

(98)

APPELLATE CIVIL.

*Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Pinhey.*1883
August 16.

JAGJIVAN JAVHERDAS SETH (ORIGINAL PLAINTIFF), APPELLANT, v.
MAGDUM ALI, DECEASED, BY HIS HEIRS SHEKH ADAM AND OTHERS
(ORIGINAL DEFENDANTS), RESPONDENTS.*

Suit or appeal filed in a wrong Court—Return of plaint or memorandum of appeal for presentation in proper Court—Practice of the High Court—Civil Procedure Code (Act XIV of 1882), Sec. 373—Cancellation of court-fee stamps.

The Code of Civil Procedure (Act XIV of 1882) does not allow of a plaint or memorandum of appeal being returned to the plaintiff, or appellant, after a case has been heard on its merits, and just as the plaintiff or appellant discovers that the Court is about to pronounce an adverse decision.

There is no provision in the Code for the return of a plaint to a plaintiff after it has been admitted, and the court-fee stamps there on cancelled.

Even if the Code allowed the High Court to return a plaint after the court-fee stamps have been cancelled, the plaint could not be again legally presented in any Court without new stamps being affixed to it. The Executive Government alone have power to remit court-fees, and no Court or Judge has legal authority to admit a plaint which bears only cancelled stamps, or to direct a subordinate Court to admit such a document.

THIS was an appeal from the decision of Rav Bahadur Mangeshrav Balvant, First Class Subordinate Judge at Nasik, in Original Suit No. 13 of 1881.

The plaintiff Jagjivan sued for the redemption of certain immovable property, alleging that he had purchased it at a Court sale in execution of a decree obtained by him against one Shekh Ali, deceased, but that in obtaining possession he was obstructed by the deceased defendant, Magdum Ali, on the ground that he (defendant) was a mortgagee in possession. The plaintiff also prayed for mesne profits. He estimated the value of his claim at Rs. 2,500.

The defendants, who claimed under a will of Magdum Ali, answered (*inter alia*) that the mortgage-debt amounted to Rs. 2,440, and that they were entitled to hold the property till the payment of that amount by the plaintiff.

The Subordinate Judge, holding that the mortgage-debt had been paid off by the rents and profits of the mortgaged property

* Second Appeal, No. 45 of 1881.

1883

JAGJIVAN
JAVHERDAS
SETH
v.
MAGDUM
ALI.

awarded possession to the plaintiff with a certain amount as mesne profits.

The plaintiff appealed to the High Court, chiefly on the ground that he was entitled to a larger amount of mesne profits than that allowed by the lower Court.

Shantaram Narayan, who appeared for the respondents, took a preliminary objection that the appeal lay to the District Court of Thana, and not to the High Court, inasmuch as the value of the plaintiff's claim was less than Rs. 5,000.

Pandurang Balibhadra, who appeared for the appellant, urged that it was always the practice of the High Court to return a plaint or memorandum of appeal for presentation in the proper Court whenever they found that the suit or appeal was filed in the wrong Court. In support of his argument the learned pleader cited *Bai Mahkor v. Bulakhi Chakur*(¹) and *Kalu bin Bhiwaji v. Vishram Mawaji*(²).

The judgment of the Court was delivered by

PINHEY, J.—In execution of a decree against one Shekh Ali, Shekh Ali's equity of redemption in a certain property was sold by auction, and purchased by plaintiff. In this suit plaintiff sues to redeem the property from the legal representatives of the mortgagee, Makdum Ali. He estimated his claim at Rs. 2,500; but the defendants, in a statement of account given in their written statement, showed that only Rs. 2,440 was due on the mortgage, and the lower Court found that even this sum was not due. The appeal from the decision of the lower Court—that is, the First Class Subordinate Court at Nasik,—therefore, lay to the District Court, and not to the High Court—*Cotterell v. Stratton*(³) and *Kondaji Bagaja v. Anau*(⁴).

This appeal must, therefore, be dismissed with costs.

It may be remarked that if we had held otherwise, and had held that the value of the property in suit was over Rs. 5,000, we should

(1) I. L. R., 1 Bom., 538.

(3) L. R., 17 Eq., 543.

(2) I. L. R., 1 Bom., 543.

(4) See *ante*, p. 448.

have had to annul the whole proceedings in the case, and reject the claim (unless the plaintiff asked to withdraw the claim) on the ground that the whole of the proceedings in the case were held without jurisdiction. The suit was instituted in the Second Class Subordinate Court at Thana, and was, on a reference by that Court, transferred by the District Court to the First Class Subordinate Court at Nasik in which it was tried ; but if the value of the property was more than Rs. 5,000, the suit could not be instituted in a Second Class Subordinate Court, and the District Court could not transfer to the First Class Subordinate Court, or to any Court, a suit not properly instituted—*Motilal Ramdas v. Jamnadas Javherdas*(1).

In the course of his address to the Court, Mr. Pandurang Kirtikar represented to us that if we held that the appeal in this case lay to the District Court, and not to the High Court, we should, instead of dismissing the appeal, return the memorandum of appeal to him for presentation in the proper Court ; and that if, on the other hand, we held that the amount of the suit was in excess of the jurisdiction of a Second Class Subordinate Court, we should return the plaint to him for presentation in the proper Court. In support of his application Mr. Pandurang Kirtikar referred us to cases in which this Court has allowed a plaint to be returned to the plaintiff after this Court has decided against the plaintiff on appeal and on second appeal.

We refused to allow either the memorandum of appeal or the plaint to be returned to the plaintiff, because we are of opinion that the Code of Civil Procedure does not allow of a plaint, or a memorandum of appeal, being returned to the plaintiff or appellant (as the case may be) after a case has been heard on its merits, and just as the plaintiff or appellant discovers that the Court is about to pronounce an adverse decision. In Chapter V of the Code of Civil Procedure provision is made for the return of a plaint to a plaintiff if it has been presented to the wrong Court. But Chapter V prescribes the procedure to be followed for the institution of suits, and before summons is issued, under Chapter VI, to the defendant. There is no pro-

1888

JAGJIVAN
JAVHERDAS
SETH
v.
MAGDUM
ALI.

(1) 2 Bom. H. C. Rep., A. C. J., 4.

1883

JAGJIVAN
JAVHERDAS
SETH
".
MAGDUM
ALL.

vision in the Code of Civil Procedure for the return of a plaint to a plaintiff after it has been admitted, and the court-fee stamps thereon cancelled. If "at any time after the institution of a suit" (to use the language of section 373) a plaintiff finds that he has instituted his suit in a wrong Court, and he wishes to avoid the dismissal of his suit by the Court, the only course open to him is to apply to the Court for permission to withdraw from the suit under section 373 of the Code of Civil Procedure.

There is, however, nothing in that section, or in the chapter of the Code, of which it forms a part, which warrants the return of the plaint to the plaintiff at this stage of the case. Mr. Pandurang Kirtikar represented that, when a plaint is returned, it can be again presented in another Court, and the cost of the court fees be saved; but we think that, even if the Code allowed of our returning a plaint after the court-fee stamps have been cancelled; the plaint could not be again legally presented in any Court without new stamps being affixed to it. The Executive Government alone has power to remit court fees, and no Court or Judge has, in our opinion, legal authority to admit a plaint which bears only cancelled stamps, or to direct a subordinate Court to accept such a document. And, if the reason of the thing be looked to, there is really no reason why such cancelled stamps should be allowed to be used. The chief object of levying court fees is to defray at the expense of litigants the cost of the judicial tribunals, so that such cost shall not fall on those who do not indulge in the luxury of litigation. After a plaintiff has instituted his suit, and set the machinery of the Court in motion, there is no reason why the institution fees which he has paid should be refunded to him afterwards, when he discovers that, either from carelessness or other cause, he ought not to have sued in a particular Court, or ought not to have sued at all. *A fortiori*, a plaintiff is not entitled to such a refund after his case has occupied a subordinate Court, and the Appellate Court, for a considerable time, and when, after his case has occupied the High Court on second appeal for half a day, he finds that the High Court is about to decide that his suit was instituted in a Court which had no jurisdiction to entertain it.

The fact that plaints have been returned by this Court is a fact that we regret, because we are clearly of opinion that such practice is wrong. Ten wrongs, however, do not make a right; and with reference to the precedents to which Mr. Pandurang Kirtikar has called our attention, it is sufficient to remark that there is not a single case in which the Court was called on to hear arguments, and formally to decide whether a plaint may or may not rightly be returned to a plaintiff, after it has been admitted to the file of the Court, and the court-fee stamps thereon have been punched.

Appeal dismissed.

Note.—See *Abdul Samad v. Rajindro Kishor Singh* (I. L. R., 2 All., 357); *Bai Motigavri v. Pranjivandas Bhaidas* (Printed Judgments for 1883, p. 100).

1883

JAGJIVAN
JAVHERDAS
SETH
v.
MAGDUM
ALL.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice West.

SETH MULCHAND BADHARSHA, DECEASED, HIS HEIRS GHELA BHAI MULCHAND AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v. BAI MANCHA, WIDOW OF SETH NAGINDAS MAYACHAND AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Alienation of immoveable property by widow—Will—Bequest.

An absolute bequest, by a Hindu of his separate immoveable property to his widow confers on her as full dominion and power of alienation over that property as if the bequest had been made to a stranger.

THIS was a second appeal from the decision of S. H. Philpotts, Judge of the District Court of Ahmedabad, affirming the decree of L. P. Parakh, Joint Subordinate Judge at the same place.

This suit was instituted by Mulchand (since deceased and represented by his heirs) for a declaration that the sale of a certain shop made by Bai Mancha (defendant No. 1) in favour of Lalchand (defendant No. 2) was valid only during her life-time, and that after her death he (plaintiff) was entitled to the property. He alleged in the plaint that he was the paternal uncle of Bai Mancha's husband, who died on the 17th October, 1878, without issue; that she had, therefore, only a life-interest in the shop, and was not competent to alienate it beyond her own life.

1883
July 10.

* Second Appeal, No. 282 of 1882.