

1893  
JUNE 28.  
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APPEL-  
LATE  
CIVIL.  
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18 B. 372.

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.

Chotalal died, leaving him surviving his two widows, named Bai Shangar *alias* Gheheli and Bai Moti, but no issue. Chanchal married one Chimanlal, to whom she bore a son Mafatlal, who apparently was born at the time of his uncle Chotalal's death. On the death of Chotalal, disputes arose between his mother Bai Harkor and his two widows. Ultimately the disputes were referred to arbitrators, who made an award declaring the minor Mafatlal to be the heir to the estate of his deceased uncle Chotalal. A decree was passed in the Subordinate Judge's Court embodying the result of the arbitration, and in that decree Chotalal's widows Bai Shangar and Bai Moti were declared to be the guardians of the minor Mafatlal. Thereupon, Chotalal's mother Bai Harkor presented an application to the District Judge for the removal of Bai Shangar and Bai Moti from the guardianship, and a question having arisen as to whether s. 39 of the Guardians and Wards Act (VIII of 1890), which authorizes the District Court to remove a guardian appointed or declared by the Court or a guardian appointed by a will or other *instrument*, was applicable to the case of a guardian appointed under a decree, and the Judge not being satisfied that the word *instrument* in s. 39 of the Act could be held to include "a decree," he made the reference in the following terms:—

"As there is considerable doubt in my mind on the matter, and as no appeal appears to lie against my order refusing to remove [377] the guardians, I beg to submit the following question \* \*. Does the word "instrument" in s. 39 of Act VIII of 1890 include the decree of a Subordinate Judge sitting as a Civil Court of original jurisdiction?"

The opinion of the Judge was in the negative.

There was no appearance for the parties.

#### OPINION.

SARGENT, C.J.—We think that the language of the section requires that the word "instrument" should be confined to instruments *ejusdem generis* with a will, and that the decree, by which the first appointment of the guardians in this case must be regarded as having been made, is, therefore, not an instrument within the contemplation of the section.

Order accordingly.

18 B. 377 (F.B.).

#### CRIMINAL REFERENCE—FULL BENCH.

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

QUEEN-EMPRESS v. MUGAPA BIN NINGAPA.\* [3rd July, 1893.]

*Criminal procedure—Charge—Alternative charge—Contradictory statements—Statement made to a police officer during a police investigation—Contradictory statement made before a Magistrate holding a preliminary inquiry—Giving false evidence—Indian Penal Code (Act XLV of 1860), s. 193—Separate charges.*

Where a person has made two contradictory statements, one to a police officer making an investigation under Chap. XIV of the Code of Criminal Procedure (Act X of 1882), and the other to a Magistrate holding a preliminary inquiry, he cannot be charged, and still less convicted, on an alternative charge.

\* Criminal Reference, No. 61 of 1893.