears have been, in fact, discharged in the manner alleged."

This judgment, I think, means that the defendant cannot plead the agreement so as to prevent the plaintiff from claiming future maintenance at the rate stipulated in the original agreement, but the defendant can prove that the plaintiff agreed to take and took possession of certain lands and the obligation to pay arrears of maintenance claimed was discharged.

The allegation in the answer does not, therefore, amount to a variation of the form of the mortgage bond, and the defendant can prove that the plaintiff received the rents and profits of his land in

[1] (*1911*) *14 C. L. J. Rep. 507.*
[2] (*1906*) *30 Mad. 231.*
[3] (*1902*) *I. L. R. 26 Mad. 195.*
[4] (*1903*) *I. L. R. 27 Mad. 368.*

payment of interest that became due. The defendant cannot, of course, insist on his oral agreement being enforced, and cannot insist on the plaintiff continuing in possession of the property and receiving the rents in lieu of interests that may become due in the future, for that would be to vary the terms of the bond, and the plaintiff can, at any moment, give up possession of the property and ask for payment of interest in cash as stipulated in the bond, but the defendant can prove that the liability to pay arrears of interest has been discharged by actual possession and receipt of rents and profits without in any way violating the terms of section 92 of the Evidence Ordinance.

The view taken by the Indian Court is practical and business-like, and should, I think, be adopted if there is nothing in our law which debars us from doing so. This view is not in conflict with the opinion expressed by the majority of the judges in *Mudianse v. Mudianse* (*supra*), for there Withers J. said—

> " I conceive it to be good law that the breach of even a notarial contract for the payment of interest in money may be satisfied by delivery and acceptance of goods, or other consideration equivalent to money in satisfaction of the interest. I consider that proposition to be good law, because the effect of such payment does not contradict or vary the notarial contract, but satisfies the breach of it. That is not the case here. It is not alleged or proved that so much of " interest due under the bond was discharged by delivery and acceptance of an equivalent of the sum due."

But there still remains the further question, even if the facts sought to be proved do not contradict or vary the terms of the bond, can the informal agreement, under which the rents and profits and possession of the property were taken, be proved in view of section 2 of Ordinance No. 7 of 1840 which declares such agreements to be of no force or avail in law unless notarially executed ? It is on this aspect of the case that *Mudianse v. Mudianse* (*supra*) becomes applicable.

In that case, the plaintiff, the mortgagee, sued the heirs of the mortgagor who had died seven years before action leaving a small estate, alleging that the defendants by heirship, possession, and interest represented the estate of the deceased debtor. The mortgage was executed in 1877, and the action was not brought till 1893. In the plaint it was averred—

> " That by an agreement entered between the plaintiff and the deceased debtor in 1880, the plaintiff entered into possession of the mortgaged property, and has been since 1880, and still is, in possession thereof, with the consent of the deceased debtor and defendants, cultivating and taking the produce of same in lieu of interest on the principal sum which the deceased debtor obliged himself to pay by bond dated December 8, 1877."

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The defendants resisted the claim on two grounds : (1) That the plaint did not disclose any cause of action ; and (2) that the claim on the bond was prescribed, as the agreement alleged in the plaint could not be proved in view of section 2 of Ordinance No. 7 of 1840. It was held by Withers and Browne JJ., Lawrie A.C.J. dissenting, that the plaint did not disclose any cause of action against the defendants as it did not indicate what asset or assets any of the defendants as heir-at-law had possessed himself of for the purpose of administration. This ground alone would have been sufficient for the dismissal of the plaintiff's action, but the Court also held, Lawrie A.C.J., again dissenting, that the agreement alleged could not be proved, and that the plaintiff's claim was therefore prescribed Withers J., continuing the passage I have cited above, said—

> " What is alleged is that three years after the execution of the bond the plaintiff, by agreement with the debtor, entered into possession of the property of which he was to take the fruits in lieu of the interest in money payable under the bond.
>
> " Now, to my mind such an agreement went to establish an interest or an encumbrance on land, and was of no force or avail in law, inasmuch as it was not notarial. This agreement was, no doubt, not used here to enforce such an interest or encumbrance. It was used to prove an agreement to substitute one sort of payment for another ; but the provision of section 2 of Ordinance No. 7 of 1840 prohibits the use, to my mind, of this agreement for even a collateral purpose."

Mr. Perera for the appellant, contends that the judgment of the Court regarding prescription and the effect of section 2 of Ordinance No. 7 of 1840 was unnecessary for the decision of the case in view of the decision on the first point, and that it must be treated as an *obiter dictum*. I do not think it could be got rid of in that way. It cannot be regarded as purely *obiter*, for as Black says in his book on " *Judicial Precedents :*"

> " A court's expression of opinion on a point actually involved in the issue and properly before it for determination is not reduced to the level of mere *dictum* by the fact that the actual judgment in the case is ultimately rested upon other ground or grounds."

And recently Warrington L.J., in *Slack v. Leeds Industrial Co-operative Society Ltd.*,[1] said—

> " In order to get rid of the effect of the opinions deliberately expressed by three Judges of this Court, it is in my judgment not enough to say 'they are all mere *dic a.*' They are not views casually expressed on a point not really

[1] *(1923) 1 Ch. 431 at p. 456.*

adequately considered, but they are arrived at and expressed with the same care and deliberation as if they had been necessary for the decision of the case. Although, therefore, they are not absolutely binding as would be an actual decision of the Court necessary to its judgment they are entitled to such weight that we ought to follow them, unless we find that they have been over-ruled, or that they are inconsistent with previous decisions."

In *Amerasekera v. Amerasekera* [1] this Court felt itself bound by that judgment, but proceeded to critically distinguish it from the case before it, Wood Renton C.J. remarking—

"I see no reason why the existence of an agreement for payment may not be established by implication from the circumstances of a case. There is nothing in the case of *Mudianse v. Mudianse* (*supra*) which compels us to hold that proof of an agreement of this character is barred by the absence of a notarially executed instrument. If the matter were *res integra*, I confess that I should be disposed to agree with the dissenting judgment of Lawrie A.C.J. in *Mudianse v. Mudianse* (*supra*). But the facts in that case were different from those now before us."

But there is an earlier Full Court case (*Perera v. Fernando* [2]) which I think is in conflict with the judgment in *Mudianse v. Mudianse* (*supra*). *Perera v. Fernando* (*supra*) was a suit to recover £9. 10*s*. for use and occupation under a parol lease. The question was raised as to whether the plaintiff could recover for use and occupation under such a lease after the Ordinance No. 7 of 1840, section 2. A Full Bench of the Supreme Court, consisting of Creasy C.J. and Temple and Thomson JJ., decided that a landowner can in Ceylon recover for use and occupation without a notarial instrument, if there has been actual use and occupation, and that an action for use and occupation may in effect be regarded as an action for compensation, and that all the evidence which is admissible to prove compensation is admissible in such an action. This case has been followed ever since as laying down good law. See (to mention a few of the cases) *Dissanayake v. Pranciscu*,[3] *Wijesiriwardene v. de Zoysa*[4] (where the application of section 91 of the Evidence Ordinance was considered), *Perera v. Amarasooriya*,[5] *de Silva v. de Silva*,[6] *Jayewickreme v. Arnolis Appu*,[7] and *Nanayakkara v. Andris*[8] where Bertram C.J. said—

"This action (that is, for use and occupation) was formally and authoritatively adopted into our system by *Perera v. Fernando* (*supra*)."

[1] (*1915*) *18 N. L. R. 508.*
[2] *Ram.* (*1863–68*) *86.*
[3] (*1898*) *1 Tamb. 23.*
[4] (*1906*) *1 A. C. R. 43.*
[5] (*1909*) *12 N. L. R. 87.*
[6] (*1913*) *2 C. A. C. 121.*
[7] (*1914*) *C. W. R. 71.*
[8] (*1921*) *23 N. L. R. 193* (*201*).

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It has also been held that a person entering into possession on a parol lease may be treated either as a monthly tenant, or as a tenant at will (*Wambeck v. Le Mesurier*,[1] *The Secretary of State for War v. Ward*,[2] and *Buultjens v. Carolis Appu*[3]), and that the terms of the parol agreement may be proved to show what would be a fair compensation to allow for use and occupation (*Perera v. Fernando* (*supra*), *Perera v. Amarasooriya* (*supra*), *de Silva v. de Silva* (*supra*), *Wambeck v. Le Mesurier* (*supra*), and *Nanayakkara v. Andris* (*supra*)) where the matter was considered afresh. And, of course, an action for use and occupation does not lie unless there has been a contractual relationship, express or implied, between the parties (*Isaa Maricar v. Andris Appu*[4]). Thus *Perera v. Fernando* (*supra*) and the cases based on it lay down that when a person is let into possession of immovable property under an agreement invalid in law, he is liable to pay compensation and can be sued in an action for use and occupation or as a monthly tenant, or a tenant at will, and the agreement can be proved for the collateral purpose of showing what would be a fair compensation. Thus in *Jayawickreme v. Arnolis* (*supra*) the compensation claimed and allowed was a share of a crop of paddy, and in *Nanayakkara v. Andris* (*supra*) a share of the gems found.

When analysed, the defendant's plea in the present case amounts in substance and in effect to a claim for compensation for use and occupation, coupled with an allegation that the compensation due has been paid and satisfied in a particular way. Defendant let the plaintiff into possession of his field, the plaintiff agreeing to pay him a share of the produce or profits. Defendant owed plaintiff money. Defendant asked plaintiff to take his share in payment of the debt. The defendant might have claimed the value of his share as compensation for use and occupation by way of counterclaim in the case, or he might, if the present plea is rejected, bring an action making the same claim. In such an event, the defendant, according to the authorities, would be entitled to prove all the facts necessary to sustain his action—the agreement and possession under it.

The principle laid down by the Full Court in *Perera v. Fernando* (*supra*) is, therefore, in direct conflict with the Full Bench decision in *Mudianse v. Mudianse* (*supra*)—

> " When a court is confronted by two conflicting decisions of Courts of co-ordinate jurisdiction, it must decide which of them it must follow (see *10 N. L. R. 148*) "—

said Hutchinson C.J. in *Perera v. Amarasooriya* (*supra*).

In the circumstances I prefer to adopt the judgment of this Court in *Perera v. Fernando* (*supra*), the soundness of which has never

[1] (*1898*) *3 N. L. R. 105.*
[2] (*1901*) *2 Br. 256.*
[3] (*1919*) *21 N. L. R. 156.*
[4] (*1907*) *10 N. L. R. 178.*

been questioned and which has been consistently followed for the last sixty years.

In my opinion, therefore, the defendant is entitled to prove that the plaintiff entered on his land and cultivated it, and that by agreement his share of the rents and profits was set off against what was due by him to the plaintiff by way of interest on the bond.

In *Nanayakkara v. Andris* (*supra*) Bertram C.J., in meeting a contention put forward for the appellant that in an action for use and occupation only a reasonable sum of money could be recovered, and that the alleged special agreement by which the defendants were to pay the respondents half the value of the gems found could not be used as evidence of the *quantum* of compensation, said—

> "It is quite true that there is no case in the books where in an action for use and occupation the compensation has been assessed as a proportion of the profits. But that is not conclusive. Local customs must be regarded. I see no reason why such a method of assessment should not be adopted when the agreement is that a certain proportion of the crops should be paid as rent. Equally, I see no reason why such a course should not be taken when the agreement is for a fixed proportion of the value of the gems found. If the agreement can be used as evidence of the *quantum* of compensation when a rent is fixed in the ordinary form, I see no reason why it should not be so used when the rent agreed upon is a proportion of the tenant's revenue derived from the land of whatever character."

If that be so, much more can the defendant here prove that what was due to him, which might have been paid either in kind or in money, was to be taken in discharge of what was due from him. Such an agreement does not involve any interest in land, and is not invalid under any provision of our law.

I accordingly allow the appeal and send the case back for adjudication on the merits. The appellant is entitled to his costs of appeal.

Set aside.