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BAKEWELL, J.

or the Court of Small Causes, and it is not clear what is the proper procedure. The shares of these creditors must therefore be carried to separate accounts entitled in the matter of their respective decrees, and be subject to the order of the Court of Small Causes of Madras.

The application of Hajee Mahomed Sait Shirajee is not correctly entitled, because it should have been made in Suit No. 237 of 1908, to the credit of which the fund stands; since, however, no objection has been raised, I direct the application to be amended by entitling it in that suit.

The shares of the judgment-debtors in suits Nos. 315 of 1911 and 381 of 1912 will be paid to the credit of those suits.

The plaintiff in this suit is a Muhammadan woman, and several of the decrees against her appear to have been made by consent; having regard to these facts and the allegations made against each other by the several applicants, and in order to give them an opportunity of establishing those allegations in other proceedings, I direct that this order be not issued by the Registrar for ten days.

Each party will add the costs of his application to his decree amount.

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## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.*

1913. February 19 and March 5.

MOTTAYAPPAN *alias* SELAMBA GOUNDAN (PLAINTIFF), APPELLANT,

*v.*

PALANI GOUNDAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

*Indian Evidence Act (I of 1872), sec. 92, provs. 1 and 3—Sale-deed—Property, vesting of—Oral evidence contrary to its tenor, admissibility of—Document operative at once—Evidence as to vesting of property at a future time, inadmissible—Rule of English Law, different.*

An executant of an instrument (which was not a sham document but intended to operate at once), cannot be permitted to set up or prove that the instrument, which according to its tenor vested the property in the grantee at once, was in reality intended to vest it only at a future time or after the death of the executant.

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* Second Appeal No. 731 of 1912.

Section 92, proviso 1 of the Indian Evidence Act has no application to a case where the instrument represents what the parties intended to put down in writing, *though it might not be in accordance with what they intended to do* and with the legal effect that they secretly wanted to bring about but which for some reason they did not want to put in writing.

The rule of English Courts of Equity permitting evidence to be given to show that a document was intended to operate in a manner different from the plain and apparent meaning of its language cannot be followed in India, as it is contrary to the provisions of section 92 of the Indian Evidence Act.

*Balkishen Das* v. *Legge* (1900) I.L.R., 22 All., 149 (P.C.), *Achutaramaraju* v. *Subbaraju* (1902) I.L.R., 25 Mad., 7, *Dattoo* v. *Ramchandra* (1906) I.L.R., 30 Bom., 119 and *Challa Venkata Reddy* v. *Devabhaktuni Mruthunjayadu* (1912) M.W.N., 164, followed.

*Jibun Nissa* v. *Asgar Ali* (1890) I.L.R., 17 Calc., 937 (P.C.), referred to.

*Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1906) I.L.R., 28 All., 439 (P.C.), *Ramalinga Mudali* v. *Ayyadorai Nainar* (1905) I.L.R., 28 Mad., 124 and *Amirthathammal* v. *Periasami Pillai* (1909) I.L.R., 32 Mad., 325, distinguished.

SECOND APPEAL against the decree of E. L. THORNTON, the District Judge of Trichinopoly, in Appeal No. 108 of 1911 preferred against the decree of A. V. RATHNAVELU PILLAI, the District Munsif of Karur, in Original Suit No. 797 of 1909.

The suit was brought for a declaration that the sale-deed executed by the plaintiff in favour of his deceased daughter Angammal on the 21st September 1906 was a nominal transaction unsupported by consideration, for the cancellation and the getting back of the document and for recovery of possession of the suit lands from the first defendant (who was the husband of the said Angammal who had died on the 6th April 1909) and the second defendant who was the father of the first defendant. The plaint alleged that the first defendant obtained possession of the lands in question after the death of his wife Angammal and that the plaintiff did not receive any consideration for the sale or put the vendee in possession of the lands. The plaint set out the purpose for which the sale-deed was executed in the following terms :—"As the plaintiff had no male issue and in order that there might be no objection subsequently from his senior wife and from his *dayadhis*, he executed the sale-deed in favour of his daughter nominally." The defence was that the first defendant was the real vendee that his wife was only a benamidar for him and that the deed evidenced a genuine sale. The District Munsif held that the sale in favour of Angammal was a nominal transaction, not supported by consideration and that the plaintiff who was the real owner of the property was entitled to

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cancel the document and recover possession of the lands. The defendants appealed to the District Court. On appeal the learned District Judge found 'that the plaintiff intended by the sale-deed to give his daughter a title to the property conveyed thereunder after his death though not in his life-time, and that the recitals in, and the execution of, Exhibit II, which was a registered patta razinamah executed in favour of the plaintiff's daughter by the plaintiff over a year after the execution of Exhibit I (the sale-deed) showed that the latter deed was partially acted upon.' The learned Judge consequently held that the sale-deed was not a sham but was partially acted upon and that, under the rulings in *Amirthathammal* v. *Periasami Pillai*(1) and *Ranga Ayyar* v. *Srinivasa Ayyangar*(2) and other cases, the plaintiff was not entitled to show that the sale-deed was intended to operate contrary to the apparent tenor of its terms, and that the plaintiff could not recover the property. The learned Judge reversed the decree of the District Munsif and dismissed the suit. The plaintiff preferred this Second Appeal.

*S. Srinivasa Ayyangar* and *A. Subbarama Ayyar* for the appellant.

*T. Natesa Ayyar* for the respondents.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The suit out of which this Second Appeal arose was instituted by the plaintiff for a declaration that a sale-deed (Exhibit I) executed by him in favour of his deceased daughter, the wife of the first defendant, was a nominal transaction and inoperative against him and to recover possession of the properties from the two defendants in the suit, the second defendant being the first defendant's father. The sale-deed was executed on the 21st September 1906. The vendees, the first defendant's wife died on the 6th April 1909. The plaintiff alleged that the first defendant obtained possession of the land in question after the death of his wife. The defendant's answer was that the real vendee was the first defendant himself, his wife being a benamidar for him, and that the deed evidenced a genuine sale. The District Munsif found that the first defendant's deceased wife was not a benamidar, that no consideration passed for the sale, that the consideration recited, viz., Rs. 1,000, was much less than the real value of the lands and that it was executed, not with the intention of vesting title in the vendee

(1) (1904) I.L.R., 32 Mad., 325. (2) (1898) I.L.R., 21 Mad., 56.

immediately but to ensure her succession to the land on his death and to make it impossible for his first wife, who was alive, or for his *dayadis* to claim it in preference to the apparent vendee who was his daughter by his deceased second wife He held also that Exhibit II, dated the 2nd December 1907, by which the plaintiff consented to the transfer of patta for the land in favour of his daughter, was also intended to be a nominal transaction, the plaintiff executing it owing to improper pressure on the part of the defendants, and on the assurance of his daughter that it should not have any legal operation. He passed a decree in the plaintiff's favour. The District Munsif's finding was in accordance with the allegation in paragraph 4 of the plaint, "As the plaintiff had no male progeny and so that there may be no objections afterwards by the first wife and the *dayadis*, the plaintiff executed this nominal sale-deed mentioning a small price and not for anything else." On appeal, the District Judge was of opinion that "the plaintiff intended by the sale-deed (Exhibit I) *to give his daughter a title to the property conveyed thereunder after his death, though not in his life-time*, and both the recitals in and the execution of Exhibit II, registered patta razinamah executed in favour of the plaintiff's daughter by the plaintiff over a year after the execution of Exhibit I, show that the latter deed was partially acted upon."

Apparently, the Judge meant by the statement that Exhibit I was partially acted upon, that the intention to give the daughter a title to the property after the plaintiff's death was confirmed by Exhibit II. We do not understand him to mean that, on the date of Exhibit II, the plaintiff intended to vest the land at once in his daughter, although his original object in executing Exhibit I was to enable her to succeed to the land on his death. We shall consider the legal result of these findings presently. The Judge held that the plaintiff could not be permitted to aver that an instrument which, according to its tenor, vested the property in the grantee at once, was in reality, intended to vest it only at a future time or after the death of the executant. On this view, he dismissed the suit.

The proposition of law enunciated by the Judge is, in our opinion, correct. The rule that the parties to an instrument cannot set up a contemporaneous parol agreement varying or contradicting its terms necessarily involves this. We are unable to accept the argument of Mr. S. Srinivasa Ayyangar, the learned

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Vakil for the appellant, that it is open to a party to show that an instrument was intended to have legal operation not according to its tenor (which he interprets to mean in the manner its terms would operate) but in a different manner. The contention is clearly opposed to the terms of the section. Mr. Srinivasa Ayyangar argues that proviso (1) to the section 92 of the Indian Evidence Act would cover his contention. He says that an agreement that an instrument should operate in a way different from what its terms import is a fact which would entitle the party alleging the agreement to a decree or order relating to the instrument similar to fraud, intimidation, etc., which, according to the section, may be alleged as a ground for invalidating the document or entitling the party to a decree or order relating thereto. The argument is obviously unsound. The facts which may be proved, according to the proviso, must be such as to show, either that the legal requisites for a valid agreement did not exist in the case at all, or that one of the parties did not give his free consent to it or that the document does not express what was really intended to be embodied in it. It has no application to a case where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal result that they secretly wanted to bring about, but which for some reason they did not wish to put in writing. The very object of the section is to prevent one of the parties from asserting that they intended to do something different from what they conjointly and deliberately stated in the instrument. In this case, both the parties stated in the instrument that the property was to vest in the daughter at once. The contention that it was really to vest not at once but at a future time could not be set up or proved. The English Courts of Equity have sometimes allowed evidence to be given in some cases that a document was intended to operate in a manner different from the plain and apparent meaning of its language, such as, that an instrument of sale was intended to have effect only as a mortgage. They allowed proof to be adduced not only of fraud in the bringing about or the engrossment of the instrument but in enforcing it in a manner which would be in accordance with the mode in which both the parties deliberately stated and intended to state that it should operate, but not in accordance with the mode in which they secretly intended that it should

operate. The Judicial Committee of the Privy Council has decided that this could not be allowed in India, it being prohibited by section 92 of the Evidence Act. See *Balkishen Das* v. *Legge*(1), *Achutaramaraju* v. *Subbaraju*(2), *Dattoo* v. *Ramchandra*(3), *Challa Venkata Reddy* v. *Devabhaktuni Mruthunjayadu*(4).

We do not think that *Jibun Nissa* v. *Asgar Ali*(5) or *Chaudhri Hehdi Hasan* v. *Muhammad Hasan*(6), lays down a different rule. In the former case, it was held by the Calcutta High Court that a patta (lease) and a *kobala* (sale) executed by a Muhammadan lady in favour of her nephews were brought about by fraud and without proper consideration. The grantees contended with reference to the patta that even if it was not intended to give an immediate leasehold interest by the executant, she intended by means of the instrument that her nephews should, by means thereof, succeed to her property in preference to her legal heirs.

WILSON, J., observed (p. 941): "Now, in order to give effect to this contention, it must be held that, although under the terms of the deed, Mehdi was to have a vested interest from the dates of their execution, in fact he was not to have it till after the death of Delrus. There are several objections to this view: first, it would directly contradict the deeds; secondly, it would conflict with the case put forward by the defendants themselves in their pleadings and evidence." Their Lordships of the Privy Council agreed with the reasons given by WILSON, J., for the conclusion arrived at by the High Court that no effect could be given to the deed in favour of the grantor's nephews. The case is a clear authority for the position that a party cannot be permitted to show contrary to the terms of the instrument that the estate given under it immediately to the grantee should vest in him only at a future time. It, in no way, helped the argument alleged on behalf of the appellant. The Privy Council did not hold that the patta was in fact intended to have effect after the grantor's death or lay down that, inasmuch as it was not intended to operate till then, the executant could impeach it as void. Their Lordships' judgment proceeded on the ground that

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(1) (1900) I.L.R., 22 All., 149 (P.C.).
(2) (1902) I.L.R., 25 Mad., 7.
(3) (1906) I.L.R., 30 Bom., 119.
(4) (1912) M.W.N., 164.
(5) (1890) I.L.R., 17 Calc., 937 (P.C.).
(6) (1906) I.L.R., 28 All., 439 (P.C.).

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the executant proved that the patta was not intended to have any present operation and that the grantees could not be allowed to prove that it should operate at a future time contrary to its terms. *Chaudhri Mehdi Hasan* v. *Muhammad Hasan*(1) is really not in point at all. The Privy Council merely held that an instrument executed by a Muhammadan which was sought to be set aside could not be given effect to either as a pure gift or as a gift coupled with consideration. The grantee failed to prove, either delivery of possession, which would be necessary in the case of a pure gift, or actual payment of consideration, which was necessary to support it as a gift coupled with consideration. They also held that he failed to prove that the donor intended to divest himself *in præsenti* of his property. No question arose as to the admissibility of evidence to prove that a reversionary interest was intended to be given though their Lordships no doubt observed that "in executing that deed, the plaintiff did not intend to give the property to the defendant except subject to a reservation of the possession and enjoyment to himself and his wife during their lives, to which the defendant pledged himself, and that the deed was not followed by delivery of possession, but was a fictitious and benami deed and was invalid and void." *Ramalinga Mudali* v. *Ayyadorai Nainar*(2) was also referred to on behalf of the appellant. It has no bearing on the case. All that was held there was that it is open to a party to an instrument to prove that it was not intended to have any legal operation at all unless a certain event happened. The instrument in that case had not been delivered to the grantee. There was, therefore, no completed juristic act. This is in accordance with proviso (3) to section 92 which allows the existence of any oral agreement constituting a condition precedent to the attaching of any obligation under a contract or grant to be proved. In *Amirthathammal* v. *Perisami Pillai*(3) this case was distinguished from the one then before the Court. The facts found were that a Hindu widow executed a deed of sale but without receiving any consideration for it in favour of her nephew, and got the tenant to attorn to the donee.

The plaintiff who was the grantor alleged that the deed was executed only with the object that the reversioner should

(1) (1906) I.L.R., 28 All., 439 (P.C.). (2) (1905) I.L.R., 28 Mad., 124.
(3) (1909) I.L.R., 32 Mad., 325.

not get the property after her death. The learned Chief Justice took the plaintiff's case to be that the deed should not operate if the nephew predeceased her (an event which happened and which led to the plaintiff's instituting the suit to have the sale declared invalid), and he held that such an agreement could not be set up. MILLER, J. was of opinion that the plaintiff could show "that it was agreed between her and the transferee that the transfer should be revocable or should be suspended or postponed until the happening of a given event" and that the lower court should be called upon to give a finding on those questions.

WALLIS, MILLER AND SANKARAN NAIR, JJ., on the appeal which was preferred in consequence of the Chief Justice's opinion having prevailed, observed that "the question whether there was an oral agreement that the sale-deed should not take effect until the plaintiff's death, and the further question whether such an oral agreement could be proved" did not arise as no such agreement was pleaded and they therefore upheld the grant. It is doubtful if there is any conflict between the propositions of law laid down by the learned CHIEF JUSTICE and by MILLER, J. There can be no doubt that a condition that a deed should not continue to operate in case a certain event happens, such as the death of the grantee before the grantor, could not be proved where the grant gives an unconditional estate. MILLER, J. apparently regarded an agreement entitling a grantor to revoke the instrument as a collateral one not inconsistent with the grant; and in stating that an agreement could be proved that a grant should be suspended or postponed until the happening of a given event, the learned Judge, apparently, meant an understanding that the instrument should have no legal operation at all until the happening of an event, and not that it should operate at once, but that the estate which it purports to vest in the grantee at once should vest only on the happening of the event. An agreement of the latter kind would, in substance, be a variation of the terms of the instrument, but not one of the former kind. The distinction is a real one, though its application may, in practice, be difficult in some cases. We are clearly of opinion that the plaintiff could not be allowed to set aside the document by proving that, though according to the terms of Exhibit I, the land in question was to pass to the plaintiff's daughter immediately it was really intended to pass to her only on his death

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any more than the defendant could be permitted to claim under the instruments a right different from that which it purports to convey. The difficulty still remains, what is the real substance of the finding of the District Judge. Does it amount to this, that the plaintiff intended that, by virtue of the instrument in question, the property should vest in the grantee on the plaintiff's death? If so, he could not be allowed to set it up or prove it. Nor could he prove an agreement that the grant should operate only if his daughter survived him, or that it should cease to operate if she predeceased him. The Judge apparently accepts the plaintiff's contention that the object of Exhibit I was only to prevent his senior wife and his *dayadis* from succeeding to the property and that it was to have no other effect. The plaintiff was to retain the right to dispose of the property, if he chose, during his life-time. The grantee could not claim that a vested reversion was given to her so as to prevent the plaintiff from doing so. At the same time the plaintiff's object was, not that his daughter should be able to claim the property after his death (that is not as a legatee) but as a vendee who acquired her title on the date of the sale deed. In substance, the deed was intended to furnish false evidence against the plaintiff's wife and *dayadis*, of the land having vested in the daughter on the date of the sale deed. The plaintiff did not intend that she should take it as a bequest. There was nothing to prevent him from making a will in her favour if that was his intention. An agreement that a gift should operate only as a will could not be proved.

But the agreement in this case was really not that the land should vest in the daughter from a future date, that is, on the death of the grantor but that she should hold it in order to prove that she obtained a title operating from the date of its execution. In other words, it was not to operate as a present conveyance, but as false evidence, to be used in future, of a conveyance operating from the dates borne by it. But as the result of such false evidence, the daughter was to derive a benefit, as she was to use it for getting hold of the property on the plaintiff's death. The result may be shortly put thus. The document was not to be a mere sham, the plaintiff's daughter was to take a benefit under it, she was to take the property eventually as vesting in her on the date of the sale, but subject to the plaintiff having the entire right to enjoy it during his life-

time and subject also to her right being defeated at the plaintiff's option. It was, therefore, intended to create some rights in favour of the vendee but different from what it purported to create. This does not come within the rule that an instrument may be shown not to have been intended to create any rights at all but was brought about entirely with the indirect object of creating false evidence against third parties, or within the rule that a party may set up and prove a parol agreement constituting a condition precedent to the attaching of any obligation under it.

The case set up by the plaintiff and found by the Lower Appellate Court is, therefore, contrary to the terms of section 92 of the Evidence Act. The result is that the document must be allowed to have operation according to its terms.

We dismiss the Second Appeal with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.*

SRI SRI SRI GAJAPATI KRISHNA CHANDRA DEO GARU, PROPRIETOR OF NANDIGAM ESTATE, BEING A MINOR UNDER COURT OF WARDS BY HIS NEXT FRIEND THE COLLECTOR OF GANJĀM (PLAINTIFF), APPELLANT,

1913. March 11 and 12.

*v.*

P. SRINIVASA CHARLU (DIED), LEGAL REPRESENTATIVE OF THE LATE DIWAN BAHADUR P. ANANDA CHARLU, C.I.E., AND TWO OTHERS (DEFENDANTS—LEGAL REPRESENTATIVE AND HIS LEGAL REPRESENTATIVES), RESPONDENTS. *

*(Indian) Contract Act (IX of 1872), sec. 70, applicability of, regardless of English decisions.*

Plaintiff's father made a gift of a village to the defendant, the condition being "we (the plaintiff's father) should get the village sub-divided in your (donee's) name, you should pay to the Government the peshkash fixed thereupon according to the said subdivision."

*Held* that the defendant was bound to pay his portion of the peshkash only from the time of the subdivision when alone the exact amount due by defendant was ascertained; and that plaintiff, who had paid the whole peshkash

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* Appeal No. 25 of 1909.