

clear intention to give up the right of cultivation which he and his father had enjoyed up to that time. The Judge seems to think that it was not acted on by the *inamdar*, because he took the rent for 1883 and 1884 from Ambo, and because Ambo remained in possession in 1884 and 1885; but the rent was, we may assume, what was due in December, 1883, after the monsoon, and by the *rajinama* itself the *inamdar* is authorized to receive it. The fact that Ambo, a sub-tenant of the recognized occupant, remained in possession after the *rajinama* was passed, is no proof that it was not accepted by the *inamdar*.

As to the plaintiff's right to sue in ejectment, the Judge seems to think it is doubtful, as he had not been put in possession; but the owner of an "*inter esse termini*,"—as such an interest is designated at Common Law in England,—is entitled to bring ejectment. See Cole on Ejectment, pp. 72 and 287.

It has been said, however, that there is no finding that the *rajinama* is proved. It was produced after the issues were raised in the Court of the Subordinate Judge, but was proved by the receiver to have been passed to him, and Pos Patil was not put into the witness box, to deny it, nor was any application made in the Court of appeal to give evidence on the subject. We think, therefore, that we must regard it as proved.

As to the *inamdar's* right to the land, so as to confer a good title on the plaintiff, we think that, looking at the only issue [297] raised by the Judge in appeal, it could not have been intended to call it in question. Upon the whole, we must reverse the decree of the Court below and substitute that of the Subordinate Judge, with costs on the defendant in this and the Court below.

Decree reversed.

13 B. 297.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

HORMUSJI AND RATANJI, MINORS, BY THEIR GUARDIAN AND UNCLE BAPUJI (Original Plaintiffs), Appellants v. COWASJI AND OTHERS (Original Defendants), Respondents.* [2nd October, 1888.]

Fraudulent conveyance—Gift in fraud of creditors—Subsequent sale by creditors in execution of subject-matter of gift—Purchase at execution sale for inadequate price by means of fraud—Suit by donee to set aside sale for fraud—Rescission when granted.

In June, 1875, A. being in pecuniary difficulties executed a deed of gift of all his property in favour of his wife and minor sons, the plaintiffs. B., one of his then existing creditors, subsequently obtained a decree against him, and in execution sold part of the said property. At the sale the first defendant, by means of false representation, became the purchaser at an inadequate price.

In July, 1879, A. applied to have the sale set aside, on the ground of the fraud of the first defendant, but his application was rejected.

In 1884 the plaintiffs by their next friend sued to set aside the sale, contending that at the date of B's decree the property was theirs by virtue of the deed of gift of June, 1875, and further that the sale was void by reason of the defendants' fraud.

* Appeal, No. 138 of 1885.

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Held, rejecting the plaintiffs' claim, that the plaintiffs could not be allowed to set up their deed of gift as against the proceedings in execution under which the defendant acquired his title as purchaser. That gift was made to them by A. when he was in pecuniary difficulties, and included all A's property. It was, therefore, void as against his then existing creditors, of whom B. was one. B. was therefore entitled to sell the property in execution of his decree.

Held, also, that the plaintiffs are not entitled to set aside the sale on the ground of fraud, and that the only remedy, if any, open to them was a suit for damages. The gift by A. in 1875 was made to his wife as well as to the plaintiff's (his sons), and it gave them the property as tenants-in-common. [298] The plaintiffs were, therefore, only owners of their respective shares, and were not entitled to have the sale set aside *in toto*. This, however, was what they sued for in their plaint. A.'s wife could not now join in rescinding the sale, as she must have known in 1879 of the fraud, her husband having immediately after the sale endeavoured to set aside the sale on that ground.

A transaction cannot generally be rescinded, unless the party seeking it is able to rescind it *in toto*, except where the transaction is severable.

[F., 17 C.P.L.R. 24 (28).]

APPEAL from a decision of Rav Bahadur Chunilal Maneklal, First-Class Subordinate Judge of Thana.

Suit to set aside a sale as fraudulent.

One Edulji Ardesir died in 1873 intestate, possessed of considerable property, including the property in question in this suit. He left him surviving a son named Ardesir Edulji and a grandson who was the son of a predeceased daughter, the wife of the first defendant Cowasji. On Edulji's death the defendant Cowasji and his son, (the said grandson of Edulji), took a $\frac{2}{7}$ th share of his property by inheritance. The remaining $\frac{5}{7}$ th share went to Ardesir. On the 19th June, 1875, Ardesir, being then in pecuniary difficulties, executed a deed of gift of all his property to the plaintiffs (his sons) and his wife. One of his creditors named Bhikaji, subsequently obtained a decree against Ardesir, and on the 27th June, 1879, in execution of this decree the property now in question was sold to the first defendant, Cowasji. On the 22nd July, 1879, Ardesir applied to have the sale set aside, on the ground that the defendant Cowasji by means of fraudulent misrepresentation at the sale had purchased at an inadequate price. His application was rejected on the 11th October, 1879.

The plaintiffs in the present suit were the minor sons of Ardesir. They sued by their next friend to have the sale of the 27th June, 1879, set aside. They alleged that at the date of the decree obtained by Bhikaji against Ardesir, in execution of which the sale had taken place, the property did not belong to Ardesir, he having given it to them and his wife on the 19th June, 1875, and having ever since managed it on their behalf. They further alleged that the defendant Cowasji had been guilty of fraud in connexion with the sale; that he had fraudulently induced people not to bid, by telling them that he was going to buy on behalf of [299] Ardesir's family, and that he had thereby secured the property at a very inadequate price.

It was proved at the hearing that the deed of gift of the 19th June, 1875, relied on by the plaintiffs included all Ardesir's property, and was executed by him when he was in great pecuniary difficulties, and that Bhikaji was at that time one of his creditors. It was also found by the lower Court that Cowasji by means of the above false representations had purchased at an inadequate price. The Subordinate Judge, however, rejected the plaintiffs' claim.

The following is a portion of his judgment:—

* * * The deed of gift, which is the only basis for the minors' title, is operative to the extent of only $\frac{5}{7}$ ths of the property in dispute, because $\frac{2}{7}$ ths of it belongs to Cowasji and his son by inheritance * * *. The gift by Ardesir is a gift jointly to his two minor sons and his wife. The wife of Ardesir has lost her right to sue to set aside the sale by efflux of time * * *. The minors can, therefore, claim to set aside the sale so far as their interests are concerned, but those interests cannot be ascertained in the absence of all the necessary parties in a suit of the present description * * *. I cannot allow this suit to be converted at this stage of the trial into a suit for partition. If so advised, the minor plaintiffs might bring a properly constituted suit for that purpose * * *.”

The plaintiffs appealed to the High Court.

K. T. Telang (Manekshah Jehangirshah with him), for the appellants:—The gift by Ardesir in June, 1875, was good, and the property passed to the donees. It was not liable to be sold in execution of a decree against Ardesir, and, therefore, Cowasji took nothing by his purchase. In any case the sale must be set aside as against him. The lower Court has found that he was guilty of fraud, and obtained the property at an inadequate price by false representations. Although the Statute 13th Elizabeth is not in force in the mofussil, its principles apply—*Rangilbhai v. Vinayek*(1); *Virsingappa v. Sudashivappa* (2).

[300] *Branson (Mahadev Chimnaji Apte with him)*, for the respondents:—The gift by Ardesir in 1875 was void as against his then existing creditors, of whom Bhikaji was one—*Spirett v. Willows* (3); *Freeman v. Pope* (4). Bhikaji was no party to the fraud of Cowasji at the sale. Defendants 2 and 3 are *bona-fide* purchasers from Cowasji.

JUDGMENT.

SARGENT, C. J.—The plaintiffs seek to recover the property mentioned in their plaint and which was purchased by the defendant Cowasji at an auction sale on the 26th and 27th June, 1879, in execution of a decree obtained by one Bhikaji against Ardesir Edulji, the plaintiffs' father, on the ground that the property had previously been given to them by Ardesir by deed of gift dated 19th June, 1875.

The defendant Cowasji pleaded that the deed of gift was void as against the creditors of Ardesir, and, therefore, could not be set up to invalidate his title under the auction sale. The Subordinate Judge held this to be a good defence on the English decisions mentioned in his judgment. Those authorities, although turning upon the proper construction and application of the English Statute of Elizabeth, enunciate a principle of equity which is equally applicable to the circumstances of this country, and they were, therefore, properly relied on by the Subordinate Judge in disposing of the question before him. The deed of gift under consideration included all Ardesir's property, and it is not denied, was executed at a time when he was in great pecuniary difficulties.

There can, therefore, be no doubt upon the above authorities, of which it is only necessary to refer to the decisions of Lord Westbury in *Spirett v. Willows* (3) and of Lord Justice Giffard in *Freeman v. Pope* (4),

(1) 11 B. 666.

(2) 7 B. H. C. R. A. C. J. 74.

(3) 34 L. J. Ch. 365.

(4) 5 Ch. App. 538 (545).

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that the gift to the plaintiffs was void at least as against all existing creditors at the time, of whom Bhikaji was one. In the latter case Lord Justice Giffard says (p. 545): "If after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent [301]and if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them." Here there were no available assets left after the deed of gift was passed to the plaintiffs to pay creditors—of whom Bhikaji was one—in respect of a debt of Rs. 1,914-10-0 found by the Court below to have been due, and which finding it has not been attempted to dispute on the hearing of this appeal. The plaintiffs cannot, therefore, now be allowed to set up their deed of gift as against the proceedings in execution by Bhikaji under which the defendant Cowasji acquired his title to $\frac{5}{7}$ ths of the property as purchaser at the auction sale.

But they contend that at any rate (subject to Bhikaji's rights), they are entitled to have the sale set aside on the ground that Cowasji fraudulently induced people not to bid by telling them that he was going to buy on behalf of the family of Ardesir; and that he was thus enabled to become the purchaser at much less than it would otherwise have fetched at the sale. The Subordinate Judge held that this was proved to have been the case, but was of opinion that the plaintiffs could have no relief in their suit, because they were not the only persons interested in the property, Cowasji and his son having a $\frac{2}{7}$ th share in the property of Edulji, of which the property in question was part, and Ardesir's wife being one of the donees, with the plaintiffs under the deed of gift; that until the plaintiffs' interest had been determined by a suit for partition, they could not set aside the sale in respect of such interest, and that it was too late to turn it into a suit for partition. But it is to be remarked that Cowasji and his son had no interest in the property attached and put up for sale, which was only the $\frac{5}{7}$ th inherited by Ardesir, and that it is only with the $\frac{5}{7}$ th thus purchased by Cowasji that we are now concerned. However, the auction sale was of the entire $\frac{5}{7}$ th share as the property of Ardesir. If, therefore, the sale is to be set aside by the plaintiffs, it can only be in respect of the entire $\frac{5}{7}$ th share and not merely of the plaintiffs' interest in that share. The well-established rule of equity in England—[302] and the rule is equally applicable to this country—is that a transaction cannot generally be rescinded unless the party seeking it is able to rescind it *in toto*, except where the transaction is severable. See Kerr on Frauds, p. 269. In the present case the plaintiffs being tenants-in-common with Ardesir's wife, and owners, therefore, only of their respective shares, cannot claim to rescind the sale *in toto*. Nor could she now join in rescinding, as she must have known of the fraud as alleged in the plaint in 1879, her husband having immediately after the sale endeavoured to set aside the sale on the same ground as it is now sought to do. The plaintiffs can, therefore, only seek reparation (if at all) by damages.

We must, therefore, confirm the decree with costs, except as to the costs of Cowasji, which he must pay himself.

Decree confirmed.