Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dwarkanath Sadanand Kale v. *Munchershaw Bomonji Chothia, from the High Court of Judicature at Bombay; delivered the 13th February* 1903.

Present at the Hearing:
LORD MACNAGHTEN.
LORD LINDLEY.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.
SIR JOHN BONSER.

[*Delivered by Lord Macnaghten.*]

This is an Appeal against a decision of the High Court of Bombay in its Appellate Jurisdiction reversing a Decree pronounced on the Original Side of the same Court by Fulton J., after a trial that lasted 17 days.

The Appellant, who was a member of an undivided Hindoo family, was Plaintiff in the Lower Court. He brought the suit to set aside an instrument executed by him on the 7th of October 1895, which purported to be a conveyance of one-fourth of his one-fourth share of the ancestral property of the family, in consideration of the sum of Rs. 25,000. The conveyance was accompanied by a bond of indemnity which the Appellant also executed on the same day. Both instruments were acknowledged by the Appellant on the 8th of October 1895 and duly registered.

The Appellant was born on the 23rd of March 1877. He attained his majority on the 23rd of March 1895. He was an ignorant, ill-educated youth of dissolute habits, addicted to

24367. 125.—2/1903. [7] A

gambling from his boyhood and beset by evil companions. When he was at school and under age he borrowed moneys from Marwaries on notes of hand most of which he seems to have repudiated afterwards on the ground of infancy. After attaining majority he went on borrowing from Marwaries, passing notes according to his own account for several thousand rupees, though he says he only received small sums. Ultimately when his credit with Marwaries was exhausted, he applied to one of his friends to help him to borrow more money. Through this friend, who seems to have been a very disreputable character, he was introduced to a man of the name of Devidas who is called a broker. This broker found the Respondent Muncher-shaw to whom the conveyance in question was made, and who was Defendant in the suit.

The Plaintiff's case was that he was the victim of a gross conspiracy, that he was cheated into executing the two deeds of the 7th of October 1895, that he did not know what the purport or effect of those documents was, that he only wanted to borrow about Rs. 3,000, that he was told that the documents which he was induced to sign constituted some sort of security for that amount and that in fact he only received Rs. 1,485 and that in driblets on different occasions.

Fulton J. thought the Plaintiff more a fool than a rogue. On the whole he accepted his story and came to the conclusion that he had fallen among thieves. He was very much impressed by the circumstance, which no doubt is somewhat extraordinary, that any person should have been willing to pay Rs. 25,000 for one-fourth of the Appellant's one fourth share of the ancestral property accepting the Appellant's statement in regard to it as communicated to him by Devidas without making any inquiry as to

the title to the property or the state of the family. The only explanation of this circumstance seems to be that Munchershaw was a person who speculated in transactions of this sort and that he probably was led to believe that the Appellant was too much of a fool to be a knave. That view of the Appellant's character was substantially the view of Fulton J. The Appellate Court however thought the Appellant was more of a knave than a fool and they accepted Munchershaw's story. They believed his witnesses and expressed their opinion that the suit ought to have been dismissed with costs, but with the consent of the Respondent (which in their Lordship's opinion would not have been required if the Appellant had insisted on his rights in that respect) they allowed the conveyance to stand as a security for Rs. 25,000 and interest on the terms of the Appellant repaying that sum with interest at 4 per cent. per annum from the date of the conveyance within six months from the date of their Decree. In default of payment the Respondent was to be at liberty to apply for a sale of the Appellant's share in the ancestral estate.

The question is purely a question of fact. The circumstances of the case are set out very fully from opposite points of view in the Judgment of the Lower Court and in the Judgments of the two learned Judges in the Appellate Court. With the earlier part of the narrative their Lordships do not propose to deal. The story from first to last reflects little credit on those concerned—least of all perhaps on the solicitor, a Mr. Chandulal of the firm of Tyabji Dayabhai & Co., who carried the transaction through, for he was of a very different class and in a very different position from that to which the other actors in the drama belonged. The crucial test of the truth of the Appellant's

story lies in what took place on the occasion when the conveyance in question was executed in Mr. Chandulal's office on the 7th of October 1895. Did the Appellant then receive the consideration money and leave the office with the money in his hands? If he did, the action has justly failed. If he did not, there is no alternative but to accept the decision of Fulton J.

On this question to which the issue was narrowed in both Courts the learned Judges of the Appellate Court say that the evidence is overwhelming in favour of the Respondent's story. Their Lordships are of the same opinion. That the money was ready and actually in the office of Mr. Chandulal on the 7th of October 1895 cannot be doubted. The money was there in Government notes the numbers of which are known. The fact that the Appellant acknowledged the receipt of the consideration money does not perhaps go for much. But Mr. Chandulal swears positively that the money, subject to certain deductions which are specified, was paid to the Appellant and that the Appellant took it away with him tied up in his handkerchief. Mr. Chandulal's account is confirmed by an entry in his diary admittedly made at the time. Their Lordships, though they strongly disapprove of Mr. Chandulal's conduct, see no reason to doubt the truth of his oral evidence. It appears to them inconceivable that he should have made this entry in his diary unless it were a true record of what actually occurred. Mr. Chandulal's story is also corroborated by the evidence of an independent witness in a respectable position who happened to be present in the office in the very room at the time. That this person should have been present and that he should have been called upon to take a part as witness in carrying out the transaction does not appear to their Lordships to be a circumstance so extraordinary

or so improbable as to throw any doubt on the truth of his evidence.

Then the Government notes representing the consideration money had all with two exceptions been returned to the Government Office before the suit was heard. There could not have been, one would suppose, any great difficulty in tracing the history of some or at least one of these notes from the date of the return to the Government Office backwards to the date of the conveyance. But the Appellant has not succeeded in tracing any one of them to the hands of anybody whose possession would tend to disprove the truth of the Respondent's version of the transaction.

It is very probable that after leaving Mr. Chandulal's office the Appellant may have gambled away or been robbed of the bulk of the money in the course of the pleasure trips which he took with his worthless companions from whom he seems to have been rescued at his father's instance—captured and brought home against his will. Fulton J. seems to have thought it strange that if the Appellant had the notes in his possession none of them is proved to bear his endorsement. Considering the Appellant's character and position and the character and position of his companions it seems to their Lordships very unlikely that those who took the notes from him should have cared about his endorsement.

In the result their Lordships accept the view of the learned Judges of the Appellate Court.

Their Lordships however cannot part with the case without making some observations upon Mr. Chandulal's conduct. Their Lordships fully believe Mr. Chandulal's evidence, but on his own statement they think that he has been guilty of a gross dereliction of duty. This boy is brought to his office and Mr. Chandulal takes upon himself the duty of carrying the transaction through for remuneration which was certainly not inadequate. It seems to have been assumed

or settled without apparently any instructions from or communication with the Appellant that the whole of the costs were to be borne by the Appellant. It is all very well for Mr. Chandulal in his bill of costs to call Munchershaw his client. But he knew the Appellant was to be his paymaster and on the most narrow view the Appellant was undoubtedly his client in that part of the transaction in which he acted for the vendor. Mr. Chandulal is a member of a firm which certainly was once respectable and is said to be respectable still. He must have known what his duty was. What did he do to protect the person who was his paymaster and client? Absolutely nothing; he did not take the pains to see that the Appellant understood what he was doing. He did not even ask him if his father or any of his relatives knew anything about the transaction. That he says was no business of his. He did not insist that the Appellant should be separately represented and advised by a solicitor who would look after his interest. He gave him no advice though he knew "he had no other solicitors who were acting "for him." He did not submit the drafts to him for approval. The result is this litigation which probably would never have taken place if Mr. Chandulal had done his duty. Mr. Chandulal's conduct in the partition action in which no one but the Appellant was his client was even worse. But as that action has nothing to do with the present question their Lordships refrain from commenting upon it.

Their Lordships will humbly advise His Majesty that the time for redemption allowed by the Appellate Court should be extended for the period of six months from His Majesty's Order on this Appeal and that subject to that provision the Appeal should be dismissed.

The Appellant must bear the costs of the Appeal.