

At first sight it would appear that the proper fee under this article must be one-half of the whole fee leviable on the plaint or memorandum of appeal, whatever may be the number and nature of the different claims comprised in the said plaint or memorandum.

But it would be manifestly unjust that when a plaint or memorandum of appeal comprises a number of claims, and a portion only of such claims has been allowed by the judgment, [28] the party seeking a review in regard to those claims which have been allowed should be required to stamp his application with a fee sufficient to cover the amount of the claims which have been disallowed in his favour, as well as the amount of the claims in regard to which he wishes the Court to review its judgment.

Having regard to the provisions of s. 17 of the Act, I have come to the conclusion (though not without hesitation) that such a harsh construction of art. 5, as that above indicated, may be avoided. Section 17 provides that when a suit embraces two or more subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects, would be liable under the Act. A plaint, therefore, or memorandum of appeal, which embraces two or more distinct subjects, is treated, for the purposes of the stamp revenue, as a collection of distinct plaints or memoranda of appeal; and treating it in this manner I think that the words "the plaint or memorandum of appeal" in art. 5 may be construed as meaning not necessarily the plaint or memorandum of appeal, formed by the combination of the several subjects comprised in it, but the plaint or memorandum of appeal which would have been presented in respect to the particular subject, in regard to which the review is sought, if the suit had embraced that subject and no other. In the present case the plaint and the memorandum of appeal embraced several distinct subjects; but the only claim which was awarded was one in respect of which the plaintiffs claimed the sum of Rs. 40,000, and which was valued at that sum in the plaint and memoranda of appeal. In case of doubt a fiscal regulation should be construed in favour of the subject: and being of opinion that the construction which I now put upon art. 5 is in harmony with the intention of s. 17, and not necessarily inconsistent with the words of art. 5, I direct that the application for review of judgment be received, if it bear a stamp of one-half the fee leviable on plaint for Rs. 40,000.

Order accordingly.

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[29] APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Pinhey.

RAVJI JANARDAN SARANGPANI (*Original Plaintiff*), Appellant
v. GANGADHARBHAT AND OTHERS (*Original Defendants*),
*Respondents.** [17th February, 1879.]

Fraudulent contract—Rights of a person defrauded—Transactions of the manager of a family liable to be questioned by the other members interested.

Every member of a family of proprietors who has an interest in the estate has a right to question any transactions entered into by the elder member as manager whereby the former would be defrauded.

* Appeal No. 39 of 1878.

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The right of a person defrauded by a contract between a manager and a third party is to have the contract altogether rescinded.

[R., 4 Bom.L.R. 587 (605).]

THIS was an appeal from the decision of M. G. Ranade, Subordinate Judge (First Class) at Nasik in the District of Thana.

The plaintiff Ravji brought this suit against his (1) brother Gangadhar and (2) Juma Kasam in the Court of the Subordinate Judge at Nasik. The material allegations in the plaint were that the plaintiff, the defendant No. 1, and other sharers held and enjoyed an *inam* village, with a jungle attached to it, in the taluka of Shahapur, in the district of Thana; that the plaintiff and defendant No. 1 had each a share of 8 pies in the rupee in the said village and jungle; that plaintiff purchased from the owners of the remaining shares their right to cut the jungle for three years, commencing from 1876; that he (plaintiff) had been the manager of the jungle in full proprietary right, and that defendant No. 1 only received his share of the proceeds, and never acted as manager; that defendant No. 1 fraudulently and without any adequate consideration executed a deed of sale of the whole jungle to defendant No. 2 on the 10th November 1876; that defendant No. 1 had no authority to contract for the sale of the jungle without the consent of the plaintiff and the other sharers; that defendant No. 2 had cut down the jungle and removed the timber, and continued to do so, although the plaintiff had forbidden him, and that defendant No. 2 thus obstructed plaintiff in the exercise of his right as owner and manager. The plaintiff therefore prayed for a declaration that defendant No. 1 had no [30] right to sell the jungle to defendant No. 2, that defendant No. 2 had acquired nothing by his purchase, and that the defendants had no right to obstruct plaintiff in his management of the jungle. The plaintiff also sought to recover the timber already cut down and removed by defendant No. 2, either in specie or the value thereof. Plaintiff sued in *forma pauperis*, and valued his suit at Rs. 16,000.

Defendant No. 1 answered that he was the sole manager of the *inam* village and jungle, and, as such, was under no legal obligation to obtain the consent of plaintiff and the other sharers for the sale of the jungle to defendant No. 2; that he was entitled to make the contract of sale and receive adequate consideration for it; that neither the plaintiff nor any other sharer had ever managed the village and jungle; that he paid to the plaintiff and the other sharers their respective shares of the proceeds; that they had only a right to sue if he did not pay them the value of their shares, and that they had no right whatever to the management of the village and jungle.

The material allegations in the answer of defendant No. 2 were that the jungle was managed for many years by defendant No. 1 on behalf of all the sharers, who could only claim from defendant No. 1 their respective shares of the proceeds, but had no right to the management of the jungle; that he (defendant No. 2) had purchased from defendant No. 1 the right of cutting the jungle for four years and two months for Rs. 4,250; that the consideration was adequate, and the contract a good and *bona fide* transaction.

The lower Court found that the plaintiff had managed the jungle from 1848 to 1865, after which it came into the management of defendant No. 1, who continued as manager on behalf of all the sharers for a period of nearly twelve years prior to the institution of the suit; that plaintiff

was entitled, in his own right and by purchase, to a share of 12 annas and 8 pies in the village and jungle ; that defendant No. 1 was entitled to sell the jungle without the consent of the other sharers, and that if he did not act fraudulently, the sale would have been valid and binding as against the other sharers ; that the contract [31] of sale made by defendant No. 1 with defendant No. 2 was fraudulent and for an inadequate consideration, the deed not setting forth the full consideration agreed upon between the parties, and the value of the jungle greatly exceeding the price stated in the deed ; that the real price at which the jungle was sold by defendant No. 1 to defendant No. 2 was Rs. 8,000, and not Rs. 4,250 as stated in the deed ; that plaintiff himself had contracted to sell the jungle to defendant No. 2 for Rs. 8,000 ; that this price, therefore was a fair consideration for the agreement, and it would not be just and equitable to set aside the sale altogether, simply because the consent of the other sharers had not been obtained. The decretal part of the Subordinate Judge's judgment is as follows :—

" I accordingly decree that the agreement (Ex. 129) was fraudulently entered into by defendant No. 1 with defendant No. 2, and it is hereby set aside, in so far as the consideration money was stated therein to be Rs. 4,250. I hold, further, that the real contract between defendant No. 1 and defendant No. 2 stipulated for the payment of Rs. 8,000, as the consideration money, and that this real contract being entered into by defendant No. 2 with defendant No. 1 as the manager of the jungle on behalf of the plaintiff and the other sharers for an adequate price, was one which defendant No. 1 had full authority to enter into, and that it must be given effect to, and cannot be set aside, though plaintiff's consent was not secured in its favour. The defendant No. 2 should pay Rs. 8,000 at the time and in the manner agreed to by him in Ex. 129 to the defendant No. 1, who should pay out of the sums received by him a 12-annas and 8 pies share to the plaintiff. The plaintiff should not in any way obstruct defendant No. 2 in his management of the jungle for the period covered by the agreement, Ex. 129."

Against the above decision Ravji appealed to the High Court on the 24th September 1878.

Shamrao Vithal, for the appellant.—The lower Court, having found that the contract made by defendant No. 1 with defendant No. 2 for the sale of the jungle was fraudulent, was bound to set it aside entirely, and not to uphold it as has been done. The [32] effect of fraud or illegality in the matter of an agreement is to render the agreement wholly void of legal operation. No action can be founded upon it (1). It is a general rule that an agreement made with the purpose or effect of defrauding or injuring a third party, is illegal and void as between the parties to it (2). The contract of sale in dispute must be annulled altogether.

G. R. Kirloskar, for respondent No. 1.—The lower Court was right in holding that respondent No. 1 was entitled to the management of the property in dispute. He is the appellant's elder brother. The property stands entered in his name in the Government's elder books since the death of their father, and he has been dealt with by the other sharers as such manager in all that related to the estate. If the appellant managed the property for some time, he did so because respondent No. 1 was absent from the place, but on his return he resumed the management with the consent and on behalf of the co-sharers. If the appellant wants his share

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(1) Leake on Contracts (1878), p. 770.

(2) *Ibid.* 765, 766.

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in the property, the proper course for him is to bring a partition suit. He cannot ask for his share in the present suit.

Shantaram Narayan, for respondent No. 2. Juma Kasam respondent No. 2, is an innocent lessee, and ought not to be made to suffer because there is a dispute between the two brothers, about the management of the estate. The contract of sale ought to be held good even though the consideration may be supposed to have been falsely entered as Rs. 4,250. The contract ought not to be wholly rescinded.

JUDGMENT.

The following is the judgment of the Court delivered by—

WEST, J.—The case attempted to be made out in favour of the plaintiff Ravji's having been manager of the estate for the family of proprietors has admittedly failed. But, as a member interested, he has none the less a perfect right to question any transactions entered into by the elder member Gangadhar as manager, whereby he would be defrauded. Such a transaction it could hardly be denied even in argument, was the one whereby Gangadhar, ostensibly selling the right to cut wood in the forest belonging to the estate to Juma for Rs. 4,000, made a collateral [33] private bargain, according to which he was to receive Rs. 4,000 more. Juma was a party to the arrangement. He was aware of its character, for he had previously negotiated with Ravji. The Subordinate Judge has adjudged fulfilment of the contract according to the terms really, though secretly, agreed to between Gangadhar and Juma, thinking that justice would be satisfied by an award to Ravji of his proper share of the full proceeds; but the right of a person defrauded by a contract between a manager and a third party, as ruled in such cases as *The Panama Telegraph Company v. The India Rubber, &c., Company* (1), is to have the contract altogether rescinded. Even as between the parties themselves, who have entered into a contract for the purpose of defrauding a third person, the Court will not usually enforce performance, and Mr. *Shantaram* has not been able, on behalf of the respondent Juma, to adduce any authority for the position that the Court could uphold the contract entered into by his client in fraud of Ravji, against Ravji's consent with or without terms. Ravji insists on his right to a rescision; and we must adjudge a rescision of the contract.

It appears that a quantity of timber was sold by a receiver, the proceeds whereof are now lodged in the Subordinate Court. After the decree made by the Court, Juma was allowed to cut and remove timber in fulfilment of his contract now rescinded. Nothing, it is agreed, has yet been paid for that timber. The quantity and the value of all things taken by Juma, under the contract, from the forest must be ascertained by evidence. The amount thus found payable must be paid into the Court by Juma, and being added to that already lodged there, the whole must be distributed amongst the co-owners of the property according to their shares.

Ravji's costs in both Courts are to be paid in equal proportions by Gangadhar and Juma, with the exception of those arising from his having made Vasudev bhat a defendant. This joinder was on the ground that Vasudev had sold his share to Ravji, a statement which Ravji failed to prove. Vasudev's costs, therefore, in both Courts must be paid by Ravji.

Order accordingly.