what documents he is required to produce. I think, on the authority of *Quilter* v. *Heatley* (1), the defendant is entitled to see them, although he has not yet filed his written statement.

Summons made absolute.

Attorney for the plaintiff :—Mr. *Shroff*.
Attorneys for the defendant :—Messrs. *Chitnis, Motilal and Malvi.*

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18 B. 369.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

CHENBASAPA AND ANOTHER (*Original Defendants*), *Applicants* v. LAKSHMAN RAMCHANDRA (*Original Plaintiff*), *Opponent.** [22nd June, 1893.]

Stamp Act (I of 1879), *s.* 34—*Evidence*—Hundis *inadmissible under Stamp Act, but admitted by defendant—Admission.*

In a suit brought upon two *hundis*, which were inadmissible in evidence for want of impressed stamps, the Judge allowed the claim, holding that the defendants' admissions in their written statement rendered it unnecessary to put the *hundis* in evidence.

Held, reversing the decree, that a *hundi* is "acted upon" where a decree is passed on it, whether proved or admitted, and that the Court cannot give effect to it in either case.

[**F.**, 30 M. 386=17 M.L.J. 308 (309); 2 L.B.R. 103 (104); 7 Ind. Cas. 320=8 M.L.T. 251; **R.**, 25 A. 509 (525)=23 A.W.N. 104; 18 B. 745 (747); 24 B. 360 (366); 11 C.L.J. 426 (430)=14 C.W.N. 703=6 Ind. Cas. 549; 17 C.L.J. 399=19 Ind. Cas. 848; 16 Ind. Cas. 33; 66 P.R. 1906=73 P.L.R. 1907; U.B.R. (1897—1901), 556; **Cons.**, 12 Bom.L.R. 466 (470)=6 Ind. Cas. 903; 4 Ind. Cas. 1086=U.B.R. 1909, 4th Qr., Stamp, 36; 2 L.B.R. 333 (335); **D.**, 18 B. 614 (616).]

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the appellate decree of J. L. Johnston, District Judge of Dharwar.

The plaintiff sued to recover from the defendants Rs. 276-4-0 alleged to be due on two *hundis*.

The defendants Chenbasapa and Basaya resisted the plaintiff's claim on the ground that the first *hundi* was satisfied by the substitution of another payable at sight, and that no money was received for the second.

[370] The Subordinate Judge rejected the claim, holding that the *hundis* not being stamped according to the provisions of art. 11, sch. I of the Indian Stamp Act (I of 1879), were inadmissible in evidence, and that no secondary evidence in support of the claim which was based on the *hundis*, could be taken under s. 65 of the Indian Evidence Act (I of 1872).

On appeal by the plaintiff urging, among other grounds, that he should have been permitted to adduce evidence of payment to the defendants otherwise than by the *hundis*, the District Judge reversed the decree and allowed the claim on the following grounds :—

"The defendant appears to admit his liability under the first *hundi*. He alleges also that Rs. 150 are due to him from the plaintiff on account

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* Application No. 162 of 1892 under Extraordinary Jurisdiction.

(1) 23 Ch. D. 42.

of *ganja*, for which plaintiff was surety and for which defendant drew the *hundi* for Rs. 88. The burden of proving these allegations rests on defendant. He has not discharged it. He is, therefore, still liable for the amount of the *hundis* admitted by him, and of which he has not proved payment. By his admission the defendant has supplied the plaintiff's want of independent evidence of consideration for his *hundis*. The lender of money can recover the original consideration—*Golap Chand* v. *Thakurani* (1). There was sufficient admission of the *hundis* by the defendant in his written statement. *Damodar* v. *Atmaram*(2) seems unopposed to this view, as the defendant admits that the money was lent to him."

The defendants applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling on the plaintiff to show cause why the decree should not be set aside on the ground that the Judge erred in law in holding that the plaintiff's claim could be allowed, although the *hundis* on which the suit was brought were inadmissible in evidence for want of impressed stamps.

Vishnu K. Bhatavdekar, appeared for the plaintiff to show cause:—Assuming the *hundis* to be inadmissible, consideration can be proved *aliunde*—*Golap Chand* v. *Thakurani* (1). Here the *hundis* were not drawn on money deposited, but were given in [371] payment of the price of goods sold. We could, therefore, fall back upon our original cause of action—*Sheikh Akbar* v. *Sheikh Khan* (3) ; *Hira Lal* v. *Datadin* (4) ; *Krishnasami* v. *Rangasami* (5). Further, we were saved from the necessity of proving consideration, because the defendants pleaded payment. The burden of proof was upon them, and the Judge says that they have not discharged it. The case of *Damodar* v. *Atmaram* (2) is distinguishable on the ground of the decision in *Sheikh Akbar* v. *Sheikh Khan* (3).

Ghanasham N. Nadkarni, appeared for the defendants in support of the rule. He relied upon *Damodar* v. *Atmaram* (2).

JUDGMENT.

SARGENT, C. J.—The opponent in this application sues the applicants on two *hundis*, which, it is not disputed, were inadmissible in evidence for want of impressed stamps. The lower appeal Court, however, awarded the plaintiff's claim on the ground that the applicants' admissions in their written statement rendered it unnecessary to put the *hundis* in evidence.

In *Ankur Chunder Roy* v. *Madhub Chunder Ghose* (6), Sir R. Couch seems to have thought that the language of the Indian Stamp Act of 1869, which prohibits a *hundi* not properly stamped not only from being received in evidence but from being acted on in any manner, precluded the application of the English cases under the Stamp Acts. He did not, however, decide the point, considering that the defendants' admissions of the contents of the *hundi* were not such as to dispense with its production in evidence. In *Damodar* v. *Atmaram* (2), the same question arose and was disposed of apparently by Mr. Justice Birdwood in the same manner as in *Ankur Chunder Roy* v. *Madhub Chunder Ghose*. Mr. Justice Jardine's remarks, however, on that case would seem to show that he thought that the defendants' admissions were precluded by the language of the Stamp Act.

It being necessary in this case to decide on the effect of the Stamp Act, it appears to us that the *hundi* is "acted upon" where a decree is passed on it, whether proved or admitted, and that owing to the language

(1) 3 C. 314. (2) 12 B. 443. (3) 7 C. 256.
(4) 4 A. 135. (5) 7 M. 112. (6) 21 W.R. 1.

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of the Stamp Act the Court cannot [372] give effect to it in either case. The lower appeal Court was, therefore, wrong in deciding in favour of plaintiff's claim on the ground of defendants' admissions. But it appears, from the grounds of the plaintiff's appeal to the lower Court, that he complained that the first Court had not permitted him to adduce evidence of payment to defendant otherwise than by the *hundis*. It will be necessary for the lower appeal Court to deal with this objection, and in doing so it will be advisable for it to consider the judgments in *Damodar* v. *Atmaram* (1) *Golap Chand* v. *Thakurani* (2) and *Sheikh Akbar* v. *Sheikh Khan* (3).

We must, therefore, in the exercise of our extraordinary jurisdiction reverse the decree of the Court below and send back the case to be disposed of afresh having regard to the above remarks. Costs to abide the result.

Decree reversed and case sent back.

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18 B. 372.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

BABAJI (*Original Defendant*), *Appellant v.* KRISHNA AND ANOTHER (*Original Plaintiffs*), *Respondents.** [28th June, 1893.]

Fraud—Sham transaction—Fraudulent conveyance—Suit for possession by purchaser of land—Defence that the sale to plaintiff was a sham transaction to defraud creditors.

The plaintiff sued for possession of certain land, which he alleged he had purchased from the defendant under a registered sale deed dated 10th November, 1876. The defendant pleaded that the deed was a sham deed and without consideration, and had been executed by him merely to save the land from his creditors.

Held, that the plea was good, and that it was open to the defendant to defend his possession by showing that the real transaction between himself and the plaintiff was to defraud, whether a third party or his creditors generally.

[**N.F.**, 4 Ind. Cas. 233=5 N.L.R. 146 (148); **Rel.**, 8 O.C. 278 (281); **R.**, 23 B. 406 (412); 33 C. 967 (982)=4 C.L.J. 22=10 C W.N. 650; 8 C.W.N. 620 (621); 1 O.C. 188 (189); 3 P.R. 1906=109 P.L.R. 1906; U.B.R. (1897—1901) 544; **D.**, 23 C. 962 (964).]

THIS was a second appeal from the decision of T. Walker, Assistant Judge of Satara.

The plaintiff Krishna bin Apa Surve and his assignee Hari Narayan Jog sued the defendant Babaji bin Sadu Kirdak to [373] recover possession of certain land, alleging that it had been sold by the defendant to plaintiff Krishna under a registered sale-deed dated the 10th November, 1876, and had been delivered into his possession, but that subsequently the defendant dispossessed him.

The defendant denied that the plaintiff was ever put in possession, and alleged that the sale-deed sued upon was a sham deed and without consideration, and was executed by him (the defendant) merely to screen the property from attachment and sale by his creditors.

The Subordinate Judge found that the transaction between the parties was a mortgage and not a sale, and was intended, the consideration

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* Second Appeal, No. 99 of 1892.

(1) 12 B. 443. (2) 3 C. 314. (3) 7 C. 256.