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that the appeal could not be allowed: for it is evident that there has been a *bonâ fide* exercise of discretion by the court below. But, the appeal being a special appeal, we have no doubt that we ought to follow the decision in *Amír Sáheb* v. *Jamsedji* (*ubi suprà*), in which it was held that a special appeal is not admissible on a matter of costs, unless the order of the lower court be contrary to the law laid down in some Act or Regulation. Now although it may be argued, and has been argued by Mr. Nánábhái, that the court below was not justified in law in awarding so many as two Pleaders' fees against the plaintiff (a point which it is not necessary for us to decide), it has certainly not been shown to us that there is any law which made it obligatory on that court, contrary to its own discretion, to award a third Pleader's fee.

Decree confirmed.

July 27.

Special Appeal No. 76 *of* 1871.

RUPA'BA'I, widow of Hormasji Nowrozji ...*Appellant.*
PARBHURA'M KIRPA'SHANKAR .....*Respondent.*

Fraud—Money paid under a Mistake induced by Fraud—Apportionment —Consideration.

A, a *gumástá* of B's deceased husband, represented to B that he had her husband's will in his possession, containing a legacy in A's favour, and obtained from B an agreement for Rs. 2,000, expressed to be in consideration of the alleged will being given up to B, of A foregoing his legacy, and of services to be rendered by A in winding up the affairs of the shop. In pursuance of this agreement B paid a sum of money to A; but, upon discovering that the alleged will was not a will at all, sued to recover back the money so paid by her.

Held that, under the circumstances, the taking of the agreement was a fraud upon B; that the payment of the sum of money by B was not a voluntary payment, and could be recovered back; and that the Court could not apportion the amount (if any) that might be claimable by B for work done under the agreement.

THIS was a special appeal from the decision of F. D. Melvill, Acting Judge of the District of Ahmedábád, in Appeal Suit No. 110 of 1868, confirming the decree of M. H. Scott, Assistant Judge at that station.

The facts of the case were these:—

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The defendant was the *gumástá*, a salaried servant in charge of business and accounts, of one Hormasji; and the plaintiff was Hormasji's widow. After Hormasji's death the plaintiff executed in favour of the defendant an agreement to the following effect:—

"You say that my husband has left his will in your keeping, and that in that will a sum of money is bequeathed to you. I or my heir will pay you Rs. 2,000, in lieu of the legacy mentioned in the will, and upon your fulfilling the following conditions, namely: (1) on your handing over to me the original will; (2) on my receiving in cash the debts due by certain persons, namely, [here follow the names], or, if ready money cannot be obtained, on your taking fresh bonds from the debtors to my satisfaction; (3) on your recovering and paying to me in full all debts due by others besides those above named. Independently of the above sum, your pay will be continued to you as long as you remain in my service."

The date of this agreement was the 14th of March 1864. On the 1st of February 1865, the plaintiff paid to the defendant Rs. 1,100, and the following indorsement was made upon the agreement:—"Paid to Parbhurám, on 1st February 1865, Rs. 1,100 on account of this contract." Subsequently the defendant sued the plaintiff for the balance of Rs. 900; but his claim was disallowed, on the ground that he had failed to perform his part of the contract, and that the so-called will was no will at all. The plaintiff then brought the present suit to recover the Rs. 1,100 paid by her, alleging failure of consideration, and imputing generally to the defendant fraud and misrepresentation.

Upon these facts the Acting Assistant Judge, Mr. M. H. Scott, held that the plaintiff could not recover; and in appeal Mr. F. D. Melvill came to the same conclusion, for the following reasons:—

"The *onus probandi* is clearly on the plaintiff to show that the payment was not voluntary, but was induced by compulsion or fraud. There was clearly no compulsion in the matter. I will take for granted that what the plaintiff says is true, namely, that the defendant did send to her to ask her to advance him part of the money, which would become due to him on the complete fulfilment of his contract, and that he did then intimate his intention of carrying out the contract. Now in order to show fraud it must be shown

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that he had then no intention of carrying out the contract any further. There is no proof even that he did nothing after that payment. Considerable stress was apparently laid in the former case on the fact that the so-called will was no will. The court found this to be the case, and I cannot, therefore, enter into the question now. Its genuineness was not proved then, but at the same time it was not proved that it was not genuine, and the document is of such a nature that I cannot presume anything against the defendant because he described it as a will. Under these circumstances, there is absolutely no proof that there was any fraud in the original contract, or that the defendant, at the time when he received payment of the Rs. 1,100, and stated that he intended to carry out the contract, deliberately intended to do nothing more in the matter, and thus deceived the plaintiff. The payment then must be looked upon as voluntary; and the only question which remains is, whether the money is recoverable by law. I hold that it is not. The consideration has only partially failed; the contract has been in part performed, inasmuch as the estate has been partially wound up, and the plaintiff has derived some benefit in consequence."

The special appeal was heard by MELVILL and KEMBALL, JJ.

Shántárám Náráyan, for the special appellant:—The payment of Rs. 1,100 by the plaintiff was not voluntary, as it was made under a mistake of fact. In *Milnes* v. *Duncan* (*a*) Bayley, J., says: "If a party pay money *under a mistake of the law*, he cannot recover it back. But if he pay money *under a mistake of the real facts, and no lâches are imputable to him* in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money." (See also 2 Smith's L. C. 376, 6th ed.) In the present case the defendant represented to the plaintiff that he had in his possession her husband's will. Relying upon this representation, she passes the agreement sued on. It turns out that the alleged will is no will at all; and there is, therefore, a total failure of consideration.

(*a*) 6 B. & C. 671.

Between the plaintiff and the defendant there is the fiduciary relation of master and servant. If the defendant had a will left by his master in his possession, he, as a paid servant, was bound, without extra remuneration, to give it up to his widow. Instead of this, he studiously withholds it from her. This is positive fraud on his part: Story's Equity Jurisprudence, Secs. 192 to 204, and Sec. 384. With regard to the observation of the learned Judge below, that the consideration has only partially failed, and that the contract has been in part performed, inasmuch as the estate has been partially wound up, and the plaintiff has derived some benefit in consequence, I submit that a Court of Equity will not enter into the question of apportionment: Story Eq. Jur., Sec. 470 *et seq.*

Nánabhai Haridás, contrà:—The court has only to consider whether there was not a paper, be it valid or otherwise, on the consideration of the giving up of which, among other things, the plaintiff passed to the defendant the agreement now sued upon. There is a conclusive finding of the court below that there was such a paper; and both parties fully knew that that was the case. Even though the defendant may not be entitled to recover on the agreement, the plaintiff cannot ask back what she has paid for services already rendered.

MELVILL, J.:—We are of opinion that, under all the circumstances, the plaintiff is entitled to recover. The so-called will is not a will at all, and the defendant must have known that it was not. Even if it be genuine (which has never been proved), it is incomplete: it bears neither date nor signature, and is attested by no witness. At the best it is nothing more than the draft of an intended will. The defendant, as a man of business, must have known that it was invalid, and that no legacy could be recovered under it. With this knowledge, he studiously kept the paper out of sight of the plaintiff, and persuaded her that he had in his possession a genuine will, under which he was entitled to a legacy. Under the influence of this misrepresentation, she agreed to pay him a sum of Rs. 2,000, for which in fact she received no consideration whatever. There was no will,

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and if there had been, the defendant was bound to give it up to the plaintiff, as next of kin. Similarly, being retained in the plaintiff's service as a salaried *gumástá*, he was bound to recover the debts due to the shop without any extra payment beyond his salary. Considering the fiduciary relation which subsisted between the parties, the disadvantage under which the plaintiff laboured by reason of her sex and ignorance of business, the power which the defendant's position gave him, the misrepresentation by which the plaintiff was induced to sign the agreement, and the absence of all consideration for the agreement, we have no hesitation in saying that the plaintiff's promise was obtained by fraud, and that she was not bound to pay any portion of the sum of Rs. 2,000.

But it has been argued that although the contract was one which could not be enforced, yet the payment of Rs. 1,100 was made by the plaintiff voluntarily and with her eyes open, and that, therefore, the money cannot be recovered. It is on this ground that the courts below have disallowed the claim. But we hold it to be clear law that a person is entitled to recover money obtained by fraud, and even money paid in ignorance of the facts—at least when there has been no lâches in the party paying it. The cases bearing upon this point will be found collected in the note to *Marriot* v. *Hampton* (*b*). In the present case the payment was made in performance of a promise which had been obtained by fraud. It was made under a mistaken belief that the plaintiff was bound to perform an agreement, which she was not bound to perform. This was not a mistake of law, but of fact: for the reason why she was not bound to perform the agreement was that it had been obtained by fraud; and at the time of the payment she was not aware of the facts constituting the fraud. The so-called will had not been given up, and she had not been permitted to see it. It is said that the defendant is entitled to retain the Rs. 1,100, in consideration of services actually rendered in winding up the estate. But these services he was bound to perform in return for his regular

(*b*) 2 Sm. L. C. 375.

salary; and even were it otherwise, we cannot apportion the payment, or any part of it, and say that it was made in return for service, and not in consideration of the defendant giving up the will or foregoing his pretended legacy. If anything be due to the defendant for work and labour done, he may be entitled to sue for it, but he cannot retain on this account money which he has obtained partly, if not wholly, by fraud.

Decree reversed.

Regular Appeal No. 40 *of* 1870.

August 9.

RANGOBA' NA'IK bin RA'GHOBA' .....*Appellant.*
THE COLLECTOR OF RATNA'GIRI'.....*Respondent.*

Deshmukh, "*usual services*" *of—Act XI. of* 1843. *Sec.* 2—*Limitation—Act XIV. of* 1859, *cl.* 12 *&* 16.

By Sec. 2 of Act XI. of 1843 hereditary officers are bound to "render the usual services of their respective offices, as far as the same may be required by the Collector or other officer under whose control they may be placed by usage or the orders of Government."

Semble, that the "usual services" of a Deshmukh consist in making himself thoroughly acquainted with all circumstances affecting the land revenue in his district, and in communicating such information to the Mámlatdár or Mahálkari; and that the Deshmukh is bound to perform or get performed so much writing business as is necessary for the above purposes, and no more. But if by reason of the subdivision of his táluká his duties in that respect are increased, he is bound either personally to perform such increased duties, or to provide a Kárkun or Kárkuns to perform them for him.

Where a Collector in the year 1854 employed certain Kárkuns to assist a Deshmukh in the performance of his duty, deducting the amount of their pay from the *deshmukhi watan*, but failed to show that the employment of such Kárkuns was necessary, *it was held* that the Deshmukh was entitled to recover the amount so deducted from his *watan*; that his cause of action was not barred in 1870, for that a new cause of action in respect of such deductions accrued each year in which the deduction was made, and that six years' arrears of such deductions could be recovered under Sec. 1, cl. 16, of Act XIV. of 1859.

THIS was a regular appeal from the decision of A. Lyon, Acting District Judge at Ratnágirí, in Original Suit No. 77 of 1869.

The appeal was argued before MELVILL and KEMBALL, JJ.