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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.*

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

\* Second Appeal, No. 99 of 1892.

(1) 12 B. 443.

(2) 3 C. 314.

(3) 7 C. 256.

being inadequate, for the protection of the property against the defendant's creditors. He, therefore, passed the following order:—

"The plaintiffs may recover from the defendant the possession of the property as described in the plaint, not as purchasers but merely as mortgagees of the land. The defendant shall bear the costs of himself and the plaintiffs."

On appeal by the plaintiffs the Assistant Judge found that the sale was a genuine transaction. He, therefore, reversed the decree and allowed the plaintiffs' claim to recover possession of the land as purchasers, observing:—

"Neither party alleges that the sale-deed (Ex. 13) the execution of which is not disputed, was a mortgage. The decree of the lower Court accordingly cannot stand, as it was not open to the Subordinate Judge to find that the deed was a mortgage. It remains to decide whether there was genuine sale or not. Defendant's statement, that Ex. 13 was passed to save the property from being taken by his creditors, amounts to this, that he committed an act punishable under s. 206 of the Indian Penal Code; and he can hardly expect a Court of Justice to support him in such a cause. \* \*\*"

The defendant preferred a second appeal.

*Inverarity* (with *Manekshah J. Taleyarkhan*), for the appellant (the defendant).—The Judge was wrong in refusing to consider [374] our case at all—*Ram Surun Singh v. Mussamat Pran Peary* (1); *Sreemutty Debia Chowdhraïn v. Bimola Soonduree Debiz* (2); *Mahadaji Gopal v. Vithal Ballal* (3); *Dharma Sakharam v. Nago* (4); *Chenvirappa v. Puttappa* (5). The last three rulings are distinguishable. We contend, on the strength of the above authorities, that we are entitled to show that the transaction in dispute was a sham sale to the plaintiff. The property is worth a great deal, and yet it purports to have been sold for one hundred rupees only.

*P. M. Mehta* (with *Balaji Abaji Bhagavat*), for the respondents (plaintiffs).—The reason why the Judge did not enter into the merits of the transaction was that immediately after the sale to the plaintiff No. 1 he was put into possession and held possession for nearly twelve years. The finding as to whether a transaction is a sham or not, is a finding of fact. Both the lower Courts have concurred in saying that it is not a sham. They have differed merely with respect to its nature. Mere inadequacy of consideration would not render a transaction fictitious. Both the Courts have found that possession was given to us *bona fide*, and that we paid the assessment.

#### JUDGMENT.

SARGENT, C.J.—The judgments of the Privy Council in *Ram Surun Singh v. Mussamat Pran Peary* (1) and of the Calcutta High Court in *Sreemutty Debia Chowdhraïn v. Bimola Soonduree Debiz* (2) as delivered by Sir R. Couch show that it is 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 the defendant's creditors generally. The decision by Sir M. Westropp and Melvill, J., in *Mahadaji Gopal v. Vithal Ballal* (3), followed in *Dharma Sakharam v. Nago Badgu* (4), turns

(1) 13 M.I.A. 551.  
(4) P.J. (1890), p. 275.

(2) 21 W.R. 422.

(3) 7 B. 78.  
(5) 11 B. 708.

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upon the special circumstances which in those cases were deemed to estop the defendant from pleading such a defence.

The general question is much discussed in *Chenvirappa v. Puttappa* (1), but we do not find that any authority of a Court of equity is referred to in that case, which questions the right of the [375] defendant to plead such a defence whatever doubt there may be as to the plaintiff's right to avoid his own deed by setting up his own fraudulent act. As the lower Court of appeal has refused to consider this defence by the defendant, and has disposed of the suit solely on the ground whether there was a valid sale independently of the question of fraudulent intention, we must send down the following issue for determination:—

Was the deed in question a colourable transaction intended to defraud the defendant's creditors?

The finding to be transmitted to this Court within two months. When the finding is returned, it will be open to plaintiffs, if the finding be in the affirmative, to contend that the defendant not having appealed against the finding of the Subordinate Judge cannot claim to keep the property unburdened by the mortgage-debt as found by the Subordinate Judge.

*Issue sent down.*

18 B. 375.

#### APPELLATE CIVIL.

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

BAI HARKOR (*Original Petitioner*), *Applicant v.* BAI SHANGAR  
AND ANOTHER (*Original Opponents*), *Opponents*.\* [29th June, 1893].

Act VIII of 1890, s. 39 (1)—*Guardian and ward—Minor—Removal of guardian—“Instrument”—Construction.*

The word “instrument” in s. 39 of the Guardian and Wards Act (VIII of 1890) means instruments *ejusdem generis* with a will, and a decree of a Civil Court is not an instrument within the contemplation of the section.

THIS was a reference made by Gilmour McCorkell, District Judge of Ahmedabad, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

[376] One Lallu Khimchand died, leaving him surviving his widow Bai Harkor (the petitioner), a son Chotalal and a daughter Chanchal.

\* Civil Reference, No. 2 of 1893.

(1) 11 B. 708.

(2) Section 39 of the Guardians and Wards Act, VIII of 1890:—The Court may, on the application of any person interested, or of its own motion, remove a guardian appointed or declared by the Court, or a guardian appointed by will or other instrument, for any of the following causes, namely:—(a) for abuse of his trust; (b) for continued failure to perform the duties of his trust; (c) for incapacity to perform the duties of his trust; (d) for ill-treatment, or neglect to take proper care of his ward; (e) for contumacious disregard of any provision of this Act or of any order [376] of the Court; (f) for conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward; (g) for having an interest adverse to the faithful performance of his duties; (h) for ceasing to reside within the local limits of the jurisdiction of the Court; (i) in the case of a guardian of the property, for bankruptcy or insolvency; (j) by reason of the guardianship of the guardian ceasing or being liable to cease under the law to which the minor is subject;

Provided that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed (a) for the cause mentioned in cl. (g) unless the adverse interest accrued after the death of the person who appointed him, or it is shown that that person made and maintained the appointment in ignorance of the existence of the adverse interest, or (b) for the cause mentioned in cl. (h), unless such guardian has taken up such a residence as, in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian.