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Special Appeal No. 812 of 1864.

MOTI'LA'L RA'MDA'S.....*Appellant.*
JAMNA'DA'S JAVERDA'S.....*Respondent.*

Jurisdiction—Institution of Suit—Transfer by District Judge—Memorandum of Appeal—Act VIII. of 1859, Secs. 6 and 334.

The Court of the Principal Sadr Amín of Tháná being closed during vacation, a plaint which, under Sec. 6 of the Civil Procedure Code, ought to have been instituted in that Court, was, by the order of the District Judge, referred for trial to the Assistant Judge, entered in the Register of Suits in the Judge's Court, and tried by the Assistant Judge:—

Held, reversing the decree of the District Court in appeal, that it was not lawful for the Judge to refer the suit, without its having first been instituted in the Principal Sadr Amín's Court; and that the District Judge ought to have considered the objection as involving a question of jurisdiction, although raised before him for the first time during the hearing, and not taken in the memorandum of appeal against the decree of the Assistant Judge.

THIS was a special appeal from the decree of R. H. Pinhey, District Judge of the Konkan, in Appeal Suit No. 542 of 1863.

The facts are fully stated in the following extract from the judgment recorded in the District Court:—

“The amount of claim in this action (Rs. 2,177-4-10) is the amount of a decree obtained by the plaintiff, Jamnádás Javerdás, against Vrajbhúkandás Varjivandás and his son Bálkrisandás, on a deed whereby a certain house was mortgaged to the said plaintiff, Jamnádás Javerdás. It appears that there were creditors who obtained decrees against Vrajbhúkandás Varjivandás and his son Bálkrisandás; but of these the plaintiff, Jamnádás Javerdás, alone had obtained a mortgage on the house which forms the subject matter of this action, and he alone obtained a decree specially against the house. The several judgment creditors made applications in the Principal Sadr Amín's Court at Tháná for the execution of their decrees in the following order: Múlji Boghá, Jagjivandás Javerdás, Láldás Mádhavdás, Purushottam Parbhudás, and Jamnádás Javerdás, the plaintiff.

Some time after these five applications for execution were filed, a first notice of sale was issued, in which all five applications were cited as the cause of the sale of the house; but this notice requires no further consideration, as it was subsequently cancelled, and no sale took place under it. After this a second notice of sale was issued, and under this notice the house was actually sold. In this second notice, however, only four applications for execution are cited, the application of the plaintiff being excluded. From the copy of the Názár's report it further appears that the sale held under this notice was held only in execution of the four applications for execution, exclusive of the application of the plaintiff, Jamnádas Javerdás. The notice distinctly warns the public that it is only to the extent of the right and title of the defendants, Vrajbhúkandás Varjívandás and his son Bálkrisandás, therein that the house is to be sold. The house was purchased at the auction sale, held in pursuance of this notice, by the defendant in the present suit, Motílál Rámdás.

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“ Such being the state of the case, it is difficult *prima facie* to see what possible doubt can have arisen as to the right of the plaintiff to recover the amount of this decree against the house in which the defendant had purchased only the right and title of the mortgagors, and against which the plaintiff had obtained a decree in a suit instituted against the said mortgagors. The action, however, of the Principal Šadr Amín, and of the parties to this suit, and of the other judgment creditors of Vrajbhúkandás Varjívandás and his son, after the auction sale, has rendered the question at issue in this case somewhat complicated, and the rights of the plaintiff more doubtful than they would otherwise be.

“ The auction sale of the house took place on the 25th of April 1860. On the same day the then Principal Šadr Amín, Ráv Bahádur Morobá Kánobá, ordered the proceeds of the sale to be paid over to the plaintiff. This order of the Principal Šadr Amín was, however, reversed, on appeal, by the then Judge, C. Forbes, who, on the 18th of September 1860, ordered that no part of the sale proceeds should be paid to the plaintiff, whose right of recovering against the

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house still subsisted, and that the whole of the proceeds should be divided amongst the other judgment creditors excluding Múlji Bhogá. The plaintiff and Múlji Bhogá then appealed to the late Şadr Court; and the Court, reversing the orders of the District Judge and of the Principal Şadr Amín, on the ground of both being in error in applying the provision of Reg. IV. of 1827, instead of the provision of the Code of Civil Procedure, to the case, ordered payment of the sale proceeds to be made in accordance to the latter law.

“The case then came before the present Principal Şadr Amín, Ráv Bahádúr Krishnaráv Viṭhal Vinchúrkar, who ordered the distribution of the sale proceeds between the plaintiff and the other judgment creditors excepting Múlji Bhogá. The Principal Şadr Amín concluded his order with a direction to the plaintiff to recover the balance of his mortgage claim; but the wording of this part of the order is not very explicit or intelligible, and leaves it doubtful whether the Principal Şadr Amín meant that the balance of the plaintiff's mortgage claim should be recovered against the mortgaged house now in the possession of the defendant, or against the persons and other property of the original mortgagors.

“Against this order of the Principal Şadr Amín appeal being made, the then Judge, H. P. St. G. Tucker, passed the order of which a copy is as follows:—‘After hearing the arguments on all sides, the Court is of opinion that by the sale to Motílál Rámdás the right, title, and interest of the judgment debtors, Vrajbhúkhandás and Báلكrishṇa were alone conveyed to the auction purchaser, and that the rights of the mortgagee (Jamnádás) were in no way set aside by this sale. He has still power to pursue the property into the hands of whomsoever it may fall, and to obtain satisfaction of his lien upon it. With regard to the other decree-holders, as their applications for execution were presented on the same day, and the order for attachment was passed on all at the same time, and the property was attached in obedience to this single comprehensive order, it appears to the Court that, under the provisions of Secs. 270

and 271 of Act VIII. of 1859, they are each entitled to share rateably in the proceeds of the sale, in which the mortgagee can take no share. The decision of the lower court is, therefore, reversed, and the claim of the mortgagee, Jamnádás, to share in the distribution of the proceeds is set aside; and it is ordered that the portion of the proceeds which has already been paid to different individuals shall be re-collected from those persons, and that the whole sum shall then be re-distributed between Málji Bhogá, Jagjívan Javerdás, Láldás Mádhavdás, and Purushottam Parbhúdás: each party to pay his own costs. The indorsement of the full satisfaction on Jagjívan's decree to be cancelled, and the amount he may receive under this order to be entered in its place.'

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"The defendant, Motilál Rámdás, sought to have this order of Mr. Tucker reviewed, but this application was rejected, as also was his application of special appeal to the High Court. It would be reasonable to suppose that the nature of Mr. Tucker's order was such, and its legal effect so obvious, that the plaintiff, Jamnádás Javerdás, would have been able, so long as that order remained unreviewed and unreversed, to execute his decree at once against the house therein mentioned. He could not, however, obtain such speedy and simple justice as this. His application for execution of his decree against the house was rejected by the Principal Šadr Amín, on the ground that, under the ruling of the late Šadr Court, in Special Appeal No. 23 of 1861 (a), the right of a purchaser with possession was better than that of a mortgagor without, and actually excluded the title of the latter.

"Hence the only means of redress left open to the plaintiff was by instituting an action against the purchaser of the house, the defendant. This action he has now filed, and on the plaint being presented in the District Judge's Court, the Principal Šadr Amín's Court being at the time closed during vacation, the then Judge, Mr. Tucker, transferred the case

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to the Assistant Judge's Court for trial; considering that the order of the Principal Şadr Amín, rejecting the application for execution of the decree, showed that he had already prejudged the essential merits of the case, so as to render him disqualified for the trial of the suit.

“During the hearing of this appeal it was attempted by the pleader of the appellant, the defendant Motilál Rámdás, to raise an objection to the *legality* of the District Judge's act in receiving the plaint, since Sec. 6 of the Code of Civil Procedure required every suit to be *instituted* in the court of lowest grade competent to try it; but, under the provisions of the last clause of Sec. 334 of the Code of Civil Procedure, as this objection was not one of the grounds stated in the memorandum of appeal, I declined to hear it argued, because, whether the District Judge's act was right or wrong, the objection was a purely technical one, which did not in any way touch the merits of the case.”

After disposing of the other objections raised by the appellant, the defendant in the original suit, the Judge amended the decree of the Assistant Judge, by awarding the plaintiff's claim in full, together with interest at nine per cent. from the 10th of March 1863 [the date of the removal of the plaintiff's attachment by the Principal Şadr Amín, on the application of the defendant], against the house purchased by the defendant, with costs and interest on the judgment.

Against this decree the defendant preferred a special appeal, in which nine grounds of objection were taken, the last being: “that the plaint was illegally received by the Judge, instead of by the Principal Şadr Amín: the Judge having the power of trying a suit before himself, or transferring it to another competent court [only] after it is once filed in the court of the lowest grade; [whereas] the Court of the Principal Şadr Amín [was] not sitting at the time [the plaint was received by the Judge].”

The case was heard before COUCH, NEWTON, and WARDEN, JJ. Anstey (with him *Shántárám Náráyaṇ*) for the appellant. Reid (with him *Dhirajlál Mathurádás*) for the respondent.

COUCH, J. :—We must set aside the decrees of the Assistant Judge and of the District Judge in this suit, as they were made without jurisdiction.

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The suit ought to have been instituted in the court of the Principal Şadr Amín, from which it might have been withdrawn by the District Judge, and then referred for trial to the Assistant Judge. The objection, though not raised in the memorandum of appeal to the District Judge, ought to have been considered by him, as involving a question of jurisdiction. The objection does not appear to have been taken before the Assistant Judge.

We, therefore, reverse the decrees of both the courts; and order the costs in this and the lower appellate court to be borne by the respondent: Each party to bear his own costs in the Court of the Assistant Judge.

Appeal allowed.

Special Appeal No. 791 of 1864.

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SULTA'NJI T. PA'TIL SIRVALE.....*Appellant.*
RAGHUNA'TH R. MARA'THE.....*Respondent.*

Alienation—Inám—Perpetuity—Amendment of Decree.

Held that it was competent for an inámdár to alienate a third share of whatever interest he himself had in a family inám, in consideration of services rendered in recovering the inám itself; and that the grantee had a right to have the award made by the decree in the terms of the grant, which purported to bestow the third share in perpetuity.

THIS was a special appeal from the decision of C. Walter, District Judge of Puná, in Appeal Suit No. 499 of 1863, reversing the decree of the Şadr Amín, in Original Suit No. 349 of 1862.

The plaintiff sued to recover a one-third share of the defendant's inám village Piple, in the Puná zilla, and its income as arrears due under an agreement in Maráthi executed by the defendant, and dated Mágh Shudh 5th, Shake 1778.

The following is a translation of the agreement :—