be made operative by an order absolute or a final decree. But at the time this decree was made, there was no provision in this Presidency either for an order absolute or for a final decree. Everything was done in execution proceedings. The Code of 1908 which provides for a final decree in mortgage suits obviously could not apply to a decree made sometime in the eighties of the last century. The Transfer of Property Act could not apply, because it only came into operation in this Presidency in the year 1893. Therefore it is impossible, as I think, to get away from the effect of the pronouncement in the decree itself. It follows from this that the right to redeem has long been barred and no suit to redeem therefore can succeed.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

BHIKABHAI MULJIBHAI PATEL (ORIGINAL PLAINTIFF) APPELLANT *v.* PANACHAND ALIAS CHHAGANLAL ODHAVJI PATEL (ORIGINAL DEFENDANT) RESPONDENT.*

1919. *February* 12.

Transfer of Property Act (IV of 1882), section 53—Transfer made with intent to defeat or delay the creditors—Whether the transfer void in toto or void in so far as there is no consideration.

One J mortgaged his property with the plaintiff for Rs. 4,000 in 1911. In the same year, the defendant, a creditor of J, brought a suit against him and obtained a decree in execution of which the properties mortgaged to the plaintiff were attached. The plaintiff having failed to raise the attachment, sued for a declaration that the defendant was not entitled to attach the properties. Both the lower Courts found that out of the consideration of Rs. 4,000 the only sum for which the plaintiff was a creditor of J at the time of the mortgage transaction, was Rs. 1,000 and dismissed the plaintiff's suit on the

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ground that the plaintiff and J had an intention to defeat or delay the creditors of J in effecting the transfer. On appeal to the High Court it was contended that the plaintiff was entitled to a declaration that he had a lien to the extent of the debt existing at the time of the mortgage.

Held, that it being found that both the transferor J and the transferee plaintiff had the intention of defeating or delaying the creditors of the transferor and the consideration of the mortgage being treated as one and indivisible, under section 53 of the Transfer of Property Act, the document must at the option of the person defeated or delayed be treated as void *in toto* and not merely as void in so far as there was no consideration.

Ex parte *Chaplin*: *In re Sinclair*[1] and *Hakim Lal* v. *Mooshahar Sahu*[2], relied on.

SECOND appeal against the decision of R. S. Broomfield, Joint Judge of Ahmedabad, confirming the decree passed by Keshavlal V. Desai, Joint Subordinate Judge at Ahmedabad.

Suit for a declaration.

Two persons Joitaram Chhagan and Magan Joitaram traded in grain and cloth in partnership from the year 1908 to April 1911. Magan died in April 1911 and the business of the firm came to an end. Eight days after Magan's death, that is, on the 27th April 1911, Joitaram executed two registered documents by which he purported to mortgage practically the whole of his immoveable property to the plaintiff for Rs. 5,400. The property which was his (i.e., Joitaram's) by right of ownership was mortgaged for Rs. 4,000 and the property which he held as mortgagee was assigned to the plaintiff as security for Rs. 1,400.

In June 1911, the defendant, a creditor of Joitaram, brought a suit against him and obtained a decree in execution of which the properties mortgaged to the plaintiff were attached. The plaintiff then applied that the properties should be sold subject to his lien, but his application was rejected.

(1) (1884) 26 Ch. D. 319. (2) (1907) 34 Cal. 999 at p. 1017.

The plaintiff, therefore, filed a suit No. 761 of 1912 for a declaration that the transfer to the plaintiff was a genuine and *bona fide* transaction and that he was entitled to have the attachment order set aside. He alleged that the consideration for the two deeds in his favour was an already existing debt in respect of four loans previously made by the plaintiff to Joitaram of Rs. 2,000, 1,200, 1,300 and 1,000 amounting in all to Rs. 5,500.

The defendant contended that the mortgage to the plaintiff was merely intended to defeat and delay the creditors of Joitaram, who was insolvent at the time, and that it was not a transaction entered into in good faith for valuable consideration.

The Subordinate Judge held that the plaintiff was not a *bona fide* transferee for consideration and that the transfer relied on by him was made with intent to defeat and delay the creditors of Joitaram, though on going into the history of the four loans of Rs. 2,000, 1,200, 1,300 and 1,000 alleged to have been previously made by the plaintiff he found that only Rs. 1,000 were due to the plaintiff. He, therefore, dismissed the plaintiff's suit.

On appeal, the Joint Judge confirmed the decree.

The plaintiff appealed to the High Court.

G. N. Thakor, for the appellant:—The transaction with the appellant is a mortgage and not an out and out sale. The full consideration is no doubt not proved but both the Courts do find the consideration proved to the extent of over Rs. 1,000. There can be no question of inadequacy of consideration in the case of a transaction of mortgage. Section 53 of the Transfer of Property Act can, therefore, have no application. Clause 2 of section 53 could not be extended to

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apply to mortgages for consideration. There is no definite finding that the transaction was not intended to be operative. It is also impossible to say that a mortgage found to be for consideration can be a sham transaction. The test of good faith is whether the transaction is a mere cloak for retaining a benefit to the grantor: *Natha* v. *Maganchand*[1]; *Ramasamia Pillai* v. *Adinarayana Pillai*[2]; *Alton* v. *Harrison*[3]; *Ex parte Games*[4].

The third clause of section 53 will, therefore, help me if section 53 applies. Section 53 is not intended to apply to cases where preference has been given to one creditor over another. *Musahar Sahu* v. *Hakim Lal*[5]; *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[6]. Section 53 is further intended to cover a suit on behalf of all creditors.

I submit, I am entitled to a lien for the amount found due to me. The case of *Chidambaram Chettiar* v. *Srinivasa Sastrial*[7] has been entirely misapplied. It was a case of an assignment and section 53 was not in question at all. I rely on *China Pitchiah* v. *Pedakotiah*[8]; *Rajani Kumar Dass* v. *Gaur Kishore Shaha*[9].

H. V. Divatia, for the respondent:—The facts found by the lower Courts show that both the transferor and the transferee had the intention of defeating or delaying the creditors of the transferor and the whole consideration mentioned in the mortgage deed is one and indivisible. The plaintiff cannot, therefore, be said to be a transferee in good faith. His mortgage deed is voidable *in toto* and cannot be upheld to the

(1) (1903) 27 Bom. 322.
(2) (1897) 20 Mad. 465.
(3) (1869) L. R. 4 Ch. 622 at p. 626.
(4) (1879) 12 Ch. D. 314.
(5) (1915) L. R. 43 I. A. 104.
(6) (1916) L. R. 44 I. A. 72 at p. 77.
(7) (1914) 37 Mad. 227.
(8) (1911) 36 Mad. 29.
(9) (1908) 35 Cal. 1051.

extent of actual consideration: see *Hakim Lal* v. *Mooshahar Sahu*[1]. The case of *Rajani Kumar Dass* v. *Gaur Kishore Shaha*[2] is distinguishable from the present case. There the transaction was not for a grossly inadequate consideration and the two parts of the consideration were separable while in the present case the whole consideration is indivisible and the same is grossly inadequate.

The case of *China Pitchiah* v. *Pedakotiah*[3] is also distinguishable from the present case. That was a suit by a mortgagee against his mortgagor to enforce his mortgage. The remarks at page 31 of the report are in my favour.

Thakor, in reply:—The case of *Hakim Lal* v. *Mooshahar Sahu*[1] is not against me. The remarks relied on are all *obiter*. The later case of *Rajani Kumar Dass* v. *Gaur Kishore Shaha*[2] explains the remarks.

SCOTT, C. J.:—Joitaram Chhagan and Magan Joitaram traded in grain and cloth in partnership from the year 1908 till April 1911 when Magan died and the business of the firm came to an end. Eight days after the death of his partner, namely, on the 27th April 1911, Joitaram executed two registered documents by which he purported to mortgage practically the whole of his immoveable property to the plaintiff for Rs. 5,000 or thereabouts. The property which was his by right of ownership was mortgaged for Rs. 4,000, and the property which he held as mortgagee was assigned to the plaintiff as security for Rs. 1,400. In June in the same year the defendant, a creditor of Joitaram, brought a suit against him and obtained a decree in execution of which the properties mortgaged to the plaintiff were

(1) (1907) 34 Cal. 993. (2) (1908) 35 Cal. 1051,
(3) (1911) 36 Mad. 29.

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attached. The plaintiff then applied that the properties should be sold subject to his lien, but his application was rejected and the plaintiff has brought this suit for a declaration that the defendant is not entitled to attach the properties and bring them to sale. The defendant's case is that the mortgage to the plaintiff was merely intended to defeat and delay the creditors of Joitaram who was an insolvent at the time, and was not entered into in good faith for valuable consideration. On behalf of the plaintiff it is alleged that the consideration for the transaction was an already existing debt in respect of four loans previously made by the plaintiff to Joitaram of Rs. 2,000 1,200, 1,300 and 1,000, amounting in all to Rs. 5,500.

The findings of the lower Courts establish that this case of four existing loans as a consideration for the mortgage transaction is entirely false, and that the only sum for which the plaintiff was a creditor of Joitaram at the time was possibly Rs. 1,300, but more probably, Rs. 1,000. The value of the properties mortgaged, apart from those of which Joitaram was the mortgagee, was about Rs. 4,000, and in this appeal we are only concerned with that mortgage for Rs. 4,000. The finding of the lower appellate Court is that "it is, to say the least of it, very doubtful, whether the transaction was intended to be a genuine mortgage at all. It purported to be a mortgage with possession, but the plaintiff never got possession, and though Joitaram executed some rent notes in his favour, he never paid any rent. The explanations given of this are very unconvincing. If this was a real mortgage, and not a sham, one cannot understand why the plaintiff took no steps to exercise his rights under it and insist on the payment of rent." The learned Judge also holds that considering the circumstances in which the transaction took place good faith on the plaintiff's part is out of the question.

The inevitable conclusion appears to be that the plaintiff and Joitaram were in collusion in framing a mortgage deed upon a false consideration of Rs. 4,000, whereas the only sum owing did not exceed Rs. 1,300, and considering the financial condition of Joitaram one must conclude that the parties were in collusion for the purpose of screening Joitaram's property from his creditors.

The only question which gives rise to any difficulty is whether the plaintiff is entitled to a declaration that he has a lien to the extent of the debt existing at the time of the mortgage. The case must be decided according to the provisions of section 53 of the Transfer of Property Act, for although there has been no suit to avoid the mortgage, the action of the defendant is tantamount to an avoidance if he has the right to avoid it as a creditor defeated or delayed. Section 53, so far as material, provides that every transfer of immoveable property, made with intent to defeat or delay the creditors of the transferor, is voidable at the option of any person so defeated, or delayed, but nothing in the section shall impair the rights of any transferee in good faith for valuable consideration. There can be no doubt that the mortgage is a transfer of immoveable property, and that the plaintiff is a transferee, and upon the findings of fact there can be no doubt that the plaintiff is not a transferee in good faith. Therefore the concluding words of the section do not apply to his case. The inferences deducible from the established facts show that both the transferor and the transferee had the intention of defeating or delaying the creditors of the transferor, and under those circumstances it appears to us that the document must at the option of the person defeated or delayed be treated as void *in toto*, and not merely as void in so far as there is no consideration.

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In May on 'Fraudulent and Voluntary Dispositions of Property,' 3rd Edition, at p. 63, it is stated, as the result of the English authorities, that a fraudulent intention, to which the purchaser was a party, will override all inquiry into the consideration, and among the cases cited in support of that proposition is *Ex parte Chaplin : In re Sinclair*[1] where a transfer was stated to be for a consideration which was entirely false, although there was some consideration proceeding from the transferee, and Lord Justice Fry held that the whole deed was void under the Statue of Elizabeth.

Similarly in *Hakim Lal* v. *Mooshahar Sahu*[3], Mr. Justice Mookerjee states, after an exhaustive discussion of the authorities, that a conveyance or transfer, whether founded on a valuable or adequate consideration or not, if entered into by the parties thereto with the intent to hinder, delay or defraud creditors, is void as to them.

It has been contended on behalf of the appellant that the judgment in *Hakim Lal* v. *Mooshahar Sahu*[2] is inconsistent with that in *Rajani Kumar Dass* v. *Gaur Kishore Shaha*[3]. In the later case, however, at p. 1057, we find the following passage. "It has not been shown by any evidence, which may be said to be cogent, that the transaction of mortgage between the plaintiffs and the Deb defendants was entirely fraudulent, or for a grossly inadequate consideration and was intended only to defeat or delay the realization of the dues of the Dass defendants. If the considerations for the mortgage (we use the plural number, to include the two different sums—Rs. 4,853 and Rs. 3,647—which make up Rs. 8,500) could not be separated from each other, there would be good grounds

(1) (1884) 26 Ch. D. 319. (2) (1907) 34 Cal. 999 at p. 1017.
(3) (1908) 35 Cal. 1051.

for holding that the transfer evidenced by the deed was fraudulent. In that case the failure of consideration to the extent of Rs. 3,647 taken with the other proved facts would lead to a reasonable conclusion that the mortgagees intended to help the mortgagors to defeat the realization of the debt covered by the *hatchitta* in favour of the Dass defendants. Such conduct on the part of the mortgagees and mortgagors would lead to the inference that they were acting in collusion." Then further on the Court indicates with regard to the Rs. 3,647, as to the reality of which as part of the consideration there was some doubt, "it might ...be that the plaintiffs had a *bona fide* intention of advancing the additional sum for enabling the mortgagors to carry on their business, that they put off payment until the money was needed or until registration of the deed, but that as the Dass defendants either commenced their suit, or were about to do so for a larger sum than Rs. 3,647, the plaintiff withheld payment of the additional sum. They might not have had any such intention as would invalidate the instrument under section 53 of the Transfer of Property Act. Their moral turpitude in making a false case afterwards in the present proceedings would not be sufficient to deprive them of their legal rights, though a false case might reflect discredit on the original transaction." It appears from this that the Judges in that case did not in any way dissent from the law as laid down in the earlier Volume. Being of opinion then that the consideration stated in the mortgage deed must, in the circumstances of the case, be treated as one and indivisible, we are of opinion that the plaintiff's case must fail. We, therefore, affirm the decree and dismiss the appeal with costs.

Decree confirmed.

J. G. R.