1871.
June 23.

Special Appeal No. 607 *of* 1870.

BA'PUJI AUDITRA'M *et al.* .....*Appellants.*

UMEDBHA'I HATHESING *et al.*, Trustees of Lallubhái Pánáchand .....*Respondents.*

Jurisdiction—Withdrawal of Suit—Reg. II. of 1827, *Sec.* 43—*Reg. I. of* 1830, *Sec.* 3; *and Sec.* v., *cl.* 2—*Hindú Law—Son's Liability for Father's Debt—Trust-Deed— Creditors.*

Where an objection to the jurisdiction of the court of first instance was taken for the first time in special appeal, being based on an illegal withdrawal of the suit by the District Judge from the Sadr Amín to the Assistant Judge's file:

It was held that the High Court was not bound to entertain the objection unless it was patent on the face of the record.

The assignment in a trust-deed, by which a person assigns all his property to trustees for the benefit of his creditors, protects the assets so assigned from all creditors.

Where a suit is brought against a Hindú son, personally and as representative of his father, to recover a debt due by the father, a decree ought to be given against the son, whether he has inherited any property or not, the result of such a decree in the case of non-inheritance being that it cannot be executed against the non-inheriting son.

THIS was a special appeal from the decision of F. D. Melvill, Acting Judge of the District of Ahmedábád, in Appeal Suit No. 138 of 1868, amending the decree of the Assistant Judge, M. H. Scott.

The plaintiffs, Bápuji Auditrám and Jayakissen Narsidás, instituted the suit in the Court of the Principal Sadr Amín of Ahmedábád, to recover from Bhogilál Lallubhái the sum of Rs. 4,065, being principal and interest due on two *hundis* for Rs. 3,000 passed by the defendant's father, Lallubhái Pánáchand. They sought to recover this amount from Bhogilál personally and as representative of his father.

The District Judge of Ahmedábád withdrew the case from the file of the Principal Sadr Amín, and referred it to the Assistant Judge.

The defendant, Bhogilál, answered that his father (Lallubhái Pánáchand) had executed a trust-deed (18th April

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1865), and handed over the whole of his property and books to certain trustees for the purpose of winding up his business, giving notice of the same to all his creditors. He also stated that, as he had inherited nothing from his father, he was not liable for his debts.

Upon this, the Assistant Judge ordered the trustees (Umedbhái and others) to be made parties to the suit. They were, accordingly, joined as defendants.

On the investigation of the case, the Assistant Judge found that Bhogilál had inherited nothing from his father, and, therefore, held him not liable for the claim. He, however, decreed the amount of the suit to be paid out of the property of Lallubhái Pánáchand (24th September 1868).

Against this decision Umedbhái and the other trustees preferred an appeal to the District Judge of Ahmedábád (F. D. Melvill), who amended the decree of the Assistant Judge, by ordering the appellants (the trustees) to pay the amount claimed by the plaintiffs rateably with the other creditors of the estate of Lallubhái Pánáchand, first the principal and then the interest (25th August 1870).

Dissatisfied, the plaintiffs, Bápuji and Jayakissen, specially appealed to the High Court, on the grounds that (1) the court of first instance had no jurisdiction to try the case, and that (2) the lower appellate court was wrong in holding the plaintiffs bound by the terms of a deed of trust not signed or otherwise assented to by them.

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

Nánábhái Haridás, for the special appellants :—The Assistant Judge had no jurisdiction to try and determine this suit. It was instituted in the Court of the Principal Sadr Amín, and the District Judge withdrew it, and referred it to the Assistant Judge, without any of the grounds specified in Sec. 43, Reg. II. of 1827; Sec. 3, and cl. 2, Sec. v. of Reg. I. of 1830. The Judge could refer the case on those grounds only, and as it does not appear from the record that those grounds existed in the present case, the whole proceeding

of the Assistant Judge was illegal, because without jurisdiction. [MELVILL, J. :—You did not take that objection before the District Judge in appeal, and have raised it now for the first time in special appeal.] The objection to a court's jurisdiction may be taken at any time: *Motilál* v. *Jamnádás* (*a*); *Bidhobudden Mookerjee* v. *Doorga Monee Debia* (*b*); *Nobeen Kishen Mookerjee* v. *Shib Pershad Pattack* (*c*). With respect to the merits of the case, the trust-deed, as it was not signed, or in any way assented to, by the appellants, is not binding on them. They were not parties or privy to that instrument.

Shántárám Náráyaṇ for the special respondents.

PER CURIAM (MELVILL and KEMBALL, JJ.) :—The objection to the jurisdiction is now raised for the first time, and we do not think that we are bound to entertain it, unless it is patent on the face of the record that the court of first instance had no jurisdiction. This is not so. The suit was withdrawn from the file of the Principal Ṣadr Amín by the District Judge, and referred by him to the Assistant Judge. These proceedings were legal if the withdrawal of the suit were made under the provisions of Sec. 43, Reg. II. of 1827, but not otherwise (see Sec. III., and Sec. v., cl. 2, of Reg. I. of 1830). There is nothing to show that the District Judge acted under Sec. 43, Reg. II. of 1827; but there is nothing to show also that he did not do so : and we do not think that we are bound, at this stage of the proceedings, to direct an inquiry whether there were sufficient grounds for an order, which the Judge was competent, on sufficient grounds, to make. The maxim "*Omnia præsumuntur rectè esse acta*" has more than ordinary force in cases of this kind, for it is reasonable to presume that if there had been an irregularity, the objection would have been raised at an earlier stage of the proceedings. At any rate, it was the duty of the plaintiffs to take the objection at the time when its validity could have been tested together with the other issues in the case, and we cannot admit it now, as the plaintiffs are not in a

(*a*) 2 Bom. H. C. Rep. 40. (*b*) 2 Calc. W. Rep., Civ. R. 157.
(*c*) 7 Calc. W. Rep., Civ. R. 490.

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position to satisfy us, without a further inquiry, that the objection is valid. The case of *Motilál* v. *Jamnádás* (*suprà*), relied on by the appellant's Pleader, does not appear to us to be opposed to the view which we have taken. In that case the defect of jurisdiction appeared on the face of the record.

This suit was brought against Bhogilál to recover from him, personally and as representative of his father, Lallubhái Pánáchand, a debt due by his father. Bhogilál pleaded that he had inherited nothing from his father, who had executed a trust-deed vesting all his property in trustees for the benefit of his creditors. The Assistant Judge, therefore, made the trustees parties to the suit. It appears to us that this was an unnecessary and irregular proceeding, and that a decree ought to have been given against Bhogilál, as representative of his father, whether he had inherited any property or not. If he had had no property, the only result would have been that the decree could not have been executed against him. The Assistant Judge then proceeded to inquire into the case, and came to the conclusion that Lallubhái had vested all his estate in trustees; that Bhogilál had inherited nothing, and that personally, *i.e.*, merely as son of the deceased, he would not be liable. This seems to be the meaning of his judgment, and, construing this decree by the light of his judgment, we understand that he refused to give any decree against Bhogilál, either personally or as representative of his father. He, however, gave a decree against the estate of Lallubhái, by which he, no doubt, intended, though he did not properly express it, to give a decree against the trustees in whose hands he had found all the estate to be. Bhogilál having thus been exempted from all liability, it was necessary for the plaintiffs to have appealed, if they wished his liability to be declared in the decree; but this they failed to do. The trustees alone appealed, and the District Judge corrected the informality in the Assistant Judge's decree by declaring the trustees, and not the estate, liable. The plaintiffs having failed to correct the error in regard to Bhogilál by an appeal in the court below, and Bhogilál not having been a party to the District Judge's

decree at all, the plaintiffs cannot now bring him before this court with the view of obtaining a decree against him. As regards the trustees, they do not object to the decree which has been made against them; but the plaintiffs ask that they may be ordered to pay the debt due to them in full, and not rateably. This would be inconsistent with the trust on which they hold the property. If the plaintiffs have any claim against them at all, it can only be such as is in accordance with the trust. Such assignments to trustees are, as remarked by Sausse, C. J., in *Bomanji* v. *Naoroji* (*d*), highly favoured by Courts of Equity, and in that case, as in the present, a creditor who had not signed the trust-deed was, nevertheless, held bound by it. Though the proceedings in this suit have been somewhat irregular, the final decision is in accordance with justice and equity, and no valid ground has been shown for interfering with it.

(*d*) 1 Bom. H. C. Rep. 233.