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apart from the accompanying statements, under section 8."

These remarks apply with full force to the evidence of P. W. 2, Saiyid Ali, and P. W. 3, Ghafur Khan, who try to incriminate the accused by alleging that it was he who pointed out the place where he said that he (the accused) had buried Izhar Ahmad and that he gave the *chhuri* (exhibit IV) as the weapon by which he had killed Izhar Ahmad. We need not, however, labour this point because in this case the evidence of the principal witness, P. W. 1, Musammat Kusuma, breaks down completely.

Nanavutty and Ziaul Hasan, JJ.

The assessors, with whose aid the trial was conducted in the Court of Session, were unanimously of opinion that the accused was not guilty of the offence charged. We are in entire agreement with their opinion. Upon the evidence on the record the case against the accused has not been proved beyond any shadow of doubt. We accordingly allow this appeal, set aside the conviction and sentence passed upon the appellant, acquit him of the offence charged and order his immediate release.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

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October, 9.

PANDIT BHAGWAN DUTT (DEFENDANT-APPELLANT) *v.* BRIJ BHUKHAN, PLAINTIFF AND ANOTHER, DEFENDANT (RESPONDENTS).*

Pre-emption—Sale disguised under the mask of a different transaction—Court to look to real nature of transaction—Direct evidence disbelieved—Circumstantial evidence, if can be considered.

Where parties have really entered into a sale transaction but have disguised it under the mask or cloak of a different transaction, the Court must look to the real nature of the transaction for the purpose of determining whether it could be

*Second Civil Appeal No. 202 of 1933 against the decree of Pandit Shyam Manohar Nath Shargha, District Judge of Gonda, dated the 10th of April, 1933, upholding the decree of Sheikh Mohammad Tufail Ahmad, Munsif of Utraula at Gonda, dated the 20th of October, 1932.

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subject to the right of pre-emption or not. It does not make any difference if direct evidence is disbelieved and it can be held on circumstantial evidence that the transaction in question was really one of sale but was disguised in the form of a different transaction. *Mohammad Ishaq* v. *Fahimunnissa,* (1), relied on.

Messrs. *Ghulam Hasan* and *Iftikhar Husain,* for the appellant.

Mr. *Mohammad Ayub,* for the respondents.

ZIAUL HASAN, J.:—This is the defendant's second appeal in a suit for pre-emption.

On the 17th of June, 1931, Manbodh Singh Jat transferred his four pies share in *patti* Ram Narain mohal Bhagwandat of village Mohammadnagar District Gonda to Bhagwandat, defendant appellant, by a deed which purports to be a *shankalapnama.* It is recited in the deed that the transferee, Bhagwandat, is the *guru* of Manbodh Singh, executant, and that the property is gifted to Bhagwandat on that account. The plaintiff respondent, Brij Bhukhan, who is cousin of Manbodh Singh, brought his suit for pre-emption on the allegation that the transaction between Manbodh Singh and Bhagwandat was really one of sale disguised in the form of a *shankalapnama* and that the sale consideration was Rs.300. How this consideration passed to Manbodh Singh was stated by the plaintiff-respondent as follows:

The price of the property was not paid by Bhagwandat but was promised to be paid at some future date and as security for the promise, Bhagwandat made a usufructuary mortgage of certain property of his in favour of Manbodh Singh's cousin, Mahabir Singh as *benamidar* in lieu of Rs.300, the sale consideration. It was suggested that no consideration really passed in regard to the mortgage and that when Bhagwandat would redeem, he would pay Rs.300, the price of the property in dispute, to Manbodh Singh. In the meantime the usufruct of the property would go to Manbodh Singh by way of interest on the unpaid price of the property in suit.

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Ziaul Hasan, J.

The defence was that the transaction in question was a *shankalap* and not a sale and that the market value of the property was Rs.1,000. Evidence was produced by the plaintiff-respondent to prove in a direct manner that the transaction actually settled between Manbodh Singh and Bhagwandat was one of sale but this evidence has been disbelieved by both the lower courts. The learned Munsif was, however, of opinion that irrespective of the direct evidence produced by the plaintiff, there were circumstances which went to prove that the transaction was really one of sale and, as another mortgage was made by Bhagwandat, on the date of the *shankalapnama*, in favour of Manbodh Singh's other cousin Dasrat Singh for another sum of Rs.300, he held that the consideration for the sale was Rs.600 and not Rs.300 as stated by the plaintiff. He therefore decreed the suit on condition of payment of Rs.600. Bhagwandat, appellant, went in appeal to the District Judge who upheld the findings of the learned Munsif and dismissed the appeal.

Bhagwandat comes here in second appeal and the only question is whether the transaction of the 17th of June, 1931, was a *shankalap* or sale. I have heard the learned counsel for both parties at some length and am definitely of opinion that the courts below were right in their finding. In the case of *Mohammad Ishaq* v. *Fahim-un-nissa* (1) it was held by Sir Louis Stuart, C.J., and the present Acting Chief Judge that where parties have really entered into a sale transaction but have disguised it under the mask or cloak of a different transaction, the Court must look to the real nature of the transaction for the purpose of determining whether it could be subject to the right of pre-emption or not and this view has very recently been affirmed by a Full Bench of this Court. It was sought to distinguish the case just referred to from the present case on the ground that while in that case it was found as a fact that the transaction entered into by the parties was really one

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of sale, in the present case the evidence on this point was disbelieved, but this does not to my mind make any difference so long as it can be held that the transaction in question was really one of sale but was disguised in the form of a different transaction. In the present case there are ample reasons to take this view. To begin with, there is reason to doubt even the truth of the allegation that Bhagwandat was the *guru* of Manbodh Singh. One of the defendant's own witnesses stated that Manbodh Singh adopted Bhagwandat as his *guru* seven or eight years ago while Manbodh Singh himself says that he became Bhagwandat's *chela* four or five years ago. Then, one of the reasons given in the *shankalapnama* for making the *shankalap* is that Manbodh Singh is issueless but in view of the fact that he is only forty years of age and has a wife living, this reason can hardly be said to be satisfactory. Further, the fact that no *zamindari* property was left to Manbodh Singh after the *shankalap* also renders the *shankalap* improbable.

Ziaul Hasan, J.

Looking to the mortgages made in favour of Mahabir Singh and Dasrat Singh, cousins of Manbodh Singh, we find the following facts:

Both the mortgages were made on the very date on which the *shankalapnama* was executed. The story was that the consideration for both the mortgages was paid to Bhagwandat prior to the execution of the mortgage deeds, but no receipt for either of the two sums was taken or produced. It was said that this money was required by Bhagwandat for pilgrimage but one of his own witnesses stated that he never saw Bhagwandat going on a pilgrimage. It is also difficult to believe that Mahabir Singh and Dasrat Singh charged no interest on the money said to have been advanced by them to Bhagwandat several months before the date of the mortgages. Mahabir Singh not only had to admit that he was himself in debt but also that he advanced Rs.300 to Bhagwandat after raising money by sale of grain. Further,

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Mahabir Singh could not say who purchased the stamped papers for the mortgage deeds or what was the value of those papers.

All the above facts constitute strong circumstantial evidence to show that the transaction in question was really one of sale disguised in the form of a *shankalap*.

The appeal is therefore dismissed with costs.

Ziaul Hasan, J.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Acting Chief Judge and Mr. Justice Ziaul Hasan

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October, 5

SHEO DARSHAN SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* KUNWAR MAHESHUR DAYAL AND OTHERS (DEFENDANTS-RESPONDENTS)*

Mortgage—Usufructuary mortgage—Profits guaranteed in a usufructuary mortgage—Deficiency in profits—Decree for deficiency, obtained before termination of mortgage, validity of—Transfer of Property Act (IV of 1882), section 99—Sales held before Transfer of Property Act came in force—Section 99, whether applies to such sales—Sales held in contravention of section 99, whether void or voidable—Civil Procedure Code (Act V of 1908), Order XXXIV, rule 14 and Order XXXII, rule 3—No steps taken to get sales set aside within limitation—Sale, if can be set aside afterwards—Minor defendant—Application for appointment of guardian ad litem—*No formal order passed—Omission, whether a mere irregularity or fatal to suit—Guardian being an executant of the deed in suit, whether a disqualification—Suit not contested by guardian—Decree, whether invalid.*

Where a usufructuary mortgage guarantees the profits of the mortgaged property and the mortgagee obtains, before the termination of the mortgage, a decree for the deficiency in the profits even if the deficiency is recoverable at the termination of the mortgage it was still a debt payable by the mortgagors and the decree passed in the suit cannot be disregarded as invalid. *Bonthi Damodaram Chetty* v. *Bansilal Abeerchand* (1), relied on.

*First Civil Appeal No. 21 of 1932, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Sitapur, dated the 7th of December, 1931.

(1) (1926) I.L.R., 51 Mad., 711.