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posted, we consider, until the Court or its officer had ascertained that notice had been served. It should then have been posted for some date not less than a month from the date of service on the respondent.

We must, therefore, allow this appeal, and, reversing the District Judge's judgment, we remand the appeal for rehearing, after giving due notice to the parties and allowing to the respondent the time prescribed by law for filing a memorandum of objections.

The second appellant will have his costs in this appeal. The costs in the Courts below must abide the event.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1890. Aug. 11.

VENKATRATNAM (DEFENDANT No. 3), APPELLANT,

v.

REDDIAH AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Evidence Act—Act I of 1872, s. 92—Collateral evidence to show that an apparent sale-deed was a mortgage—Variance between pleading and proof.

In a suit by an attaching creditor to set aside an order (which allowed an objection made to his attachment by one claiming under a sale-deed from the judgment-debtor,) and for the declaration of the judgment-debtor's title, the sole issue framed was whether the sale-deed was *bonâ fide* and supported by consideration:

Held, that the plaintiff was entitled to show by collateral evidence that the sale-deed was really a usufructuary mortgage and that the mortgage had expired.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 745 of 1888, reversing the decree of M. B. Sundara Rau, District Munsif of Masulipatam, in original suit No. 42 of 1888.

In original suit No. 669 of 1885 in the Subordinate Court of Cocanada, the present plaintiff obtained a decree against defendant No. 1 and in execution attached the land in question in the present suit. The son, since deceased, of defendant No. 3, intervened in execution, claiming title under a registered instrument, dated 24th May 1877, and executed to him and defendant No. 2 by defendant

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* Second Appeal No. 830 of 1889.

No. 1. That claim having been allowed, the plaintiff now sued for the cancellation of the order allowing that claim and for a declaration of the title of defendant No. 1.

The only issue which was framed in the case was as follows:—"Was the suit property sold *bonâ fide* to defendant No. 2 and the "late son of defendant No. 3 and for consideration?"

The District Munsif recorded a finding on this issue in the affirmative and accordingly dismissed the suit. On appeal the District Judge, relying upon the oral evidence of the case and upon certain letters, which had passed between defendants Nos. 1 and 2 and the son of defendant No. 3, came to the conclusion that the sale-deed was in reality a usufructuary mortgage which had now spent itself and that it was accordingly open to the plaintiff to attach the land.

Defendant No. 3 preferred this second appeal.

Mr. *Ramasami Raju* for appellant.

Rama Rau for respondents.

JUDGMENT.—It is argued that document I being registered, the Judge was in error in finding that the real transaction between the parties was a mortgage. We do not consider that section 92 of the Evidence Act has any bearing on the question. Where one party alleges that a transaction is a sale and the other contends that it is a mortgage, it has been held that oral evidence is admissible to prove that the real transaction was a mortgage (see *Govinda* v. *Jesha Premaji*(1), *Mahadaji Gopal Baklekar* v. *Vithal Ballal*(2), *Hem Chunder Soor* v. *Kally Churn Das*(3), *Baksu Lakshman* v. *Govinda Kanji*(4), and *Kashi Nath Dass* v. *Hurrihur Mookerjee*(5).

Another contention is that neither plaintiff nor defendant alleged that the transaction was a mortgage, as found by the District Judge. There is, however, in the third defendant's written statement a distinct reference to a promise made by the third defendant's son to restore the land on payment of the money due to him, and the issue framed in the case admitted of either party showing what the transaction really was. The fact of plaintiff (a stranger) having stated that the sale was for no consideration and collusive did not preclude the Judge from finding, upon the evidence, that there was consideration and that the transaction was in fact a mortgage. We dismiss the second appeal with costs.

(1) I.L.R., 7 Bom., 73. (2) I.L.R., 7 Bom., 78. (3) I.L.R., 9 Cal., 528.
(4) I.L.R., 4 Bom., 594. (5) I.L.R., 9 Cal., 898.