1895.

RÁJMAL MOTIRA'M MA'RVA'DI v. KRISHNA VALAD MAHIPATI HAGADEKAR.

sufficient averment of fraud such as the Court should take notice of, the Judge should not have entertained the plea of fraud at all—*Krishnáji* v. *Wámnáji*[1].

There was no appearance for the opponent (defendant).

SARGENT, C. J.:—The Special Judge and the Subordinate Judge have both construed the expression "show cause" in the second paragraph of section 44 of the Dekkhan Agriculturists' Relief Act as meaning "allege cause" without proving it, or, in other words, as simply "to object." But we think that the expression, as was held by this Court in construing section 525 of the Civil Procedure Code in *Dándekars* v. *Dándekars*[2], is a well-known one denoting both to allege and prove sufficient cause. If that be the correct meaning of it, the Subordinate Court could not act upon the defendant's mere statement of objection, but should have decided as to its sufficiency after giving notice to the other side. This was not done by the Subordinate Judge. However, the applicant had an opportunity of supporting the argument before the Special Judge, and if he did not intend to do so on the day fixed for the hearing, he cannot now complain if the Special Judge confirmed the decision of the Subordinate Judge, and ask for the exercise of this Court's extraordinary jurisdiction. We must, therefore, discharge the rule.

Rule discharged.

(1) I. L. R., 18 Bom., 144. (2) I. L. R., 6 Bom., 663.

APPELLATE CIVIL.

FULL BENCH.

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

1895. *January* 24.

REFERENCE BY THE COLLECTOR AND SUPERINTENDENT OF STAMPS, BOMBAY.*

Stamp Act (I of 1879)—Instrument—Trust-deed—Settlement—Testamentary document—Stamp.

An instrument called a trust-deed by the party executing it was intended to have immediate operation. It vested the property in the trustees at once, and the provi-

* Civil Reference, No. 17 of 1894.

1895.

REFERENCE BY THE COLLECTOR AND SUPERINTENDENT OF STAMPS, BOMBAY.

sions as to the management and the ultimate beneficial interest in the property showed that it was contemplated that its operation might extend beyond the lifetime of the owner.

Held, that the instrument fell under the definition of a settlement in the Stamp Act (I of 1879), and should be stamped accordingly.

THIS was a reference by J. M. Campbell, Collector and Superintendent of Stamps, Bombay, under section 46 of the Indian Stamp Act (I of 1879).

The reference was made in the following terms:—

"On the 19th January, 1890, Hormasji Sorábji Tádivála, of Poona (now deceased), executed a writing in the Maráthi language. The following is the substance of the several clauses of the said document:—

"*Clause* 1—Sets out the names of his children, two of whom are sons named Shápurji and Ardesarji.

"*Clause* 2—Animadverts on the conduct of his said sons.

"*Clause* 3—Describes his property.

"*Clause* 4—Specifies the property which he has set apart for charitable purposes.

"*Clause* 5—Makes over his property other than that devoted to charitable purposes for the benefit of his grandson Pestonji, the son of the said Shápurji, and states that the said Pestonji has no right to sell or mortgage it, but he is only to enjoy its income.

"*Clause* 6—Appoints himself and three other persons as trustees for the administration of the property.

"*Clause* 7—States that the settlor will so long as he lives carry on the management of his property, and will administer its income in the interest of his said grandson Pestonji, and that no one has authority to hinder him in any way.

"*Clause* 8—Provides that, in the event of his becoming incompetent to manage the estate or relinquishing it, the other three trustees should carry on its management and should appoint a fourth until the said Pestonji arrives at the age of 21 years, when it is to be handed over to him after satisfying themselves that he would protect it.

"*Clause* 9—Gives directions as to employing a man for the management of the property and as to his wages.

"*Clause* 10—Contains provisions for the sons in the event of their getting into difficulties, and for the wives of his sons in case of the deaths of their respective husbands.

"*Clause* 11—Contains provisions for future sons of his said two sons.

"*Clause* 12—Contains provisions for daughters and their funeral ceremonies.

"*Clause* 13—Provides for payment of a certain sum per month for the education of the grandson Pestonji.

1895.

REFERENCE BY THE COLLECTOR AND SUPERINTENDENT OF STAMPS, BOMBAY.

"*Clause* 14—Makes provisions for marriage expenses of his son Shápurji's daughters.

"*Clause* 15—Contains provisions regarding the said grandson after he attains the age of twenty-one years.

"*Clause* 16—Specifies the amount to be spent for the settlor's funeral expenses.

"*Clause* 17—Gives directions as to the management of the property in the event of the grandson behaving himself badly.

"*Clause* 18—Is as to outstandings.

"*Clause* 19—Is as to payment of debts.

"*Clause* 20—States that the said Shápurji and Ardesir and his daughters or their respective creditors have no claim whatever to the said property.

"*Clause* 21—Directs that all the property, both moveable and immoveable, should be considered as trust property.

"The said Hormasji does not state the value of his property, but it is believed that it is of the value of about Rs. 3,00,000.

"That, in a suit lately filed by the trustees against a tenant in the Court of Small Causes at Bombay, the said document was produced, and on its admissibility in evidence being disputed by the defendant in the suit on the ground of insufficiency of stamp, it was impounded and forwarded to me under section 35 of the said Act.

"I think it is a question whether the document is a settlement, or whether it is intended to operate only after the death of the said Hormasji Sorábji Tádivála, and whether, in the latter event, it is a testamentary document and therefore not chargeable with an *ad valorem* duty under article 57 of the first schedule of the Stamp Act. I also think that it is not a declaration of trust, and that the stamp of rupees fifteen is not required on that ground, and if it is a settlement, it is at present insufficiently stamped."

The Collector, therefore, referred the following question :—

"Whether the above-mentioned document requires any and what stamp ?"

The reference was fixed for argument and disposal before a Full Bench consisting of Sargent, C.J., and Jardine and Candy, JJ.

Macpherson (with *Little*, Government Solicitor) appeared for the Government of Bombay :—The question is whether the docu-

1895.

REFERENCE BY THE COLLECTOR AND SUPERINTENDENT OF STAMPS, BOMBAY.

ment is a testamentary instrument and, therefore, exempted from the payment of stamp duty, or is it liable to be stamped as a settlement or otherwise. The executant has named it a trust-deed, but the context of the document shows that it is a settlement. It is not a mere declaration of trust. The executant has appointed trustees, and has settled the estate on his grandson. Under the terms of the document he himself is to continue in management of the property, and the trustees are to take over charge of the property in case he becomes incompetent. All these circumstances show that the instrument is a settlement, and it should be stamped as such.

Cleary, Q.C. (with *Sitánáth G. Ajinkya*) appeared for the administratrix and son of Hormusji Sorábji, deceased:—We submit that the document is a testamentary instrument. The mere form of a document is not a test of its particular nature. The present document has made provisions for certain things which are to take effect *in futuro*. A trust-deed can have nothing to do with such things.

Mánekshán J. Taleyárkhán appeared for Sorábji Shápurji, trustee, and the minor Pestonji Shápurji was represented by his guardian Shápurji Hormasji.

Macpherson, in reply:—The executant had appointed himself a trustee. Therefore, it is clear that the document was to take effect during his lifetime, and that being so, it is not a testamentary disposition. The form of the document is immaterial—*Thorncroft* v. *Lashmar*[1].

The judgment of the Full Bench was delivered by

SARGENT, C. J.:—The only question which has been argued before us is whether the instrument is a testamentary document or a settlement. The party executing it calls it a trust-deed. It was clearly intended to have immediate operation, the most important test in distinguishing a settlement from a will. It vests the property in trustees at once, and the provisions as to the management and the ultimate beneficial interest in the property show that it was contemplated that its operation might extend beyond the lifetime of the owner.

(1) 31 L. J. P., p. 150.

1895.

REFERENCE BY THE COLLECTOR AND SUPERINTENDENT OF STAMPS, BOMBAY.

The reservation of the management by the owner during his life cannot affect its character. In *Crossman* v. *The Queen*[1] and *Attorney-General* v. *Heywood*[2] it was held that even the reservation of a life estate by the settlement did not render the instrument less a settlement.

It was argued by Mr. Cleary that the concluding words in para. 7 of the instrument "as long as I am alive, I have authority to increase or decrease" gave the owner the right to revoke the instrument. In the first place, those words must, we think, apply to the management which had just previously been reserved to the owner "in the interests of the property and (the beneficiary) Pestonji." But in any view of the words, as pointed out by Mr. Jarman in his Treatise on Wills, the insertion of a clause of revocation so far from indicating an intention to make a will, gives quite a contrary colour to the transaction, as a will does not require an express power to render it revocable.

It was also argued that the circumstance of the owner providing that any future property he might acquire and all sums to become due to him should be brought into the settlement, and all sums to become due from him during his lifetime should be paid out of the property, were provisions which were never heard of before in a settlement, and that an assignment of such property could not have effect given to it, and that such disposition gave a testamentary character to the whole. But, as pointed out by Mr. Jarman, the introduction of such disposition into the instrument would only show that he attempted to include what he could not, and not that he intended to resort to a different species of disposition. On the whole we think the instrument is one which falls under the definition of a settlement in the Stamp Act, and should be stamped accordingly.

Order accordingly.

(1) 18 Q. B. D., 256. (2) 19 Q. B. D., 326.