criminal Courts trying over again matters which have been thoroughly dealt with and finally decided by a civil Court of competent jurisdiction. It may be that to this principle there would be rare exceptions founded on, possibly, the discovery of new, cogent and important evidence. But ordinarily that principle must prevail, and if that principle must prevail, then it is a matter of the first importance, of the very highest relevancy to show to a criminal Court that the matter which the criminal Court is asked to adjudicate on has already been fully dealt with by a civil Court. That is all it was proposed to do in this case by the production of the judgment of the civil Court, and, I think, it was undoubtedly relevant and of the very highest importance. It was so, however, not for the purpose of proving or disproving facts in dispute in the case, but for the purpose of enabling the Magistrate to decide whether he should or should not exercise the discretion given him by clause (2) of section 253 of the Criminal Procedure Code.

Order set aside.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1916. *August 4.*

IBRAHIM BHURA JAMNU (HEIR OF ORIGINAL PLAINTIFF), APPELLANT *v.* ISA RASUL JAMNU AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Construction of document—Sale of houses in consideration of Mehr—*Consideration not necessary to support transaction—Limitation Act (IX of 1908), Schedule I, Articles 142, 144.*

The plaintiff's husband sold to her two houses in 1898 by a registered document in consideration of her *Mehr* (dowry). One of the houses sold

*Second Appeal No. 542 of 1915.

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remained in the occupation of the plaintiff's husband from 1898 till his death in 1911. Soon after his death, the defendants took possession of the houses. The plaintiff having sued to recover possession, the lower Courts dismissed the suit on the grounds that the sale of 1898 was a sham and supported by no consideration and that the claim was barred by limitation. On appeal,

Held, that the deed of 1898 was on the face of it a document of advancement and needed no consideration.

Held, also, that the possession of the house by the plaintiff's husband up to 1911 being permissive, the plaintiff was in constructive possession of it, and her claim was, therefore, not barred by limitation.

SECOND appeal from the decision of G. N. Mehta, Joint Judge of Ahmedabad, confirming the decree passed by B. G. Tolat, Subordinate Judge at Godhra.

Suit for possession.

One Rasul was the owner of the house in dispute. He had two wives: Bai Asha (defendant No. 2) and Bai Hajiani (plaintiff). By the former he had one son (defendant No. 1).

In 1886, Rasul executed a registered document reciting that he had given ornaments to the plaintiff on account of her *Mehr* (dowry). He passed another registered document to the plaintiff in 1898, reciting that he had sold two of his houses to her on account of her *Mehr*. It provided as follows :—

"You are my wife. Therefore, at the time I contracted (*nikah*) marriage with you, I had agreed to pay you Rs. 1,700, namely, rupees seventeen hundred, in respect of your *Mehr*. The said moneys are due to you by me. Whereas, you having now made a demand on me for taking (? payment of) the said moneys (to you), I have sold (? I sell to you), in lieu of the said moneys, houses two in number......which belong to me by right of ownership and are in my possession and enjoyment......I have sold (to you), in lieu of the abovementioned moneys in respect of your *Mehr* two houses."

Of the two houses sold, one remained in possession of the plaintiff. In the other (*i.e.*, bearing No. 603), Rasul continued to live as before and he occupied it till his

death which took place in November 1911. Shortly afterwards, defendants Nos. 1 and 2 took possession of the house.

In 1912, the plaintiff filed the present suit to recover possession of the house. The defendants contended *inter alia* that the house in dispute was never in plaintiff's possession but was in their possession; and that the sale of 1898 was nominal and made with a view to shield the property from Rasul's creditors.

The Subordinate Judge held that the sale of 1898 was sham and unsupported by consideration; and that she was not dispossessed by the defendants for the house was in Rasul's possession. He, therefore, dismissed the suit.

On appeal, the Joint Judge held that the sale deed was mere sham and intended to convey no real title; and that the plaintiff was not in possession of it and was not forcibly evicted by defendants.

The plaintiff appealed to the High Court.

G. N. Thakor, for the appellant.

T. R. Desai, for the respondent.

BEAMAN, J. :—This is a troublesome case, because, on a first view, it seems as though there are two concurrent findings of fact in the Courts below either of which would be fatal to the plaintiff's case. The first of these is that there was no consideration for the conveyance upon which the plaintiff relies bearing date the 26th February 1898. But, in our opinion, having regard to the true character of the document and the relations subsisting between the parties thereto, it stood in no need of consideration, and the question thus raised and answered as a question of fact, bearing upon the operativeness of that document in both the Courts below, was a question which never should have been raised at all,

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The nominal vendor was the husband of the plaintiff and in form he sells two houses to his wife for what was then owing to her as her *Mehr* or dowry. The sum thus owing at the time is stated to be Rs. 1,700 (*babashai*). A document of that kind is, on the face of it, a document of advancement and needs no consideration. It would have been as valid a document had there been no reference made to the amount of the *Mehr*. Had the vendor purported to sell these two houses to his wife for a nominal consideration of one anna, that would have been perfectly good consideration in the eye of the law, and indeed had no consideration at all been expressed, the document would have been a perfectly valid transfer in consideration of marriage, for love and affection. Its true nature then more clearly appearing to be what it really is, a deed of gift, a very little examination of the terms of the document would have shown to the Courts below that no question of money consideration ought to have arisen. And all documents of this kind being made in consideration of marriage, the consideration is not from the point of view of the donee, the money value expressed, but the marriage. Here what the vendor says in effect is, 'in consideration of our marriage I desire to give you the equivalent of Rs. 1,700 (*babashai*) which I should have given you before and I give it to you in the form of two houses.' No one can suppose for a moment that the money was to pass first from the husband to his wife and then from the wife to the husband as in the case of an ordinary sale. Thus it appears to us that the whole inquiry into consideration instituted at the instance of the defendants in the Courts below was entirely irrelevant. And the course of that inquiry was seriously deflected by the wrong view of the document taken in both the Courts below. Thus the plaintiff, being put upon proof of consideration, she, a

poor ignorant woman and suddenly confronted with a document of the year 1886, Exhibit 70 in the case, imagined that she was bound to give some explanation of that before the Court would accept the later document of 1898. It is very natural, therefore, that she may have committed herself to statements under examination which the trial Judge and the Court of first appeal were right in disbelieving. But this does not in the least affect our view that primarily it was for the Courts to look at the true character and legal effect of the document itself and so in the first instance properly apportioning the burden of proof, if there was any burden, they should have next given effect to what was and what must have been at the time the intention of the parties to the document as expressed upon its face. It is to be borne in mind that this gift, as I choose to call it, is made by the husband in the year 1898 and that he survived it for thirteen years. It was made by a registered conveyance which immediately transferred the ownership of the property to the plaintiff, his wife. During the whole of that period it is not suggested that the donor or vendor made any attempt to revoke the document or have it set aside upon any ground of fraud, misrepresentation, failure of consideration or the like, and it is perfectly certain that he could never have done so, for the very good reason that it is a document which is in no need of consideration at all. It is idle, therefore, to say, as was said in the Courts below, that it was open to the parties to show that the document was hollow and sham and that the vendor or donor never intended that it should be acted upon. It has all its legal effect from the moment of execution and there can, therefore, be no question of any intention to act upon or not to act upon it, later. If this view be correct, and we feel no doubt whatever but that it is, it follows that the finding of fact in both the Courts

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below that the plaintiff-donee or vendee of the document of 1898 gave no consideration therefor is a finding of fact which is not binding upon us. What the Courts evidently meant was that all the *Mehr* she was entitled to had been given to her as far back as 1886, and this by the document, Exhibit 70. In the first place that is a consideration which does not properly arise in considering the effect of a complete document of advancement of the year 1898. In the next place if it did arise, it should be plain, I think, that it carries no weight. For there is nothing whatever that I am aware of, to prevent a Mahomedan husband increasing the amount of *Mehr* at any period after the marriage, beyond that which was originally in contemplation. And if it be said that *Mehr* owing by the husband to the wife once discharged is thereby finally extinguished, I may add that in that case the deed of 1898 shows itself more clearly in the light of a purely voluntary gift for love and affection. I do not say that on an ordinary construction of its terms that would be the view we should take of it. It appears to us sufficiently clear and expressed in itself that the husband acknowledged that he was under some promise or obligation to pay his wife a sum of Rs. 1,700 (*babashai*) in consideration of her marriage and whatever effect is to be given to the earlier deed, showing that at one time he had entrusted her with ornaments of the value of Rs. 1,000 also in consideration of marriage, that in itself does not appear to be in any way inconsistent with the later estimate made by the husband himself, of what he at that period still considered himself to owe to his wife, in consideration of marriage. That is what he and he alone should be cognizant of. He has recorded it in a registered instrument and it would be idle to attempt now to substitute the interpretation of Courts or the evidence of witnesses for an intention locked within the mind of an individual,

who is now dead and not in a position to speak to it himself. Thus it is clear that, in his opinion, Rs. 1,700 (*babashai*) being his indebtedness to his wife in respect of her marriage in 1898, he discharges it by the present of these two houses conveyed to her under a registered instrument. That, I should say, is the true construction of the document and sufficiently explains why we do not feel ourselves bound by the finding of fact in the Courts below on the point of consideration as it was presented and understood by those learned Judges.

Next, there is a point of adverse possession upon which again there are concurrent findings of fact against the appellant, that is to say, the learned Judges believed that the facts they found were conclusive against her present claim. Now if we look at the form of the plaint itself, we see at once that it is an extremely crude and inartificial document. What the plaintiff says is that she is the owner of this property and that she has been dispossessed of it, somewhere in November 1911, shortly after her husband's death, by the defendants. In that form the suit appears to be a suit governed by Article 142 of the Schedule to the Limitation Act, and in all cases of that kind the onus falls first upon the plaintiff alleging dispossession and by implication, therefore, possession, to prove possession within the statutory period. But if we look to what was evidently the plaintiff's real meaning, taking the whole of her plaint in connection with the document of 1898 annexed thereto, I think it is perfectly clear that every fact, found as a fact and rigorously separated from mixed inference, is entirely consistent with the plaintiff's allegations throughout. She has contended that under the deed of 1898 her husband sold to her, or gave to her, as I prefer to say, both his residential houses Nos. 603 and 604 standing side by side, and that from that time onwards until 1911 she had the

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use and enjoyment of both of them. It is common ground that she has resided in house No. 604 and the finding of fact in both Courts—if indeed the Court of appeal directed its attention to this point which I doubt—is that the plaintiff's husband Rasul resided in house No. 603 up to his death. Now we think it would be no violent presumption upon that finding of fact, having regard to the relationship existing between Rasul and the plaintiff, to hold that such residence by Rasul was permissive by and on behalf of the plaintiff, and if that was so, then indeed she would prove her ownership by the deed of 1898 and thereafter constructive possession by the permissive residence of her husband Rasul in that house up to his death in 1911. Why are we to infer from the residence of a Mahomedan husband in one of the two houses owned by his wife with whom, as far as this evidence goes, we must infer he was on the most affectionate terms, that such residence was adverse to her right over the property? That that right existed is proved beyond all doubt by the execution of the conveyance. And nothing would be more consistent with normal relations in a Mahomedan household where the husband had two wives, as Rasul had, than that he should have occasionally availed himself of the other house for residence with his other wife with the permission of the plaintiff to whom he had given both houses in consideration of marriage. If then we take this view while adopting every real finding of fact of the Court below, we arrive, without any difficulty, at this conclusion upon the whole case. Whether the plaintiff was evicted forcibly as the Courts below have thought she alleged she was—seems to us a matter comparatively unimportant, and yet that is the only matter which appears to have engaged the attention of the Appellate Judge who disposed of it in a line and a half. Upon all the evidence, we think that her case throughout was that she never

had physical possession of house No. 603 at all in the sense, I mean, that she ever herself lived therein. Upon this incident of violent dispossession, both the lower Courts appear to have thought that she said that the defendants came to house No. 603 and turned her out of it. What she really said was something quite different. She said that she put her head out of the window of her own house No. 604 which is next door to the other house and remonstrated with them, but without any effect. Now that is entirely consistent with the view of the case as a whole which has commended itself to us, viz., from the execution of the instrument, Exhibit 69, in this case until the death of Rasul the plaintiff's possession of house No. 603 was never more than constructive, although from that time until the death of Rasul there was no interposed adverse possession of any other person. Adopting that view and for the reasons which, speaking for myself, I have attempted to give in some detail—we are of opinion that the materials before us are sufficient to enable us to dispose of this case without a further remand.

Before concluding perhaps I may mention a preliminary objection taken by Mr. Desai on behalf of the defendant to the substitution of the present plaintiff, Ibrahim, for the original plaintiff Mariam. We went into that with some minuteness in order to be satisfied that Mariam's estate was fully represented by the present substituted plaintiff, Ibrahim, and we are satisfied that Ibrahim is the only surviving son of the late Mariam and that there are no others who are entitled to share in the representation of her estate. We, therefore, thought it unnecessary to direct further inquiry into this matter although the substitution was allowed *ex parte*. Our conclusion upon the whole matter is that the plaintiff's claim has been proved and should now be awarded with all costs throughout.

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HEATON, J.:—I agree. It seems to me that when you have a document executed and registered such as Exhibit 69 in this case, there is no need to enquire, and it is irrelevant to enquire, about the consideration. It is a conveyance by a husband to his wife with whom he is living and expressed to be on account of dower. It is not a sale in the ordinary sense. But it is proved in the case that on a previous occasion the wife had received Rs. 1,000 of dower or the equivalent and that this was the dower fixed as that which was to be paid on the occasion of her marriage. But because this had been paid, what is there which invalidates the document in which the husband conveys the property to his wife for a different amount of dower. It is quite open to him to do so and having done so the conveyance is a good conveyance: it is in substance, however you look at it, a deed of gift. The only way in which such a document can be set aside is by proof of some such circumstances as are indicated in section 53 of the Transfer of Property Act. That, indeed, was the case set up by the defendants in this very suit. That attack admittedly fails. So I need say no more about it, and that attack having failed, I cannot see that there is any merit in what else has been urged against the deed. What has been urged seems to be inspired by some idea, to me rather curious, that after a man has duly executed a document and had it registered he can get rid of it by showing that he did not intend it. This seems to me to be in law an entirely futile method of proceeding.

Then as to the point of limitation, I am also in agreement with my learned colleague. Had the defendants any real case of adverse possession, they would, it seems to me, have put it forward in their pleadings or at any rate have raised it in the trial Court and have directed evidence to that point. But the case did not

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proceed on any issue of adverse possession. The defendants were content to deal with the question of limitation as a question involving only Article 142, and as my learned colleague has shown and as I entirely agree, Article 142 does not bar the plaintiff's claim. It seems to me that to allow the defendants now to substitute an attack on a ground of adverse possession—and this would involve a remand of the case—would be an indulgence to them which is not required either by law or by justice.

So I concur in the order proposed.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Ag. Chief Justice and Mr. Justice Shah.

1916. *August* 16.

BABU GANESH DESHMUKH AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* SITARAM MARTAND DESHMUKH (ORIGINAL PLAINTIFF), RESPONDENT.*

Limitation Act (IX of 1908), section 5—Delay in filing appeal—Death of party pending judgment—Legal representatives not brought on record—Minority of one of the appellants—Negligence of the guardian—Excuse of delay—Sufficient cause, a question of discretion.

S filed a suit against G in the Subordinate Judge's Court. G died after the hearing of the suit, but before delivery of judgment. The judgment was pronounced on the 3rd July 1913 against G. On the 2nd October 1913 G's widow R filed an appeal to the District Court on behalf of her two sons B and D, of whom B was major but D a minor. The appeal was found to be beyond time by fifty days. The question being raised whether there was a sufficient cause for excuse of delay in favour of the minor appellant,

Held, that there was no sufficient cause as R and B, the adult relatives of the minor, who were concerned to prosecute the litigation in their own interests and in the interest of the minor, were negligent, remiss and careless.

* Second Appeal No. 603 of 1915.