we should have the result that while section 9 would enable a *dharekari* and *quasi-dharekari* to transfer, he would on exercising the right of transfer so conferred on him, place his land at the disposal of the Khot by virtue of section 10.

This obviously cannot have been intended; and so we are of opinion that by transferring his land on sale an occupant does not resign his land within the meaning of section 10.

As this admittedly disposes of the case adversely to the plaintiff, we must reverse the decree of the lower appellate Court and dismiss the suit with costs throughout.

Decree reversed.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar.

ASHIDBAI, WIDOW OF OOSMAN AHMED BUKHAI, PLAINTIFF, *v.* ABDULLA HAJI MAHOMED AND OTHERS, DEFENDANTS.*

1906.
July 13.
August 9.
September 13.

Mahomedan Law—Relinquishment of share—Voluntary settlement—Document whereby heirs give up their rights in the property in favour of one heir—Deed supported by valuable consideration—Onus of proof—Power of revocation in a voluntary deed—Indian Trusts Act (II of 1882), section 53—Trustee—Transactions entered into by trustee for his own benefit—"Unless otherwise provided"—Indian Trusts Act (II of 1882), section 36—Equity in favour of a person paying off a subsisting charge on property—Appointment of cestui que trust as trustee—Partition suit—Dismissal of suit—Defendants cannot claim partition of their shares in that suit.

O., a Mahomedan, died leaving him surviving his widow A. and a daughter Z. Z. died leaving her surviving two sons, two daughters and her husband. After her death, her mother A. and her husband A. H. M. arrived at a settlement and executed a document whereby they relinquished their share in the property of O. in favour of the minor sons of Z. A. then brought a suit to set aside the document alleging that it was a voluntary settlement:

Held, that the document was not a voluntary settlement but was a transaction supported by valuable consideration, inasmuch as the relinquishment by one was consideration for the relinquishment by the other.

Mahammadunissa Begum v. *J. C. Bachelor*(1) followed.

* O. C. J. Suit No. 432 of 1905.

(1) (1905) 29 Bom. 428; 7 Bom. L.R. 477.

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In a suit to impeach a deed to which he has been a party, the onus lies on the plaintiff to make out a case for setting aside on equitable grounds a deed duly executed for valuable consideration.

Melbourne Banking Corporation v. *Brougham*(1) followed.

PER CURIAM :—Section 53 of the Indian Trusts Act (II of 1882) strikes at transactions entered into by a trustee for his own profit after he has accepted the trust and while he is performing the duties of the office. It does not render void a mortgage in favour of a person created before he becomes trustee of the property by the deed of trust itself as a condition of the trust imposed by the settlor.

The expression "unless otherwise provided," used in section 36 of the Indian Trusts Act (II of 1882), means, unless otherwise provided by the instrument of trust.

Where there is a subsisting charge on certain property paid off by the person in possession, it is equitable that when the plaintiff reclaims the estate, credit should be given to that person for the payment of the mortgage which the plaintiff would have had to meet.

Mahomed Shumsool v. *Shewukram*(2); *Lomba Gumaji* v. *Vishwanath Amrit*(3); and *Ranu* v. *Kedu*(4) followed.

There is no provision in the Indian Trusts Act (II of 1882), that a *cestui que trust* shall not be appointed a trustee. He is not as such incapacitated from being trustee for himself and others; but as a general rule he is not altogether a fit person for the office in consequence of the probability of a conflict between his interest and his duty.

Where a plaintiff brings a suit for partition and fails, it is not open to any of the defendants to claim that the partition suit should go on in order that the share of one or more of such defendants may be determined.

THIS was a suit to set aside a document executed by the plaintiff and to claim her share by partition in certain property.

The property in suit belonged to one Oosman Ahmed Bukhai, the husband of Ashidbai (plaintiff).

On the 14th December 1882, Oosman Ahmed Bukhai mortgaged the property to one Haji Ebrahim Tar Mahomed for Rs. 10,000. He subsequently created further charges on the same property to the extent of Rs. 9,000.

Oosman Ahmed Bukhai died in the year 1892, leaving him surviving his widow (Ashidbai, plaintiff), a daughter (Zullekhabai) and a sister (Ashidbai).

(1) (1882) 7 App. Cas. 307 at p. 311.
(2) (1874) L. R. 2 I. A. 7 at p. 17.
(3) (1893) P. J. p. 30.
(4) (1894) P. J. 39 at p. 40.

Ashidbai, the sister of the deceased, gave up her claim and share in the property of the deceased in favour of the plaintiff.

On Oosman's death, plaintiff and her daughter took possession of his property and managed the same through one Cassum Jooma, the husband of a predeceased daughter of Oosman, and enjoyed the rents and profits.

The plaintiff and her daughter created on the 18th July 1896 a further charge on the property in favour of Haji Ebrahim Tar Mahomed.

Cassum Jooma gave up the management of the property in 1899: and since then the management passed into the hands of Abdulla Haji Mahomed (defendant No. 1, husband of Zullekhabai).

In 1901, Zullekhabai died intestate leaving her surviving her husband (defendant No. 1), two sons, Esmail and Ibrahim (defendants Nos. 2 and 3), two daughters, Khatizabai and Sapurabai (defendants Nos. 4 and 5), and her mother (plaintiff) as her heirs and next-of-kin according to Mahomedan Law.

After Zullekhabai's death, defendant No. 1 continued to carry on the management of the property as before.

On the 26th February 1903, Ashidbai (plaintiff) and Abdulla Haji Mahomed (defendant No. 1) entered into an agreement (Exhibit B) whereby they relinquished their shares in Oosman's property in favour of the minor sons of Zullekhabai (defendants Nos. 2 and 3). The agreement further provided that Ashidbai (plaintiff) was to receive Rs. 80 every month as her maintenance out of the proceeds of the property.

The plaintiff brought this suit on the 27th June 1905, alleging that the defendant No. 1 falsely induced her to execute the deed under a misrepresentation as to its effect. She, therefore, prayed that it might be declared that the document dated the 26th February 1903 was obtained from her under fraud and misrepresentations on the part of defendant No. 1 and as such the same was void; and that the shares of the parties and their interest in the property may be ascertained and declared.

After the plaint was filed defendants Nos. 6—11, claiming to represent the line of Ashidbai (the sister of Oosman) and therefore claiming to be interested in the property of the deceased Oosman,

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applied to be made parties to the suit and were accordingly made parties.

Defendant No. 1 in his written statement submitted himself in all respects to the Court, contending at the same time that the allegations made by the plaintiff against him as to the execution of the document were false.

Defendants Nos. 2 to 5 similarly submitted their rights in all respects to the Court and contended that the settlement was for their benefit and that it could not be set aside or cancelled.

Defendants Nos. 6 to 11, representing the line of Ashidbai, the sister, contended that the plaintiff did not give up her share in the property and prayed that "their share and interest in the said property may be ascertained and declared and that the said property may be partitioned between the persons interested therein."

At the first hearing on 25th June 1906

Inverarity, Kanga and *Bhandarkar,* for the plaintiff.

Raikes (Acting Advocate General) with *Strangman* for defendants 1—3.

At the second hearing on 2nd August 1906

Inverarity, for the plaintiff and defendants 6—11.

Strangman, for defendant 1.

At the third hearing on 8th September 1906

Lowndes (Acting Advocate General), for defendants 6—11.

Strangman, for defendants 1—3.

CHANDAVARKAR, J.—This is an action brought by Ashidbai, widow of Oosman Ahmed Bakhai, to set aside a document dated the 26th of February 1903 and for further reliefs, on the ground that it was obtained from her by means of fraud, misrepresentation and undue influence by Abdulla Haji Mahomed, the first defendant.

The property in dispute, which is situate at Sobpari Bag, Parel, belonged to the plaintiff's husband. He died intestate in the year 1892, leaving him surviving as his next-of-kin and heirs, according to Mahomedan Law, his widow (the present plaintiff), a daughter by name Zulekhabai (wife, since deceased, of the first

defendant), and a sister by name Ashidbai, also since deceased. At the death of the plaintiff's husband the property was subject to several mortgages created by him on different occasions in favour of one Haji Ebrahim Tar Mahomed. A few years after his death the plaintiff and her daughter created further charges on the property. The daughter died intestate in 1901, leaving as her heirs her husband (the first defendant), two sons (the second and the third defendant, who are minors), two daughters, also minors (the fourth and the fifth defendant), and her mother (the plaintiff).

On the 26th of February 1903 the plaintiff and the first defendant executed the document (Exhibit A) by which they relinquished their respective shares in the property in favour of the two minor sons of the first defendant, subject to certain terms and conditions. It is this document which is alleged to have been obtained by fraud and misrepresentation, particulars of which are stated in the 10th paragraph of the plaint. There the plaintiff alleges:—

10. About 18 months after the death of the plaintiff's said daughter Zulekhabai and shortly after plaintiff's return from Mecca where she had been on a pilgrimage for about 7 months, the first defendant one day asked plaintiff to go to a Vakil's office with him, where he said he had got a document made making a proper *bundobust* of his own share in the property for the benefit of his children and that the plaintiff's signature was necessary thereto as the head of the family. The plaintiff told the first defendant that she was an old woman and did not understand anything and he should not trouble her, but the first defendant said that it was all for the children's good that there would be no harm or trouble to the plaintiff, and that she had merely to sit quiet and sign the document when she was asked to do so, and he himself would also sign the document. The plaintiff had great confidence in the first defendant at that time and relying upon the representations and assurances made as aforesaid, the plaintiff went with the defendant to a Vakil's office. The first defendant and some Parsee read from some document and talked amongst themselves. The plaintiff took no part in these proceedings, and until the first defendant asked her to put her mark upon the said document when she did so. The first defendant also signed the same. Hereto annexed and marked B is the copy of the said document dated 26th February 1903, to which the plaintiff believes her mark was taken as aforesaid.

Upon the evidence recorded I disbelieve this story of the plaintiff. I can place no reliance upon her testimony, having regard to her contradictions and her demeanour. Besides, it is

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clear beyond doubt from the evidence of her own witness, Mr. Jehanghir Vimadalal, and from the evidence of the defendant's witnesses, Chinoy and Karmalli, that the plaintiff had seen a draft of Exhibit A, that she had it twice in her possession for some days before it was finally approved by her, that she had the draft interpreted to her, and that she knew well before putting her mark to Exhibit A that she was parting with her share in favour of her grandsons (the second and the third defendant) and would thereafter get out of the property nothing beyond Rs. 80 for maintenance. I do not think it necessary to discuss the evidence on this point. Mr. Inverarity for the plaintiff has not rested her case in argument on the specific allegations of fraud in paragraph 10 of the plaint. I find the specific fraud and misrepresentation alleged there to be not only not proved but disproved by the evidence in the case.

The question round which the dispute at the Bar has centred is that of undue influence. It is contended by Mr. Strangman for the first defendant that the plaint disclosed no case of undue influence and that, therefore, it ought not to be allowed. But I think that there is sufficient in the plaint to entitle the plaintiff to be heard upon that case. She alleges that both before and at the date of Exhibit A the first defendant was carrying on the management of the property, collecting the rents, and keeping the accounts; that she, an old woman, illiterate and *pardanishin*, reposed "great confidence" in him; and that she put her mark to the document without knowing or understanding the true meaning and effect of it. It is upon these allegations in the plaint that Mr. Strangman raised the third and the fifth issue. And evidence has been led on either side with reference to them.

Before dealing with the evidence on this case of undue influence, it is necessary to clear the ground by determining the legal character of the transaction evidenced by Exhibit A. The plaintiff's case has throughout the trial been that it is a voluntary settlement, and, being a gift of an undivided share, is invalid according to Mahomedan Law. I am unable to accept that view of the transaction. Both the plaintiff and the first defendant have joined in relinquishing their shares in favour of the second and the third defendant. That cir-

cumstance brings the transaction within the principle deducible from such cases as *Good* v. *Cheesman*[1], and *Norman* v. *Thompson*[2], where it was held, as to composition deeds executed by the creditors of a bankrupt, that the consideration to each creditor is the engagement by the others not to press their individual claims. "Such an agreement, if made by a number of creditors, each acting on the faith of the engagement of the others, is binding upon them, for each has the undertakings of the rest as a consideration for his own undertaking."[3] To put it in the words of Parke B. in *Norman* v. *Thompson*[4], "the agreement by each individual to give up part of his claim is a sufficient consideration." The definition of the term "consideration" in the Indian Contract Act is wide enough to embrace this principle and make it applicable to a case like the present. According to that definition, the act which forms the consideration for a promise need not be the act of the promisee; it may be the act of some other person. Accordingly, in *Mahammadunissa Begum* v. *J. C. Bachelor*[5], where some Mahomedan relatives of certain minors joined in relinquishing their respective shares by a deed in certain property in favour of those minors, a Division Bench of this Court held that the transaction was not a mere voluntary settlement or gift but was supported by valuable consideration because "the relinquishment by each was consideration for relinquishment by the others." I have been referred by Mr. Inverarity to *Rujabai* v. *Ismail Ahmed*[6], where a conveyance, which was in form a deed of sale, was held by Sargent, J., to be in reality a deed of gift. But the ground of that decision was that the consideration was a nominal sum of Rs. 10 intended merely to give the transaction the form of a sale. The learned Judge held that the transaction must be treated as one of gift, not of sale. There is nothing before me in the present case to show that the consideration, moving from the first defendant, *viz.* the relinquishment of his own share, in favour of the minors, was of a

(1) (1831) 2 B. & Adol. 328.
(2) (1850) 4 Exch. 760.
(3) Smith's Leading Cases, Vol. I, p. 347 (11th Edn.).
(4) (1850) 4 Exch. 755 at p. 760.
(5) (1905) 29 Bom. 428; 7 Bom. L. R 477.
(6) (1870) 7 Bom. H. C. R. O. C. J. 27.

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nominal or illusory character. Under these circumstances the deed (Exhibit A) must be dealt with not as a voluntary settlement but as a transaction supported by valuable consideration. The objections to it, raised on the ground of Mahomedan Law applicable to gifts, fail. Nor is there any sense in the 7th issue raised: whether the transaction evidenced by Exhibit A is not of a testamentary character. Mr. Inverarity has not argued that point at all.

Dealing now with the question of undue influence we have at the outset the undisputed fact that the plaintiff is not a *pardanishin*. I say *undisputed* because, though in the plaint there is an allegation that the plaintiff is a *pardanishin*, and though in the witness-box she appeared throughout with a veil on her face, yet she has admitted in cross-examination, and the evidence of her own witnesses as also that of those called by the defendant on the point leaves no doubt, that there is no custom enjoining *purda* among women of the Khatri community to which the plaintiff belongs; and that the plaintiff has been in the habit of visiting and seeing people without a *purda*. She is indeed an old woman, unable to read and write. She gives her age as 75 but the other evidence in the case fixes it at 60. Judging from her voice and the manner in which she answered questions in the witness-box, I think she is about 60 years of age but not infirm. Though illiterate, she appeared to me to be very shrewd and intelligent. She seemed to understand well enough the drift of the questions put to her in cross-examination; she often hesitated to answer them straight and in some respects told what I have no doubt she knew to be false. I have, therefore, no reason whatever to think that her mental capacity has been affected by reason of her age. Mr. Jehangir Jamsee jee Vimadalal, a solicitor of this Court, who prepared the document Exhibit A and explained its contents to her, says that she appeared to him intelligent. Her *quondam* son-in-law, Haji Cassum Juma, who had the management of the property in dispute on her behalf for some years, says that during that period she managed it with him and that he used to consult her. According to him, "she is a woman with business instincts. She was able to give good advice about the manage-

ment of the property." He also deposes that she is herself managing her present litigation and "gives all the instructions herself" to her solicitors. And that is confirmed by the evidence of her solicitors, Mr. Seervai and Mr. Jehangir Dorabjee. Nor does the evidence satisfy me that at the time of Exhibit A the first defendant stood in a fiduciary relation towards her. I can place no reliance on her statement that at that time the defendant was managing the property, collecting the rents, and keeping the accounts for her. On the other hand, the effect of the evidence, taken as a whole, is that soon after the plaintiff's return from Mecca, the defendant made over the management to her and she looked after the property down to the time of the document Exhibit A. I believe the evidence of the Mehta Parmanand and he is supported by the accounts. He confirms the defendant's sworn testimony about the management of the property and says that the plaintiff is intelligent and used to go to the chawls, and attend to the rents. Where the tenants refused to pay she used to threaten them. It is not proved to my satisfaction that the defendant had and has suppressed the plaintiff's books of accounts. The plaintiff never lived with or under the protection and care of the first defendant. She always lived in a separate house at Khokha Bazar. The relations subsisting between the parties and the plaintiff's mental capacity were not, in my opinion, such that the defendant was in a position to obtain any unfair advantage over the plaintiff. The fact that some months before the execution of Exhibit A the defendant had managed the property for the plaintiff is not sufficient to bring the case within section 111 of the Evidence Act: see *Chaudhri Thakur Das* v. *Chaudhri Jairaj Singh* [1].

The case, then, stands thus. Both the law as to voluntary deeds and section 16 of the Indian Contract Act, on which Mr. Inverarity has rested his client's case, do not apply here. The case resolves itself into one of an ordinary plaintiff impeaching a deed to which he has been a party. The onus lies on him to make out a case for setting aside on equitable grounds a deed duly executed for valuable consideration. (Per Lord Sel-

(1) (1903) L. R. 31 I. A. 46.

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borne in the *Melbourne Banking Corporation* v. *Brougham* (1). And I have arrived at the conclusion after a careful consideration of the oral and documentary evidence including the account books put in that the plaintiff has failed to discharge the *onus* that lay on her under the circumstances of this case.

Mr. Inverarity has laid stress upon a number of circumstances as showing that this lady never had the legal effect of the deed explained to her before she put her mark to it and that she was induced to execute it by means of misrepresentations. Now, it is true that Mr. Jehangir Jamsetjee Vimadalal, who prepared the deed, says that he explained the deed to her only in the sense of interpreting its contents and its effect so far as it resulted from the document. But he also says that he had no reason to doubt that she understood she was giving up the *corpus* of her share in the property for Rs. 80 a month. He also says that she twice took away the deed from him, that she had it with her and sent it finally approved. Karmalli says that the lady consulted him, that he explained to her that she was by the deed tying up her share, and that she would after execution get no more than Rs. 80 a month for maintenance; and that she perfectly understood it. To the same effect is the evidence of Chinoy. The lady herself does not state that she did not understand what Karmalli and Chinoy interpreted to her. She says she never consulted either of these. Karmalli's evidence is that he distinctly told her that she was by the deed "tying up her share." This is, argues Mr. Inverarity, a very ambiguous phrase—it may mean a sale or a mortgage. So it may in English. But Karmalli interpreted the deed in Gujarati and "tying up" is, it is clear, only his translation of some Gujarati expression used by him in interpreting. He was not asked in cross-examination what Gujaráti expression he had used; and, if he had used the ordinary expression in that language, it could not but have conveyed to the lady the meaning that she was for ever depriving herself of her share. And he told her, besides, that she would get only Rs. 80 a month. According to her own evidence, she knew at the time she put her

(1) (1882) 7 App. Cas. 307 at p. 311.

mark this much at least that the defendant was parting with his share in favour of his children. That is, she understood what parting with a share meant. I have no doubt upon the evidence that the lady knew thoroughly when she put her mark to Exhibit A that she was parting with her share absolutely in favour of her own grandsons and that she would under it get no more than Rs. 80 a month. The probabilities support that conclusion. What was the state of things at the time of Exhibit A? The plaintiff's daughter, Zulekhabai, wife of the first defendant, had died leaving four children, two sons and two daughters, minors. The first defendant had married another wife. There was the fear natural in such cases of the children being neglected. They were the plaintiff's nearest relatives. She would naturally think of doing something to secure their interests and guarding against the risk of their father ceasing to care for them and devoting all his affections to his new wife and his children by her. It is probable, therefore, that she proposed the arrangement that both she and the first defendant should assign their shares to her grandsons in trust. The grandsons were alone chosen probably because it is usual in this country to think more of male than female children. A good deal has been made of the fact that the draft of Exhibit A is not forthcoming. Mr. Vimadalal is unable to say whether he gave it to the first defendant and he has not found it in his own office. Having regard to the practice in his office, it may have been delivered to the defendant. The defendant says he never got it back. I see no reason to hold that the defendant has deliberately suppressed the draft. The deed was engrossed by Mr. Vimadalal from the draft after it had come back to him from the plaintiff "finally approved" and not a single question was put to him as to whether Exhibit A was not a correct copy of the draft so returned.

But it was said that the absence of the power of revocation in this deed is fatal to its validity, and reliance was placed on the judgment of Farran, J., in *Bai Manigavri* v. *Narondas Calliandas*[1]. That was a case, however, of a voluntary deed,

(1) (1891) 15 Bom. 549.

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the law as to which is that, where it does not contain the usual power of revocation, it is liable to be set aside as void and not binding upon the settlor, if the Court is not satisfied by the person seeking to uphold it that the absence of that power and its effect were duly explained to the settlor. That is upon the ground that the Court in such cases presumes that the settlor executed the deed without understanding it: *Dutton* v. *Thompson*[1]; *Henry* v. *Armstrong* [2]. Here the case is different. The deed Exhibit A is not a voluntary settlement. It is supported by valuable consideration and a power of revocation is out of place in such a deed. Moreover, the lady had this deed twice with her for some days and she returned it to Mr. Jehangir finally approved. Karmalli says that he explained to her that she was parting with her share absolutely and would get only Rs. 80 a month. She was making a provision for her grandsons who had been deprived of their mother; and their father was joining her by parting with his share likewise. At first it was proposed that she should get Rs. 60 a month for maintenance; finally after discussion the amount was raised to Rs. 80. There was no precipitancy; no undue haste in the transaction; the lady consulted Chinoy and Karmalli of her own accord; she kept the deed with her for some time. These are the surrounding circumstances of this transaction and they prove to my satisfaction that the lady was told and knew that she was entering into an arrangement irrevocable in its nature and as to its provisions. The observation of Kay, J., in *Henry* v. *Armstrong* [3] that "such a power" (*i. e.* of revocation) "would in this case be entirely inconsistent with the objects which I am told the plaintiff had in executing this deed" applies here. I have no doubt the plaintiff's object in executing Exhibit A was to make some provision for her grandsons, as there was the fear of their father and their step-mother neglecting them; that object she thought she could attain by getting the first defendant to part with his share likewise in favour of her grandsons, who were his sons by his deceased wife; and as an inducement for him to do that she parted with her own share.

(1) (1883) 23 Ch. D. 278. (2) (1881) 18 Ch. D. 668.
(3) (1881) 18 Ch. D. 668 at p. 670.

Under these circumstances she must have known that she was parting with her share irrevocably in favour of her grandsons just in the same way that the first defendant was parting with his.

I attach no importance to the fact that there is a recital in Exhibit A that it is for the benefit of the grand-daughters as well, though so far from getting any benefit by the deed, they suffer because virtually the shares they had in the property by right of inheritance, according to Mahomedan Law, from their mother, have been sacrificed in favour of their brothers. Mr. Vimadalal, who prepared Exhibit A, says that he brought this circumstance to the notice of the first defendant, but that the latter instructed him to let the deed stand in that respect. This infirmity in the deed is not, however, a sufficient reason for setting it aside. The plaintiff's grand-daughters, who are defendants Nos. 4 and 5 in this case, are not parties to Exhibit A and are not bound by it, so far as their shares are concerned. The plaintiff has nowhere alleged that she intended to part with her share in favour of them as well as of her grandsons. Both in her plaint and her deposition she states that she was told by the defendant that the deed was intended to operate only as to his own share and that it was upon the faith of that representation that she put her mark to the deed. Next, as to the sum of Rs. 1,700, which are made a charge on the property in favour of the first defendant, I am unable to accept upon the evidence as a whole the plaintiff's case that she owed no such debt to the defendant at the time she executed Exhibit A. It is admitted by her that she received from the defendant Rs. 1,700 to defray the expenses of her pilgrimage to Mecca; but she says that the sum in question formed part of her own amount of Rs. 2,150 which she had put into the hands of the defendant before leaving Bombay for Mecca. This amount of Rs. 2,150, she says, was obtained from the sale of her ornaments. But though the defendant had expressly stated in his written statement that there had been this debt of Rs. 1,700 owing to him from the plaintiff, she made no mention whatever of her case as to Rs. 2,150 in her affidavit of the 3rd October 1905 (Exhibit C) in reply. Her solicitor, Mr. Jehangir, no doubt states that she had

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mentioned it to him in her instructions to file the suit, and the written instructions (Exhibit 5) do contain a reference to it. But there the sum mentioned is Rs. 2,100. Moreover, it appears from her reply (Exhibit 3), dated December 1902, to the defendant's notice, Exhibit 2, that before the preparation of Exhibit A, there had been a dispute between them as to this sum of Rs. 1,700. I find it difficult to believe that after all this the lady did not know and could not understand before she put her mark to Exhibit A that the sum was inserted as a debt due from her. It is indeed a question whether the defendant as a trustee appointed under this deed could create or take in his own favour a charge on this property, having regard to the provisions of section 53 of the Indian Trusts Act. But that circumstance cannot affect the validity of the deed as a whole though the mortgage may be void. It forms part of the consideration which moved the defendant to part with his own share; it is separable from the rest of the consideration; and the defendant himself has not asked that the deed should be set aside on this ground. Whether the mortgage in his own favour is binding upon the minors, who are the beneficiaries under the deed, is a question which I am not called upon to decide in the present case.

There are other misrepresentations charged against the defendant. The recital in Exhibit A that the defendant had paid the mortgagee, before its execution, Rs. 4,333 is admitted by the defendant to be not in accordance with fact, the mortgagee having been paid subsequently. I do not see how this can be treated as a misrepresentation sufficient to invalidate the deed at the plaintiff's instance. So long as the mortgagee has been paid, it matters not whether he was paid before or after the execution of the deed. A good deal of the cross-examination of the defendant was directed to showing that he had paid Rs. 4,333 to the mortgagee by borrowing money from outsiders on his own account and lending it to the estate. Whether in paying that amount to the mortgagee the defendant has not acted with due regard to the interests of the estate is a question which does not arise here, as it concerns transactions subsequent to the execution of Exhibit A. But I am satisfied that the defendant has paid the mortgagee. The entry, Exhibit G, has been attacked as an after-

insertion and fabrication made for the purposes of this suit, but the ledger (Exhibit 18) shows that it is a genuine entry. Then there is the recital as to the value of the property and of the shares of the plaintiff and the first defendant. The defendant admits that he told the lady that the value was Rs. 45,000 or 40,000. From the deed itself it appears that the shares of the plaintiff and the defendant were valued at Rs. 7,500 for the purposes of stamp duty. It would seem that Rs. 45,000 were adopted as the value of the property in accordance with the value fixed in respect of the shares. But, however that be, there is nothing to show that the plaintiff did not know the real value and that she entered into the transaction on the faith of the defendant's statement. She herself does not say so. It is not a representation by which she could possibly be misled or deceived. We have it in the evidence of Haji Cassum Juma, a witness examined for her, that in 1896 or so Abdul Hak had offered to purchase the property for Rs. 80,000, that the offer was made to the witness, who was then in management, in the presence of the plaintiff and her daughter Zulekhabai, but that though the plaintiff was willing to sell it for that price, the offer failed because Zulekhabai would not consent. The plaintiff could not but have been aware of this fact at the date of Exhibit A, and even if it be true that the property was worth more at the date of Exhibit A, mere undervalue would not alone be a sufficient ground for impeaching the transaction, especially when we bear in mind the fact that the main object of it was to make a provision for the lady's grandsons and the defendant was giving up his own share. In any case, where the transaction is supported, as this is, by valuable consideration, it was for the plaintiff to give satisfactory proof that the recital in the deed was not understood by her when it was interpreted to her by Chinoy, by Karmalli, and by Mr. Vimadalal, and that she was deceived in that respect. The conclusion I draw from the evidence and probabilities is that she knew the real value and that she deliberately joined the defendant in showing less value in the deed for the purposes of stamp, that both she and the defendant were on the same footing at the date of Exhibit A with reference to the information about the value

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and rents of the property and their shares and that there was no overreaching on the defendant's part. The evidence shows that, before Exhibit A, the plaintiff used to receive the whole of the rents of the property. In 1903 the net rents came to about Rs. 4,000 a year, *i. e.*, after deducting the usual outgoings. The interest payable to the mortgagee was about Rs. 1,960 a year. The balance was about Rs. 2,000 and under Exhibit A plaintiff became entitled to Rs. 960 a year which is about half the net income of the property. As to the promissory note, Exhibit B, I hold that the transaction evidenced by it is genuine and I accept the defendant's version. It is urged for her that the lady was made to give up her share for Rs. 80 a month as if it were 4 annas and a half whereas in fact it was more than a half; and that no explanation was given to her as to the power she had, according to the Mahomedan Law, of willing away one-third of it. But she gave up her share not merely for Rs. 80 a month but also in consideration of the defendant giving up his. It is not her case here again that she gave up her share, because she was led by the defendant to believe that her share was only four annas and a half. Her case rather is that she understood, because she was told by the first defendant, that she was not giving up any share of her own. As to the absence of any explanation as to her power to will away one-third of her share, the lady was herself asked no question and I do not see why we ought to presume that she did not know when she put her mark to Exhibit A that she had no such power, when we are dealing as here with a transaction supported by consideration and not in the nature of a voluntary deed. Lastly, it was said that the plaintiff had other relatives besides the defendant's sons. But they were not, as she herself admits, her nearest relatives. The grandsons were the nearest.

I dismiss the suit with costs of the first, second, third, fourth and fifth defendants on the plaintiff. Let there be a declaration that the shares, if any, of the fourth and fifth defendants in the property are not affected by Exhibit A.

Aug. 9.—CHANDAVARKAR, J.—After I had delivered judgment as above, Mr. Inverarity, the learned Counsel of the plaintiff, desired that I should hear arguments on the question whether

the mortgages in favour of the first defendant created by the trust deed, Exhibit A, were void under section 53 of the Indian Trusts Act and affected to that extent the validity of the deed so as to entitle the plaintiff to an interest in the property beyond the receipt of Rs. 80 a month for maintenance. That question had not been raised at all during the hearing; but a few days after the hearing had concluded and while the suit stood over for judgment, Mr. Inverarity saw me in my chambers and mentioned that he had forgotten to argue the question under section 53 of the Indian Trusts Act. He then simply drew my attention to the section without any argument and waived his right to be present when Mr. Strangman might, if so minded, reply on it. Accordingly I sent for Mr. Strangman, who said that he had not considered the question at all and intimated that, if he had anything to submit, he would argue the question later on. I waited for some days after that but Mr. Strangman not having appeared to argue, I formed my own opinion on the question and embodied it briefly in the judgment delivered as above. I have heard a very short argument from both counsel since and the conclusion I have arrived at on the question raised by Mr. Inverarity is as follows.

According to Exhibit A, the first defendant is entitled to interest on Rs. 4,333 at 6 per cent. per annum out of the income of the proparty, the said sum of Rs. 4,333 having been, as recited in the document, paid by him to the mortgagee of the property. Further, interest at 6 per cent. per annum is charged on the income of the undivided share of Ashidbai in the said property in respect of the debt of Rs. 1,700 which was due at the date of Exhibit A from the plaintiff Ashidbai to the first defendant. The interest on either is made payable to the first defendant during the life-time of Ashidbai. After her death and on the younger of the two minor sons of the first defendant attaining the age of 18 years the trustees are to sell the property and out of the proceeds pay off the mortgage and to pay to the first defendant the two sums, Rs. 4,333 and Rs. 1,700 and all interest due thereon, and divide the balance among the two minor sons of the defendant as beneficiaries. Section 53 of the Indian Trusts Act has no application here. That section, in my

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opinion, strikes at transactions entered into by a trustee for his own profit after he has accepted the trust and while he is performing the duties of the office. But it does not render void a mortgage in favour of a person created before he becomes trustee of the property by the deed of trust itself as a condition of the trust imposed by the settlor. The word "trustee" is defined in section 3 of the Indian Trusts Act as one who accepts the confidence; and no confidence is accepted until the deed creating the trust has been executed and the relationship of trustee and *cestui que* trust created thereby. The section embodies a well-known rule of the Courts of Equity in England, which is that "a person in a fiduciary position .....is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict." (See per Lord Herschell in *Bray* v. *Ford*[1]).

I understand the qualification "unless otherwise provided" to mean "unless otherwise provided by the instrument of trust." That qualification is embodied in section 36 of the Indian Trusts Act, according to which "in addition to the powers expressly conferred by this Act and by the instrument of trust and subject to the restrictions (if any) contained in such instrument, and to the provisions of section 17, a trustee may do all acts which are reasonable and proper for the realisation, protection or benefit of the trust property." See also section 11 of the Act, according to which "a trustee is bound to fulfil the purpose of the trust and obey the directions of the author of the trust given at the time of its creation."

By the deed, Exhibit A, the trust is created for three purposes —payment of debts charged on the estate, payment of Rs. 80 a month out of the balance to the plaintiff and the remainder to be for the two minor sons of the first defendant. The trust in favour of the plaintiff and the sons consists of what remains after the former have been paid. Even if Rs. 4,333 had not been made a charge by the trust deed, it would have become a charge in favour of the first defendant as if he had paid it out of his own pockets, according to the equitable doctrine to which

(1) [1896] A. C. 44 at p. 51.

effect was given by the Privy Council in *Mahomed Shumsool* v. *Shewukram* [1] and by this Court in *Lomba Gumaji* v. *Vishwanath Amrit* [2] and in *Ranu* v. *Kedu* [3]. The doctrine is that where there is a subsisting charge on certain property paid off by the person in possession, it is equitable that when the plaintiff reclaims the estate, credit should be given to that person for the payment of the mortgage which the plaintiff would have had to meet. In the present case the plaintiff must make out her title to recover the property independently of the question as to the validity of the mortgage she has created in favour of the first defendant on account of a subsisting charge which she was bound to pay off. As to Rs. 1,700, Exhibit A makes a trust in favour of the plaintiff and the first defendant's minor sons of what remains after that debt has been discharged. In fact, as I have pointed out, the property is subject to a trust of a threefold character, first, for the payment of the debts due to the first defendant, secondly, for the maintenance of the plaintiff, and, thirdly, for the benefit of the first defendant's minor sons. The first of these trusts has precedence over the other two. Had the deed, Exhibit A, empowered the first defendant to become a mortgagee in respect of Rs. 4,333 and 1,700 after he had accepted the trust and while executing the duties of the office of trustee, it may be that section 53 would have come in his way and rendered any mortgage taken by him under those circumstances void, though even that is doubtful, having regard to *Passingham* v. *Sherborn* [4], where a trustee empowered by the trust deed to take a lease was removed from the office but the lease was upheld. But the mortgages in favour of the first defendant are created by the deed itself. So far as the trust is for his benefit as a creditor of the estate, he is a *cestui que trust* himself and there is nothing in the Indian Trusts Act, which provides that a *cestuis que trust* shall not be appointed a trustee. On the other hand, "*cestuis que trust* are not, as such, incapacitated from being trustees for themselves and others; but, as a general rule, they are not altogether fit persons for the office, in consequence of the probability of a conflict between their interest and their

(1) (1874) L. R. 2 I. A. 7 at p. 17.
(2) (1893) P. J. p. 30.
(3) (1894) P. J. 39 at p. 40.
(4) (1846) 9 Beav. 424.

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duty" (Lewin on Trusts, at page 40, 10th edition, citing *Forster* v. *Abraham*). But he says "there is no positive legal objection to appointing a *cestui que trust* as trustee." (Lewin on Trusts, at p. 40.)

Upon the whole, I am unable to hold that the trust deed, Exhibit A, is void, wholly or partially, because of the provisions as to the mortgages in favour of one of the trustees, *viz.*, the first defendant. It is true that those provisions in the trust deed place the first defendant in a position where his duty as trustee is likely to conflict with his interest as a mortgagee. It is his duty to act for the benefit of the trust. If in the discharge of that duty he acts otherwise, that may be a ground for his removal from the office of trustee. But the provisions in his favour would remain all the same valid and binding on the settlors and the beneficiaries, as they were the result of a contract entered into before the first defendant was clothed with his fiduciary character as trustee in relation to the trust estate; and such a contract is not within the purview of section 53 of the Trusts Act.

Before I pass a final decree, I must hear what defendants 6 to 11 have to say about their claim. I adjourn the hearing for that purpose till tomorrow.

Sept. 13.—CHANDAVARKAR, J.—Though the plaintiff's suit for partition has been dismissed by the judgment finally delivered by this Court on the 9th of August, defendants Nos. 6 to 11 contend that they are entitled to a declaration that they have a share in the property which is the subject-matter of the suit and to have that share allotted to them by partition in this suit. In support of that contention reliance is placed on the decision in *Sheikh Khoorshed Hossein* v. *Nubbee Fatima*[1] where it was held that a decree for partition, when properly drawn up, is in favour of each shareholder, whether he is plaintiff or defendant, in the suit. That decision is, however, inapplicable here, because here the question is whether, the plaintiff, who brought the suit for partition, having failed to establish her right to partition, any of the defendants can never-

(1) (1878) 3 Cal. 551.

theless claim partition upon the ground that such defendant has a share in the property. There are cases both in our authorised law reports and the old printed judgments on the appellate side of this Court in which it has been held that "it is the right of every defendant in a partition suit to ask to have his own share divided off and given to him," and that "a defendant claiming a share on partition is, *qua* that claim, in the position of a plaintiff." (*Shivmurteppa* v. *Virappa*)(1). Further, "it is obviously most undesirable that parties should be driven to further litigation to obtain a relief which they are entitled to, and ask for at a proper time, and which can be given to them in an existing suit." (*Abdul Kadar* v. *Bapubhai*)(2). This rule was first enunciated in very clear terms by Westropp, C. J., in *Abu valad Budankhan* v. *Amin valad Hamidkhan*(3) where his Lordship said:— "This Court has over and over again pointed out that all persons interested as co-parceners or tenants in common or joint tenants in an estate should, in a partition suit, be made parties in order to prevent a multiplicity of actions in respect of the same property" and that the Court must strictly observe it by refusing to make a partial division of undivided property. But all the cases, in which this rule has been adopted by this Court, will on examination be found to be cases in each of which the plaintiff suing for partition succeeded in proving his right to it and the decree passed in favour of the defendants followed as a natural result of, or corollary to, the decree in favour of the plaintiff. And on principle that must be the essential condition of the rule. When a suit for partition is brought by a person alleging that it is undivided property and that he has a certain share in it, the law requires that in order to enable the Court to ascertain such person's share, it must have before it as parties to the suit all the persons admittedly having or claiming to have shares in the property. Otherwise there cannot be a valid, final and binding decree for partition. The *quantum* of the share of the plaintiff must be determined with reference to the number of sharers and their respective shares. And such determination of the shares,

(1) (1899) 24 Bom. 128 at p. 130. (2) (1898) 23 Bom. 188 at p. 190.
(3) (1875) P. J. p. 218.

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being essential for the determination of the plaintiff's share, enables the Court to pass a complete decree for partition, allotting to each party, whether he is plaintiff or defendant, his share. In such a case it is obvious injustice that a defendant should be driven to another suit to have his share already determined partitioned off. That is the reason of the rule. But where the case of the plaintiff fails on the preliminary ground that he has no right to a share at all and that a suit for partition is not maintainable at his instance, the reason of the rule fails to apply. There is nothing on which a defendant's right to have his share ascertained and awarded in that suit can rest. The defendant was brought in for determining the share of the plaintiff, if any. If the plaintiff is found to have no share at all, there is no suit for partition and consequently no necessity for determining the defendant's share. To hold in such a case that, notwithstanding the plaintiff's failure, the defendant is entitled on his own account to go into and try the question whether he has any share at all, would be to convert a suit brought by an unsuccessful plaintiff into a suit brought by another person placed on the record as a defendant for the purpose of determining the *quantum* of the plaintiff's share in the event of the plaintiff proving that he has a right to some share. The decision in *Sheikh Khoorshed Hossein and others* v. *Nubbee Fatima*[1] on which the learned Advocate General, appearing for defendants Nos. 6 to 11, strongly relies, lends no support to his argument. That decision applies only where there has been a decree properly drawn up in favour of the plaintiff and the defendants in a suit for partition.

There is further this peculiarity in the present case that the right of defendants Nos. 6 to 11 to a share is by no means admitted by the other parties to the suit. In the plaint it is alleged that their right is barred by adverse possession. Were I to allow their prayer, I should be trying a practically separate suit. And as the rule on the basis of which the prayer is made is a rule of judicial discretion, in the exercise of which the Court must be guided by what I have above pointed out to be its

(1) (1878) 3 Cal. 551.

proper limits, I must disallow the prayer of defendants Nos. 6 to 11 for the determination in this suit of their right to a partition of the property which forms its subject-matter. It is open to the said defendants, if they choose, to file a suit for partition. Defendants Nos. 6 to 11 must pay to defendants Nos. 1 to 5 the costs of and incidental to this application.

Attorneys for the plaintiff: *Messrs. Jehangir & Seervai.*

Attorneys for defendants: *Messrs. Thakurdas & Co.* and *Captain & Vaidya.*

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Batty and Mr. Justice Heaton.

1907. *January* 11.

EMPEROR *v.* ABDOOL WADOOD AHMED.*

Indian Penal Code (Act XLV of 1860), section 499, Exceptions; 3, 6, 9, sections 500, 52—Defamation—Comment—Right of fair comment—Comment should be suggested by and confined to the work under review—Good faith, tests of—Malice, interpretation of the term.

The word "malice" in the legal use of that term is not limited to hostility of feeling, but by virtue of its etymological origin, extends to any state of the mind which is wrong or faulty (whether evidenced in action by excess or defect), such as would be unjustifiable in the circumstances and incompatible with thoroughly innocent intentions. It is not necessary that such impropriety of feeling should in all cases be established by evidence extrinsic to the comment which is the subject of the complaint. For whether fair comment is to be regarded as falling under a branch of the law of privilege or not, it cannot excuse an injury arising, not from the mere act of criticism, but from a state of mind in the critic which is in itself unjustifiable and the excuse may be so forfeited either by reason of an evil intent in him, or by reason of mere recklessness in making an unwarrantable assertion. For then the comment would not be fair comment at all. Apart from extrinsic evidence of malice, protection must be withheld even from what purports to be criticism, if it states as a fact to be inferred from the book criticised, an imputation for which the book itself contains absolutely no foundation whatever.

The right of fair comment involves two essentials, first that the imputation should be comment on the work criticised, and second that it should be "fair"—that is to say, that if it professes to be an inference drawn from the contents of that work, it must be an inference which it is possible to draw therefrom.

* Criminal appeal No. 386 of 1906.