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 NARU PIRA
 v.
 NARO SRI-
 DHESHVAR.

WEST, J.—The argument for the appellant is that as the claim relates to land, by relating to the produce of land, it does not constitute a suit of the nature of these cognizable by a Small Cause Court. The claim has, no doubt, some relation to land, but so in a similar remote sense have many others that are still regarded as constituting small causes. It is not for an interest in land, but for a share in produce severed from the land; and such a suit, according to the judgment in *Hanmantrav Sadashiv v. Keru Bhavnak*(1) and the cases there relied on, is cognizable by a court of Small Causes.

We must, therefore, in the absence of any authorities to the contrary, dismiss the second appeal with costs.

Appeal dismissed.

(1) See Printed Judgments for 1875, p. 291.

APPELLATE CIVIL.

(11)

Before Mr. Justice West and Mr. Justice Pinhey.

September 4. GOPI WASUDEV BHAT (ORIGINAL DEFENDANT), APPELLANT, v. MARIKANDE NARAYAN BHAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Sham Decree—Innocent Purchaser.

In 1861, J mortgaged certain lands to the defendant, who in 1864 sued upon the mortgage, and obtained a decree for sale. The decree remained unexecuted by the defendant. In 1869 the lands were sold in execution of a money decree against J, and the plaintiff became the purchaser. Thereupon the defendant attached the land in execution of the decree obtained by him in 1864. The Court found that the mortgage of 1861 was not a *bonâ fide* mortgage. In a suit for possession, held that the plaintiff was entitled. The decree obtained in 1864, being based upon a colourable mortgage, gave the defendant no claim as against a subsequent *bonâ fide* purchaser for value. What was purchased by the plaintiff at the execution sale in 1869, was the real interest of J in the lands in question, not his interest as diminished by a fictitious derogation arising out of a sham transaction.

This was an appeal from the decision of A. L. Spens, Judge of Kanara, by which he affirmed the decree of the Subordinate Judge of Kumta.

On Janu, the owner, executed a mortgage of certain lands to the defendant Gopi on the 28th of June 1861. On the 3rd of September 1864, Gopi obtained a decree, directing a sale of the lands and payment of the proceeds towards satisfaction of the debt

* Second Appeal, No. 210 of 1878.

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due upon the mortgage. This decree was not executed, but on the 30th July 1869 the mortgaged lands were sold in execution of a money decree subsequently passed against Jānu. At the sale a portion of the lands were brought by the plaintiff Mārkanḍé, and the remainder by one Gunpāja, by whom it was afterwards sold to the plaintiff. Thereupon the defendant attached the lands under his prior decree, and the plaintiff applied to raise the attachment. His application was rejected, and he brought this suit for possession of the lands, alleging that the mortgage by Jānu to the defendant as well as the decree obtained by him in September 1864 were colourable and fictitious transaction. The defendant answered that his transactions with Jānu were *bonā fide*, and that the plaintiff's purchase was subject to his lien. The Subordinate Judge held that the defendant's mortgage was fictitious, and passed a decree in favour of the plaintiff. The District Judge concurred with him in this finding, and upheld his decree.

Shāntārām Nārāyan for the appellant.—The defendant's decree against Jānu stands unreversed. Jānu cannot ask for an investigation of the nature of the transaction which resulted in that decree. At the date of the plaintiff's purchase, Jānu was the legal owner, subject to Gopi's right. His deed of sale is registered under Act XX of 1866, by which the plaintiff got only the right, title, and interest of Jānu, subject to all subsisting rights in derogation of the proprietorship of the ostensible owner. The defendant's was such a right: *Kānu Khandu v. Krishna Bhulaji Shet.*(1) The defendant's mortgage and decree were both before the registration Act came into force.

Shāmrao Vithal for the respondent.—The finding of the fact that the defendant's mortgage is fictitious, concludes the case. A sham decree does not support the sham transaction upon which it is founded. Jānu may be bound by the decree against him, but there is no priority between him and the plaintiff, who is at liberty to question it. If there is any priority, it is incomplete and insufficient to conclude him, he being an innocent purchaser for value without notice. [WEST, J., referred to *Bowes v. Foster*, (2) *Ram Surun Singh v. Mussamat Pran Peary*.(3)] Both these cases are cited in the case of *Param Singh v. Laljimal*,(4) and followed.

(1) 5 Bom. H. C. Rep. 147, A.C.J. (3) 13 Moo. Ind. Ap. 551.

(2) 2 H. & F. 779.

(4) I. L. R. 1 All. 403.

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Turner and Oldfield, JJ., held that the maxim "*in pari delicta potior est conditio possidentis*" was not applicable without qualification to India, where justice, equity, and good conscience require no more than that a party should be precluded from contradicting, to the prejudice of another, an instrument pretending to the solemnity of a deed, when the parties claiming under it, or their representatives, have been induced to alter their position on the faith of such instrument.

WEST, J.—The Courts below have found that the mortgage under exhibits 23 and 24 and the decree obtained thereon in 1864 constituted only a fictitious transaction between Jánú and Gopi Wásudev. The decree, it is said, was directed against the land mortgaged, and if the transaction was a real one, that decree would have been at once executed. It, however, remained unexecuted in 1869, when the land, being sold in execution of a decree obtained by an ordinary creditor, was purchased by Márkandé Náráyan and another, who then sold his interest to Márkandé Náráyan. The non-execution of Gopi's decree for so long a period, while Jánú was allowed to remain in possession and carry on dealings as ostensible owner of the property, supports the conclusion, arrived at by the lower Courts, as to the character of the transaction as a merely colourable one, and we must accept their finding on that point.

It is urged, however, that whatever the nature of the transaction between Jánú and Gopi Wásudev, the decree obtained by the latter operated so as to give him an interest in the property, or a charge on the property in 1864, which left Jánú's right, title, and interest, purchased by Márkandé Náráyan in 1869, diminished to precisely the same extent. In the case of *Kanu Khandu v. Krishna Bhilaji Shet*, (1) it was held that an unregistered mortgage and a decree obtained on the mortgage did not deprive of priority a subsequent conveyance duly registered. The mortgage in this case, as in that, was unregistered; but the case of *Bálaji Gunesli v. Khasaji, son and heir of Bahiroji* (2) and of *Rávi Náráyan v. Krishnaji Lakshman* (3) have been relied on as, in effect, superseding the earlier decision by the operation which they have given to the principle of *lis pendens*. But those cases leave the question

(1) 5 Bom. H. C. Rep. 147, A. C. J.

(2) 11 Bom. H. C. Rep. 24.

(3) *Ibid.*, 132.

of the consequences of a sham transaction untouched. The contention is, that the decree obtained, whatever basis it rested on, caused a transfer of ownership to the intended extent; but, looking to the current of recent decisions, we think that they show a strong tendency to refuse effect to fraudulent and fictitious transactions, and to undo them even in the interest of a party, where that can be done without unreasonable prejudice to the other party. Such cases are those of *Symes v. Hughes*, (1) *Sraemutty Debia Chowdhrahi v. Bimola Soonduree Debia*, (2) *R. Watson & Co. and others v. Gopee Soonduree Dosee*, (3) and *Param Singh v. Laljimal*, (4) And if such transactions will be set aside even at the suit of a party, much more may they be treated as a nullity in the interest of an innocent purchaser for value. If the ostensible sale or mortgage was really a mere colourable transaction, the vendee from the mortgagor can claim that it be disregarded, even though the fraud has been carried a stage farther, so as to give to the sham mortgage the corroboration of decree which is then allowed to lie by unexecuted for several years. The Courts will be slow and cautious in arriving at a conclusion that, where a decree has actually been obtained, it has not had its natural effect; but they must, at the same time, guard against its being made a means of furthering fraud and duplicity. Here the Courts below have concurred in finding that this was the purpose of the mortgage, and we feel justified, therefore, in refusing to allow it to operate as against

Markande Naryan's subsequent purchase.

That purchase was, no doubt, of Janu's right, title, and interest as it stood at the time of purchase; but then it was of the real interest, not of the interest as diminished by a fictitious derogation arising out of a sham transaction against which equity would relieve the estate, even in favour of Janu, but for quasi ethical considerations bearing upon the party to a fraudulent transaction who afterwards seeks a remedy against the partner in misconduct. Those considerations do not weigh against an innocent purchaser, such as the plaintiff in this case, and he is, we think, entitled to possession in preference to Gopi Wasudev. We, therefore, confirm the decree of the District Court with costs.

(1) L. R. 9 Eq. 475.

(3) 24 Calc. W. R. 392.

(2) 21 Calc. W. R. 423.

(4) I. L. R. 1 All., 403.