[APPELLATE CIVIL JURISDICTION.]

1874.
July 6.

Special Appeal No. 17 *of* 1874.

GIRDHAR NA'GJISHET .....*Appellant.*

GANPAT MOROBA' and BHA'GIRTHIBA'I KOM MOROBA' .....*Respondents.*

Regulation XVIII. of 1827, *Section* 10 *et seq.—Objection to the validity of a document —Objection on the merits.*

An objection to the validity of a document under Regulation XVIII. of 1827, as distinguished from its inadmissibility in evidence, or from a prohibition to courts of justice or public officers to act upon it, is an objection on the merits under Act VIII. of 1859.

Where two documents were executed in the Island of Bombay, respectively, under date the 29th August 1851 and 4th August 1852, and did not appear to have been originally *expressly* intended to operate within any of the zillahs subordinate to the Presidency of Bombay, *Held* that they did not come within the scope of Regulation XVIII. of 1827. That regulation, being an enactment imposing stamp duties upon the subject, must be strictly construed, and although the High Court believed that those documents were *actually* intended to operate, so far as the particular property in question in the suit was concerned, in the zillah of Tanna, the High Court declined to hold "expressly" to mean the same as "actually," as nothing appeared on the face of either of those documents to show where the property mentioned in them was situated.

A and *B*, two undivided Hindu brothers, conveyed to their mother, *C*, one-third share in the ancestral property of the family by a deed of sale, dated 29th August 1851. Subsequently, *A* sold his one-third share in the joint ancestral property to *B* by a deed dated the 4th August 1852. In a suit brought by a judgment-creditor of *A* in 1868 to recover *A's* half share in the joint property from *B* and *C*, the plaintiff gave in evidence proceedings taken by *A* jointly with his brother *B* in 1856 against a third person, relating to the joint property, with a view to show that the two documents were illusory, and intended to screen *A's* share from execution by his creditors:

Held that such proceedings were important and relevant evidence, in order to test the *bona fides* with which *A* executed the two documents, as it was important to ascertain how *A* subsequently demeaned himself with regard to the property, his share or interest in which he purported to convey by those documents.

THIS was a special appeal from the decision of W. H. Crowe, Assistant Judge at Tanna, reversing the decree of the Subordinate Judge of Panwel.

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Girdhar Nágjishet brought this suit to establish the right of his judgment-debtor, Bhagvantráv Morobá, to half of the ancestral property in the possession of his brother, Ganpatráv Morobá, and his mother Bhágirthibái. The defendants pleaded partition of the family property into three equal shares, two of which were allotted respectively to the two brothers and the remaining one to their mother (Exhibit No. 10). They further stated that subsequent to this partition, Bhagvantráv had sold his one-third share to Ganpatráv Morobá by a deed (Exhibit No. 9) dated the 4th August 1852. The Subordinate Judge decreed the plaintiff's claim in his favour. That decree, however, was reversed in appeal by the Assistant Judge, for reasons which are contained in the following extract from his judgment :—

"The plaintiff sues to have certain land declared to be the property of his judgment-debtor, Bhagvantráv Morobá. The defendants admit that the property formed originally part of their ancestral immoveable property, but allege that they purchased the share of the plaintiff's judgment-debtor, Bhagvantráv. The 3rd issue relates to the *onus probandi*, which, in my opinion, rests clearly on the plaintiff. It is for him to show that the property in dispute is the property of his judgment-debtor, or was so at the date of attachment. The plaintiff is in a position not differing from that of any other plaintiff, and must prove his case. This case differs from that of *Nathu Sadáshiv* v. *Rámchandra Annáji* (*a*), where it was held that the *onus* lay, not on the decree holder, but on the intervenor, inasmuch as in that case the plaintiff had already been unsuccessful in an application under Section 246 of the Civil Procedure Code.

"The defendants admit that the property was originally ancestral, and that they became possessed of Bhagvantráv's share by a deed of acquittance. Now, bearing in mind the presumption of Hindu law regarding joint property and joint families, I opine that the *onus* is now shifted on to the defend-

(*a*) 5 Bom. H. C. R. 76 A.C.J.

ants, and that it will be for them to show that they became the purchasers of the share of Bhagvantráv. With this view Exhibits Nos. 9 and 10 are recorded in the case, and objection to their being admitted is taken by the pleader for the plaintiff on the ground of their not being stamped. On a reference to the stamp law bearing on the point, Regulation XVIII. of 1827, Section 11, it appears that Nos. 9 and 10, though executed beyond the zillahs subordinate to the Presidency of Bombay, yet, being intended to take effect within those zillahs, are not valid, unless duly stamped. The question now arises whether their having been admitted is a ground for reversing the decision. Section 350 of the Civil Procedure Code provides that no decree shall be reversed on account of any irregularity or error not affecting the merits of the case. It is true that the plaintiff raised an objection to the admission of these documents in the Court of first instance, but this objection having been overruled, I am inclined to be guided by the precedents in the High Court of Calcutta, and to hold that the irregularity, though it affected the Government revenue, did not affect the merits of the case: *Mark Ridded Currie* v. *S. V. Mutti Ramen Chitty* (*b*), *Lalji Sing* v. *Syad Akram Ser* (*c*), *Shrimath Saha* v. *Saroda Gobindo Chrowdhry* (*d*), *Enayetoollah* v. *Shaikh Meajan* (*e*). I know of no ruling on this point by the High Court of Bombay by which I could be guided. Exhibit No. 10 is a deed of sale dated August 1851, by which a one-third share of the estate, which Bhagvantráv Morobá and Ganpatráv Morobá inherited from their father, is sold to his widow, Bhágirthibái, defendant No. 2. Exhibit No. 9 is a deed of sale by which Bhagvantráv disposes of his entire right, title, and interest in the ancestral property to the two present defendants. It is dated 1852, or 13 years before the institution of the present suit. The execution of these two documents is proved by witnesses Nos. 90 and 101. The Lower Court refused to record the evidence of witness No. 90, under Section 179 of the Civil Procedure Code. I consider this order was a wrong one. Section 179

(*b*) 3 Beng. L. R. 126 A. C. J. (*c*) *Id.* Ib. 235.
(*d*) 5 Beng. L. R. 10 Appx. (*e*) 16 Calc. W. R. 6 Civ. Rul.

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provides that a deposition taken under a Commission shall not be read in evidence without the consent of the party against whom it may be offered, unless it be proved that the deponent is beyond the jurisdiction of the court, &c., &c. Now, the deponent in the present instance was a resident of the town of Bombay, as appears from the deposition itself, and, therefore, beyond the jurisdiction of the court of Panwel. There was no necessity, therefore, to prove the sickness of the deponent, as on the other ground the deposition was admissible without question.

"Regarding these two documents, Nos. 9 and 10, the contention of the plaintiff is that they are collusive, and he relies on the want of adequate consideration, as shown by the documents themselves and on witnesses Nos. 31 and 72 and the position of the parties to those deeds. Though the documents are in the nature of deeds, that is to say, written instruments sealed and delivered, if fraud be proved, they will be considered void. Exhibit No. 10 purports to convey from Bhagvantráv Morobá and his brother, Ganpatráv Morobá, to their mother, Bhagirthibái, a one-third share of their deceased father's estate, in consideration of a sum of Rs. 3,001 being paid by Bhágirthibái in cash. The payment of the money is attested separately at the end of the deed, and witness No. 90 speaks to the fact of its having been made. Exhibit No. 9 assigns the entire interest of Bhagvantráv in the ancestral property to his mother and brother for the sum of Rs. 15,600, to which amount he had incurred debts. The reason assigned for this transaction is, that Bhagvantráv was a man of extravagant habits, and was in debt. It is contended by the defendants that these two deeds operate as a deed of partition of the family property, and that certainly is the effect of them, or rather of No. 9. It may well be that the defendants, seeing a probability of their family estates being wasted by the lavishness of the elder son, would be only too glad to get him out of the concern by any means in their power, and it is only natural to suppose that Bhagvantráv, if, as he is described, he was a man of spendthrift habits, would be ready to part

with his interest in the property for sums of money in cash. It is not contended that the property has ever been divided, and a number of precedents are quoted to show that it is not necessary for a partition in the estate that there should be any actual division of the lands: *Mussamut Jusoda Koonwar* v. *Gourie Byjonáth Sohae Sing* (*f*), *Lalla Shriper-shád* v. *Mussamut Akoonjoo Koonwar* (*g*), *Lalla Mohabeer Per-shád* v. *Mussámut Kundur Koowar* (*h*), *Appovier* v. *Rámá Subba Aiyan* (*i*). All that is required by Hindu Law being that the shares shall be defined, and that there shall be distinct and independent enjoyment. Witnesses Nos. 31, 36, 37, 89, 90, all prove that Bhagvantráv is separated from the family, and though the sale to relations is open to suspicion, yet, under the circumstances of this case, there is nothing to show that it was made at this long interval of time with a view to defraud creditors, or that it is tainted with fraud in any way. The plaintiff relies further, to some extent, on the evidence of No. 31, who proves that five or six years before his deceased brother received an *ákhtiár patra* from Ganpatráv and Bhagvantráv together, and that their joint interest may be presumed therefrom. He states, however, that Bhagvantráv had nothing to do with the produce of the land, and that Ganpatráv was in enjoyment of it. Similarly No. 72 is relied on to show that the two brothers sued together as co-plaintiffs in respect to certain ancestral property, and, although this decree was not between the same parties, yet it should be used in favour of a stranger against one of the parties thereto for what it is worth, following the ruling in *Bhyrub Nath Toee* v. *Kally Chunder Chowdhry* (*j*). There is one fatal objection to its being used, or at least too much weight being attached to it, that the suit was brought in 1856 before Act VIII. of 1859 came into operation.

"I consider that the circumstances of the present case do not warrant the presumption of fraud. The contract of sale (Exhibit No. 9) between the brothers is evidence, to my

(*f*) 6 Calc. W. R. 139 Civ. Rul. (*g*) 7 *Idem.* 488 Civ. Rul.
(*h*) 8 *Idem.* 116 Civ. Rul. (*i*) 11 Moore I. A. 75.
(*j*) 16 Calc. W. R. 112 Civ. Rul.

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mind, of a partition of estate, and, if Bhagvantráv had remained in enjoyment of any share of the family property from 1852 up to the date of the present suit, evidence of such enjoyment would have been forthcoming. I consider that the interest possessed by Bhagvantráv did pass to the defendants by Exhibit No. 9, and that their title is valid and good. I reverse the decree of the Lower Court, and find for the appellants. Costs on the respondent throughout."

In special appeal it was contented, on behalf of the plaintiff, that (I.) Exhibits 9 and 10 were invalid for want of the proper stamps and should not have been admitted, and (II.) the objection to using Exhibit No. 72 against the respondents was not valid.

The special appeal was argued before WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J.

Vishvanáth Náráyan Mandlik for the special appellant.

Nagindás Tulsidás for the special respondents.

The judgment of the Court was delivered by

WESTROPP, C.J. :—The plaintiffs, in their appeal, allege that the documents of the 29th August 1851 (Exhibit No. 10) and the 4th of August 1852 (Exhibit No. 9) are, under Regulation XVIII. of 1827, Sec. 10 *et seq.* (the stamp law for the mofussil of this Presidency in force at their respective dates), invalid, as being unstamped.

The defendants say that such an objection is not open to the plaintiffs on appeal or special appeal, the Subordinate Judge having admitted those documents in evidence which were objected to before him as being unstamped, and that his decision as to their admissibility is conclusive. For this proposition the defendants rely on the cases reported at 16 Calc. W. R. 6 Civ. R.; 11 Calc. W. R. 520 ; 3 Beng. L. R. 126, 235 ; 5 Beng. L. R. Appx. 10, as showing that the objection is not an objection on the merits or to the jurisdiction, and, therefore, not within Section 350 of the Civil Procedure Code.

But the enactments, on which those cases were decided, do not declare unstamped documents to be invalid, as does Regulation XVIII. of 1827. We, therefore, regard those cases as inapplicable to the present question, as we are clearly of opinion that an objection to the validity of a document, as distinguished from its inadmissibility in evidence, or from a prohibition to courts of justice or public officers to act upon it, is an objection on the merits, and, therefore, that we must consider the objection.

It appears that those documents were executed in the Island of Bombay, where at that time there was not any stamp law in force, and we cannot say that they were originally expressly intended to operate within any of the zillahs subordinate to the Presidency of Bombay so as to bring them within the scope of Regulation XVIII. of 1827. The Regulation, being an enactment imposing stamp duties upon the subject, must be strictly construed (*k*), and although we fully believe that those documents were actually intended to operate, so far as the property now in dispute is concerned, in the zillah of Tanna, we cannot hold "expressly" to mean the same as "actually." There is nothing on the face of either of the exhibits 9 and 10 to show where the property mentioned in them was situated. It is quite possible, nay more, it would seem to be certain, that Morobá, the father of the defendants Bhagvantráv and Ganpatráv, left property in the Island of Bombay as well as in Tanna Zillah. Those documents show that letters of administration of his separate property had been granted to the defendant Bhágirthibái, his widow, and the two exhibits 9 and 10 seem to have been intended to operate on that property as well as on the Tanna property. But, it not appearing *expressly* on either of those exhibits that they were intended to operate in Tanna Zillah, we cannot regard them either as invalidated or inadmissible for want of a stamp.

There remains the objection that the Assistant Judge declined to regard the suit instituted on the 24th January 1856, in

(*k*) See the authorities collected in *Dullabh Shivlal* v. *Hope*, 8 Bom. H. C. Rep. 216, 217, A.C.J.

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which a decree (Exhibit 72) was made on the 8th December 1856, as relevant evidence in this cause. On this point we are of opinion that the Assistant Judge fell into a serious error; so far as we can conjecture, he would appear to have been misled by an imperfect recollection of Section 2 of Act VIII. of 1859 and of its scope. We are of opinion that in order to test the *bona fides*, with which Bhagvantráv executed the exhibits 9 and 10, it was most important to ascertain how Bhagvantráv subsequently demeaned himself with regard to the property, his share or interest in which he thereby purported to convey. If, notwithstanding those conveyances, he still took an active part in managing or interfering with or using or suing for any part of the property affected by either of those deeds (9 and 10), such conduct, if not resisted by his mother or brother, Ganpatráv, would tend to show that those exhibits were illusory, and merely intended to screen Bhagvantráv's share from executions by his creditors. Therefore, proceedings in courts of justice, taken by Bhagvantráv jointly with Ganpatráv, would be important evidence which the Assistant Judge should have weighed in connexion with the other circumstances of the case. He has evidently thought that he was not bound to take such circumstances into his consideration, and we must, therefore, remand the suit for a fresh trial on the merits. On such trial, it will be necessary that the Assistant Judge should place in one scale the exhibits 9 and 10, and all circumstances which tend to show that they were executed and acted on *bonâ fide* by both brothers, as, for instance, that they gave up, under Exhibit No. 10, possession or enjoyment of a third share in the property, mentioned in that exhibit, to their mother Bhágirthibái; or as to Exhibit No. 9 that Bhagvantráv gave up complete or at all events substantial possession of his one-third of the property covered by it to Ganpatráv and Bhágirthibái; and the Assistant Judge should place in the other scale the fact, not perhaps conclusive, if it be the fact, that the property or a considerable portion of it stood in the Government Books in the name of Bhagvantráv until a comparatively recent period, and any circumstances, such as those referred to by the Sub-

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ordinate Judge, or evidence tending to show that he sued for or enjoyed partially or wholly his one-third share, or exercised control over it or managed and exercised control over the property at large subsequently to the execution of exhibits 9 and 10.

This Court does not intend by these remarks in anywise to express an opinion as to the merits of the case, but merely desires to show what the process of investigation should be.

[APPELLATE CRIMINAL JURISDICTION.]

REG. *v.* BALVANT V. PENDHA'RKAR.

July 9.

Acquittal by Jury—Conviction by High Court—Confession—Sec. 24 of Act I. of 1872—Section 263 of the Code of Criminal Procedure.

In the absence of evidence that a confession of an accused person has been induced by illegal pressure, it is not to be presumed that such confession was so induced.

According to Section 24 of the Indian Evidence Act, a confession is inadmissible only if the Court considers it to have been induced by illegal pressure. Where the Session Judge did not consider a confession to have been so induced, the High Court, upon a reference under Section 263 of the Code of Criminal Procedure: *Held* it to have been properly admitted, and finding it to be full and clear, and supported by reliable evidence, acted upon it by convicting the person who made it, notwithstanding his retraction of it in the Court of Session, and his being found not guilty by the Jury.

THE accused was tried on a charge of forgery by N. Daniell, Session Judge of Poona, and a Jury. The majority of the Jury were of opinion that the accused should be acquitted; but the Session Judge, differing from them, submitted the proceedings under Section 263 of the Code of Criminal Procedure.

The case was heard by NA'NA'BHA'I HARIDA's and LARPENT, JJ.

Dhirajlál Mathurádás, Government Pleader, for the Crown:—There is no question that the bills presented by the accused have been altered. The accused made a full confession of his guilt before the Magistrate, although he afterwards retracted it in the Session Court, on the ground of its having