1948 *Present :* **Dias and Basnayake JJ.**

PENDERLAN, *et al.*, Appellants, *and* PENDERLAN, Respondent

S. C. 251–252—D. C. Chilaw, 11,937

Evidence—Sale of immovable—Fictitious transaction—No consideration—Oral Evidence—Admissibility—Evidence Ordinance—Section 92.

The prohibition in section 92 of the Evidence Ordinance does not extend to a case where it is sought to prove that the transaction in question was a sham and that an instrument was never intended to be acted upon.

APPEAL from a judgment of the District Judge, Chilaw.

S. J. V. Chelvanayakam, K.C., with *S. W. Jayasuriya*, for the 3rd defendant appellant.

Cyril E. S. Perera, with *Christie Seneviratne*, for the 1st defendant appellant.

N. E. Weerasooria, K.C., with *H. W. Tambiah* and *K. C. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

April 20, 1948. BASNAYAKE J.—

The plaintiff is the sister of the first and second defendants and the sister-in-law of the third defendant. The fourth defendant is a stranger. The plaintiff asks that she be declared entitled to a fibre mill known as " St. Antony's Mills " and that deed No. 925 dated May 15, 1941, attested by H. H. A. Jayawardene, Notary Public, be set aside. The learned District Judge has given judgment for the plaintiff, and the first and third defendants have appealed therefrom to this Court. The learned District Judge has accepted the evidence of the plaintiff and her witnesses and we see no reason to interfere with his finding. According to the facts as proved by the plaintiff, she received by way of gift from her father during his lifetime a land called Makullagahawatte. In 1935 she constructed thereon a fibre mill at a cost of four thousand rupees. The second defendant was placed in charge of the mills. In 1936 the first defendant, having conceived the idea of applying for the post of Vidane Aratchi, asked the plaintiff to transfer to him her land, so that he may have the necessary property qualification, promising to re-transfer it within a month. Deed No. 10,423 of November 19, 1936, attested by M. D. A. S. Gunasekera, Notary Public (exhibit P1), was accordingly executed. The plaintiff's mother, younger brother, and a child adopted by the plaintiff's father, were also parties to it, as they themselves transferred certain lands to the first defendant for the same purpose. The transfer was made in the form of a conveyance for a consideration of Rs. 5,000. Actually no consideration was paid, nor was there any change in possession. The land transferred by the plaintiff was thus described in the schedule :

> " The lands called Makulkarandagahawatta and the adjoining Kajugahawatta, situate at Kolinjadiya in Kammal Pattu, Pitigal Korale, Chilaw District of the North-Western Province, which are together bounded on the north by the garden formerly of Nikulan Fernando and presently of Benedict Fernando and others, east by field, south by village limit belonging to the heirs of Jappu Singho or presently Dombagahawatta belonging to Medarlis Panderlan, west by the garden of Philippu Annavirala and others, containing in extent about eighty-five coconut trees plantable soil together with the planta tions and soil *and the fibre mill called ' St. Antony's Mills ' erected thereon together with the machinery, tools and implements and the buildings held and possessed by the second named vendor under and by virtue of deed No. 34,734 dated May 8, 1917*, attested by P. M. A. Fernando, Notary Public, and by the first named vendor upon the life interest reserved by the said deed ".

The first defendant did not carry out his promise to re-transfer within a month. When pressed to do so, he asked the plaintiff to wait till he got married. When he got married in 1940 he was again asked for

the re-transfer and after some delay on May 17, 1941, he executed deed No. 6,744 attested by T. P. M. F. Gunawardene, Notary Public (exhibit P2). The land in question is thus described in the schedule to that deed:

> "*After excluding the fibre mills called 'St. Antony's Mills' together with the fixtures and everything appertaining thereto on the land called Makulkarandagahahena* and the adjoining Kajugahawatte situate at Kolinjadiya in Kammal Pattu, Pitigal Korale, Chilaw District of the North-Western Province, and bounded on the north by the garden formerly of Nikulan Fernando now of Benedict Fernando and others, east by field, south by the village limit belonging to the heirs of Jappu Singho or presently Dombagahawatte belonging to Medarlis Panderlan, and west by the garden of Philippu Annavirala and others and containing in extent about eighty-five coconut trees plantable soil together with the plantations produce and everything appertaining thereto with the soil held and possessed by me the said vendor under and by virtue of deed of transfer No. 10,423 dated November 19, 1936, attested by M. D. A. S. Gunasekere, Notary Public".

The plaintiff did not discover that the fibre mill had been excluded till December 29, 1942, when the third defendant entered into possession of the mills. Then it was that she came to know that the first defendant had sold the fibre mill to the 3rd defendant by deed No. 925 of May 15, 1941, attested by H. H. A. Jayawardene, Notary Public (exhibit P3), for a sum of Rs. 2,000. It is this last mentioned deed that the plaintiff seeks to have declared null and void.

It is clear from the plaintiff's evidence that the transaction evidenced by exhibit P1 was fictitious. Though it purported to be a sale it was no sale at all for it lacked the essentials of such a transaction, for as Huber [1] says:

> "He who under cloak of sale makes another contract, but for the sake of appearances pays a trivial amount by way of price, effects no sale;".

Voet says the same thing (18.1.1) when he quotes with approval the following statement from the digest:

> "'merely fictitious sale is considered as null, and consequently the property in the thing which is the subject of it is not considered to pass'. That is to say, it is so far null that it cannot hold good as a sale, because where a price is lacking 'a contract of purchase lacks its very essence'".

It has been argued that section 92 of the Evidence Ordinance precludes the admission of the evidence which the plaintiff has given as to the true nature of the transaction, and we have been referred by learned counsel to a number of decisions [2] of this Court in support of his submission. Those cases have no application to the present case. There is nothing in the provisions of section 92 of the Evidence Ordinance that precludes the reception in evidence of the fact that no consideration was received by the vendor although the notary in his attestation says that the vendors

[1] *Huber's "Jurisprudence of My Time", Vol. I., p. 409.*
[2] *(1913) 16 N. L. R. 368; (1946) 47 N. L. R. 457; (1946) 47 N. L. R. 297; (1945) 46 N. L. R. 213; 48 N. L. R. 289.*

declared in his presence that they received the consideration prior to the execution of the deed. In the case of *Sah Lal Chand v. Indarjit* [1], Lord Davey observes :

> " The point which was chiefly pressed on their Lordships by the learned counsel for the appellant was also raised in the High Court and considered by the learned judges—namely, that no evidence should have been received of the agreement alleged by the respondent, because it varied or contradicted the written contract, and was therefore inadmissible under s. 92 of the Evidence Act. Their Lordships, agreeing with the High Court, regard it as settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so, facilities would be afforded for the grossest frauds. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted by oral evidence, but that the terms of the contract may not be varied, &c. The contract was to sell for Rs. 30,000, which was erroneously stated to have been paid, and it was competent for the respondent, without infringing any provision of the Act, to prove a collateral agreement that the purchase-money should remain in the appellant's hands for the purposes and subject to the conditions stated by the respondent. This objection, therefore, fails ".

In the Allahabad Full Bench decision of *Mohammad Taki Kahn v. Jang Singh* [2], Sulaiman C.J. explains the scope of section 92, thus :

> " Section 92, Evidence Act, provides that where a contract has been entered into between two parties and certain terms have been reduced to the form of a document, then neither party, with certain exceptions, can be allowed to go back upon the written document and either contradict, vary, add to or subtract its terms. Both parties must be tied down to the agreement which they chose to reduce into writing. The exceptions are contained in the various provisions. The section therefore prevents a party from varying the terms of the document in a way which would be contrary to its plain language, but where other evidence is sought to be produced in order to invalidate the document itself, then, of course, there is no prohibition because obviously the invalidation of a document is not a variation of its terms, but its very negation ".

I agree with the view expressed by Sulaiman C.J. that the prohibition in section 92 does not extend to a case where it is sought to prove that a transaction was a sham.

Apart from the principle laid down by the Privy Council in the case I have cited above, the plaintiff was also entitled on the principle stated by Sulaiman C.J. to lead evidence of the fact that no consideration was paid, and that possession was not transferred to the vendee. The fact that the vendee re-conveyed the lands though after some delay is also a circumstance the Court is entitled to look at. Conduct of parties is relevant in such a case as this, when it is sought to prove that the document is fictitious and not what it purports to be. Evidence of the

[1] *(1900) 27 I. R. I. A. 93 at 97.* [2] *(1935) A. I. R. Allahabad 529 at 532.*

fact that an instrument was never intended to be acted upon is not excluded by section 92. It has been so held in a number of decisions of the Courts in India. This principle was first enunciated by Sir Barnes Peacock in the Full Bench case of *Kasheenath Chatterjee v. Chundy Churn Banerjee* [1] and followed in Calcutta Full Bench case of *Preo Nath Saha v. Madhu Sudan Bhuiya* [2] and several other decisions since, the most recent of which is *Satyendra Nath Roy v. Pramananda Haldar* [3].

The deed P1 did not convey to the first defendant any title at all to the plaintiff's lands mentioned therein and the first defendant had therefore no right to exclude the fibre mill from his re-conveyance P2. The plaintiff has therefore rightly been declared entitled to the fibre mill. The first defendant had no right at any time to the fibre mill and the third defendant can get no title thereto by deed P3. The learned District Judge has rejected the third defendant's claim of *bona fides* and has rightly made order setting aside deed No. 925 of May 15, 1941, attested by H. H. A. Jayawardene, Notary Public.

For the reasons we have given the appeals are dimissed with costs.

DIAS J.—I agree.

Appeals dismissed.