

District Judge upheld the decree of the Assistant Judge, but reduced the amount of the plaintiff's claim to Rs. 38-4-9.

The defendant appealed to the High Court.

A preliminary question was raised in the High Court whether a second appeal lay in the case.

*Nanabhai Haridas*, Government Pleader, appeared for the appellant.

*Gokaldas Kahandas* appeared for the respondent.

SARGENT, C. J.—We think that no second appeal lies in this case. Act X of 1876, sec. 15, removes suits, in which the Collector is a party, from the jurisdiction of the Small Cause Court; but the nature of the suit, by which must be understood the jural relations between the parties, remains unaltered, and as the present suit is one of the nature cognizable by a Small Cause Court, no second appeal lies, as provided by section 586, Act X of 1877. Appeal dismissed with costs.

*Appeal rejected.*

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Kemball.*

RAGHO GOVIND PARAJPE (ORIGINAL DEFENDANT), APPELLANT, *v.* BALVANT AMRIT GOLE (ORIGINAL PLAINTIFF), RESPONDENT,\*

1882  
September 18.

AND

BALVANT AMRIT GOLE (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAGHO GOVIND PARAJPE AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.†

*Tacking together of secured and unsecured debts—Voluntary conveyance—Construction—Trustee for creditors—Circuity of actions—Administration suit.*

K., who was a relation of the plaintiff, executed a deed of conveyance by which he conveyed all his estate to the plaintiff, in consideration of his undertaking to pay all K.'s debts. The deed stated that it was K.'s desire that the estate should remain in his family. After K.'s death the plaintiff sued for an account and for redemption of some of K.'s land which had been originally mortgaged by K. to the defendant. It was contended in defence that the deed created a trust for the payment of K.'s debts, and that the defendant was entitled to tack on to the mortgage debt a simple contract debt which K. owed to him. It was found that the defendant was the only unpaid creditor, and that the property was more than sufficient to pay the debt.

\* Second Appeal, No. 524 of 1880.

† Second Appeal, No. 116 of 1881.

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*Held* that the deed did not create a trust for K.'s creditors,—the object, on the contrary, being the preservation of the family property,

*Held*, further, that due effect could not be given to the whole of the instrument, unless construed as a conveyance to the plaintiff, charged as between himself and K. with the payment of K.'s debts.

*Held*, also, that during K.'s life his creditors could not claim to be paid under this instrument, in the absence of any communication between them and the plaintiff, capable of being construed as an admission by him that he held the property as trustee for them, although they might possibly impeach it. On K.'s death, however, his creditors would be entitled in an administration suit to have the charge of his debts enforced in their favour.

*Rolfe v. Chester* (1) followed.

THESE were cross second appeals from the decision of W. H. Newnham, Judge of the District Court of Poona, varying the decree of M. G. Ranade, First Class Subordinate Judge at the same place.

The plaintiff, Balvant, brought this suit for an account and redemption of certain immoveable property, which had been originally mortgaged by one Krishnarav Sakharam (deceased) to the defendant, Ragho. The plaintiff relied upon a deed of conveyance (exhibit No. 2) dated the 31st November, 1876, and executed in his favour by the said Krishnarav. The principal portions of the deed are set out in the judgment of the High Court.

The defendant answered, *inter alia*, that the deed was invalid and that the plaintiff could not redeem, without paying not only the debt due to him (defendant) from the deceased Krishnarav, on the mortgage, but also a simple contract debt due to him from K.

The Subordinate Judge held that the deed was valid and that the plaintiff was entitled to redeem on payment of Rs. 1,299 due on the mortgage of the property in suit. The District Judge in appeal varied that decree by ordering redemption, on payment by the plaintiff of Rs. 1,926-8-0, including the sum of Rs. 600 due on a mortgage (exhibit No. 64) which was held by the first Court to have been satisfied. Both the lower Courts held that the defendant was not entitled to recover in the redemption suit the amount of any debt which Krishnarav owed him on personal security.

Both the parties appealed to the High Court.

*Farran* and *G. N. Nadkarni* appeared for the appellant (defendant) in Appeal No. 524 of 1880.

*V. H. Atley* appeared for the appellant (plaintiff) in Appeal No. 116 of 1881 and for the respondent in Appeal No. 524 of 1880.

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The Hon. Rao Saheb *V. N. Mandlik* appeared for the respondent (defendant) in Appeal No. 116 of 1881.

*Farran* and *G. N. Nadkarni*.—The lower Courts were wrong in holding that the plaintiff was entitled to redeem, without paying the amount of the debt due to the defendant by the late *Krishnarav* on personal security. Those Courts have misconstrued exhibit No. 2 under which the plaintiff claims. It is a voluntary conveyance by which *Krishnarav* in his lifetime conveyed all his property to the plaintiff, on condition that he (plaintiff) should pay all his debts. The defendant, therefore, ought to be allowed to tack together the unsecured and secured debts, for the purpose of avoiding circuity of actions, on the principle laid down in *Rolfe v. Chester* (1). Moreover, the plaintiff is a trustee under the deed for *Krishnarav*'s creditors, and as there is no other unpaid creditor, the Court should allow the defendant to tack on the unsecured debt.

SARGENT, C. J.—The important question in this case is, whether the plaintiff is entitled to redeem the property in question without also paying the amount of a simple contract debt owing to the mortgagee by the original mortgagor from whom the plaintiff derives his title. It was admitted for the appellant that the original mortgagor, *Krishnarav*, could have redeemed without paying it; but it was contended that the conveyance to the plaintiff, *Balvant* (exhibit 2), under which he derives his title, was a voluntary conveyance, and that, as *Krishnarav* had by that instrument made over all his property to plaintiff in his lifetime with the obligation of paying all his debts, the Court ought to allow the mortgagee to tack on the debt in question to avoid circuity of actions on the same principle as by English law a mortgagee is entitled to tack on a simple contract debt as against executors or volunteers under the mortgagor: *Rolfe v.*

(1) 20 Beav., 610.

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*Chester* (1). It was also said that the deed created a trust for the payment of debts, and that as there were no other creditors to be paid, the defendant should be allowed to tack on the debt.

Now, exhibit 2 is a native document of a very informal character. After reciting that Krishnarav was well stricken in years and without sons or any hope of finding a boy to adopt; that he had debts, to secure which he had mortgaged his property, and that "living had hence become hard", it proceeds as follows:—

"As for the desires of my mind [they are]: 1, that I should be free from debts; 2, that I should be comfortable in living; 3, that a good provision should be made for my declining age; 4, that all the estate should remain in my own family (*swagotra*); 5, and that my name should, somehow or other, remain famous. And after such arrangements [as these] are made, I should spend my [remaining] days in the service of God. I made known these desires to my *bhaubands* more closely related than yourself. They thought over the matter for these two years. But as they were void of means, such as money, &c., and as my daughters, too, were equally helpless, I lost all hope of getting any help. It is difficult to discharge the debts and [also] to manage the household within the remaining estate. Hence, though you were one degree more distant in lineage, knowing that your father was on friendly terms with me, you have been behaving towards me up to this day with the same regard for me. Being convinced of this and being aware of your competency, I threw [myself] a burden upon you, with confidence for the fulfilment of the aforesaid desires. Thereupon [you] said [to me]: 'If provision be made to release [you] from debt, other matters will, by [your] blessing, be easily accomplished. And accordingly you are to execute a separate document to me.'

\* \* \* \* \* Thus considering in a satisfactory manner, I, while in sound mind, and with full apprehension and understanding, have made over to you the absolute ownership of the entire estate, and have [also] informed you of the debts and outstandings. It [*i.e.*, the particulars thereof] is as follows:—  
1. The particulars of debts due up to this day to other persons

besides yourself, on mortgage, loans, bonds, and without bonds are as follows :—

Rs.	a.	p.	
2,631	11	9	The total amount due to Ragho Govind Parajpe is Rs. 2,831-11-9. Deducting therefrom Rs. 200 which are to be paid directly by Kaleshwar Gopal Gole, [there remains a balance] Rs.
100	0	0	due to Dhondaji, son of Somaji Navala Mali.
50	0	0	due to Anant Govind and Vishvanath Govind Bhopale Joshi Kulkarni.
25	0	0	due to Vasudev Vithal Gadre.
25	0	0	due to Dhondiba, son of Ranoji Setge.
600	0	0	due to my own daughters and other miscellaneous [debts].

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3,431 11 9

“In all rupees three thousand four hundred and thirty-one and annas eleven and three-quarters are due. You are directly to pay the same, together with interest thereon according to law, to several persons at your convenience. For the purpose of paying it off I have given you the ownership of the property, which is as follows :—Particulars thereof are (as follows :—\* \* \* \* \* The absolute ownership of the estate mentioned in the first paragraph is given to you in consideration of [your having undertaken to pay off my] debts, and the papers, sanads, takids, sale-deeds, and dumalapatras, and deeds of gift, and each and every paper of evidence in respect thereof have been made over to you along with a separate index [ferist]. Except the debts written as aforesaid there is no occasion under this deed to pay the debt due to yourself.”

Such being the document, it does not, we think, as was contended for the defendant, create a trust for creditors ; on the contrary, the object was that the family property might be preserved, but, we think, due effect cannot be given to the whole of the instrument, unless it be construed as a conveyance to plaintiff charged as between him and Krishnarav with the payment of Krishnarav's debts. During Krishnarav's life the creditors could not (in the absence of any communication between

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plaintiff and the creditors capable of being construed as an admission by him that he held the property as a trustee for them) claim to be paid under this instrument, although possibly they might impeach it. However, on Krishnarav's death, his creditors would be entitled in an administration suit to have the charge of Krishnarav's debts enforced in their favour, and under these circumstances it being admitted that the defendant is the only unpaid creditor, or at any rate that the property is far more than sufficient to pay them, we think that the principle established in the above cited case may well be applied, and so avoid the circuitry of suits which would otherwise be necessary. As to mortgage, exhibit 64, we cannot interfere with the District Judge's finding of fact that Krishnarav had acknowledged the mortgage debt as his own. The decree must, therefore, be reversed; and it is hereby ordered that the District Judge do take an account of what may be found due in respect of monies lent to the deceased Krishnarav by the defendant on personal security, and that in the event of the plaintiff paying to the defendant the sum so found due on taking the said account together with the sum of Rs. 1,926-8-0 found by the District Judge to be due on the mortgage debt and the costs of suit and both appeals within six months that he do recover possession of the mortgaged lands from the defendant, and that in default of his so paying as aforesaid that he do stand foreclosed.

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## APPELLATE CIVIL.

1882  
September 7.

*Before Sir Charles Sargent, Kt., Chief Justice, and Justice Kemball.*

DAMODAR SHALIGRAM, PLAINTIFF, v. MALHARI AND ANOTHER,  
DEFENDANTS.

*Decree payable in instalments—Execution by arrest and imprisonment—Civil Procedure Code (Act X of 1877), Sec. 341.*

In the execution of a decree payable by instalments the judgment-debtor cannot be arrested and imprisoned separately for default in the payment of each instalment.

UNDER section 617 of Act X of 1877, this case was referred for the opinion of the High Court by Rao Saheb W. M. Bodas, Second Class Subordinate Judge of Yeola.