

1891

JAN. 28.

APPEL-
LATE
CIVIL.

15 B. 670.

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[670] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.*VIRBHADRAPPA (*Original Defendant*), *Appellant v.* MAHANTAPPA
(*Original Plaintiff*), *Respondent*.* [28th January, 1891.]*Procedure—Error in procedure—Second appeal—Finding of fact by lower Court not accepted by High Court where the District Judge in consequence of a mistake as to a date was biased in dealing with the defendant's evidence—Practice.*

Where a Judge, under a mistake, thought that a bond which was really dated 19th November, 1885, was dated 8th November, 1886, and consequently treated the deposition of the defendant, in which he stated that the bond had been passed by him a fortnight before he signed in the plaintiff's account book the acknowledgment sued on dated the 10th December, 1895, as "false."

Held that as the Judge must have been biased by the strong opinion so formed as to the defendant's untruthfulness in dealing with the rest of the defendant's evidence, there was such a substantial error in the procedure as ought to preclude the High Court from accepting the Judge's finding as conclusive upon the point in dispute.

Decree reversed, and the case sent back for fresh decision on the merits on the evidence as it stood.

Hemanta Kumari Debi v. Brojendro Kishore Roy Chowdry (1), referred to.

THIS was a second appeal from the decision of J. L. Johnston, District Judge of Dharwar.

The plaintiff sued to recover a certain amount due on an acknowledgment signed by the defendant in the plaintiff's account book on the 10th December, 1885.

The defendant admitted that he owed the amount claimed, but alleged that he owed it not to the plaintiff, but to one Chanappa for whom the plaintiff had been manager. He contended *inter alia* that the plaintiff had no right to sue, inasmuch as the transaction in dispute was effected by him (the plaintiff) in his capacity as manager for Chanappa; that Chanappa had attained his majority before the institution of the suit; that a portion of the amount claimed was paid by him (the defendant) to Chanappa, and that for the remainder he had passed a bond to Chanappa on the 8th November, 1886.

[671] The Court of first instance (Rao Saheb Venkatesh Lakshamaya, Subordinate Judge of Gadag) found that the amount sued for was due to Chanappa and not to the plaintiff, and that the plaintiff had no right to sue for and to recover it. He rejected the plaintiff's claim.

Plaintiff appealed, and the District Court, in appeal, held that the amount in dispute was due by the defendant to the plaintiff, and reversed the decree of the Court of first instance.

In his judgment the District Judge made the following observations:—

"Chanappa's own account books do not show anything due to Chanappa from defendant at the time of the balance entry in suit. The plaintiff's own account books show the amount in suit due to himself. The fact that plaintiff lived sometimes in Chanappa's house does not prove that plaintiff had no dealings of his own. Chanappa had a separate

* Second Appeal No. 858 of 1899.

(1) 17 C. 875 = 17 L.A. 65 (69).

karkun, and plaintiff or his father only wrote a few pages of Chanappa's accounts. The deposition of defendant shows clearly that his defence of payment and bond passed to Chanappa are not real transactions. They were after quarrels had arisen between plaintiff and Chanappa. This deposition shows that defendant is false. He says that he passed the bond for Rs. 450, which is dated 8th November, 1886, to Chanappa about a fortnight before signing the acknowledgment in suit in plaintiff's *khata* book, which is dated 10th December, 1885, or eleven months before the bond. He makes out Chanappa to be 29 years old now, as he was 16 years old 13 years ago, when defendant borrowed Rs. 300 from Basawa, mother of Chanappa, and that when he passed the bond to Chanappa, the plaintiff was managing, and that all documents were being executed to plaintiff in plaintiff's name, but that plaintiff specially asked him to pass this bond to Chanappa. He says Chanappa was then 27, which would make him 29 in 1888, when the deposition was given. There is nothing in the letters from plaintiff to Chanappa showing that plaintiff was his manager. Exhibit 44 is quite what an elder relative would have written to a younger whom he helped occasionally, and is hardly what a manager would have written to his ward."

[672] *Inverarity* (with *Shamrao Vithal* and *Ganesh Ramchandra Kirloskar*), for the appellant.—The District Judge was wrong in holding that the defendant's deposition proved him to be "false." What the Judge found to be a discrepancy in the date was no discrepancy at all. The District Judge was mistaken in supposing that the bond relied on by the defendants was dated 8th November, 1886. The correct date of the bond is 19th November, 1885. The Judge's mind was materially prejudiced by the mistake under which he laboured, and he has in consequence come to a wrong decision.

Narayan Ganesh Chandavarkar, for the respondent.—The Judge was not wrong in holding that the date of the bond, on which the defendant relied in support of his case, was 8th November, 1886, because that was the date given by the defendant in his written statement. The Judge has given reasons for holding that the defendant's deposition shows him to be "false." The judgment of the lower Court clearly shows that, in coming to the conclusion unfavourable to the defendant, the Judge was influenced by all the circumstances involved in the case, and not only by the particular circumstance pointed out by the appellant. The finding of the lower Court, that a certain amount is due by the defendant to the plaintiff, is a finding of fact, and it cannot be disturbed in second appeal.

JUDGMENT.

SARGENT, C.J.—The District Judge says that the defendant's deposition shows him to be "false," because he stated that he passed the bond for 450 rupees, which is dated 8th November, 1886, to Chanappa about a fortnight before signing the acknowledgment in suit in plaintiff's *khata* book, which is dated 10th December, 1885, or eleven months before the bond. An examination, however, of the bond shows that the Judge was under a mistake as to its true date, which was, it is not disputed, the 19th November, 1885, instead of 8th November, 1886, as supposed by the District Judge. As the District Judge must have been biased by the opinion so formed as to the defendant's untruthfulness in dealing with the rest of the defendant's evidence, we think there has been such a substantial error in the procedure as ought to preclude our accepting the District Judge's

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—
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LATE
CIVIL.
—
15 B. 670.

[673] finding as conclusive that the 450 rupees were due to plaintiff and not to Chanappa—*Hemanta Kumari Debi v. Brojendro Kishore Roy Chowdry* (1).

Without, therefore, intending to suggest that his conclusion was wrong, or to express any opinion directly or indirectly on the merits of the case, we must, for the reasons above stated, reverse the decree of the Court below and send back the case for a fresh decision on the merits on the evidence as it stands. Costs to abide the result.

Decree reversed.

15 B. 673.

APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Telang.

RANGAYANA SHRINIVASAPPA (*Original Plaintiff*), *Appellant v.*
GANAPABHATTA (*Original Defendant*), *Respondent.**
[28th January, 1891.]

Hindu law—Alienation—Mortgage by a co-parcener—Liability of his share after his death to satisfy the mortgage.

Where a member of a joint Hindu family makes a mortgage, such mortgage, being good when made, creates a valid charge on the property to the extent of his share, which cannot be defeated by his death.

[R., 32 B. 81=9 Bom.L.R. 1366=3 M.L.T. 44.]

SECOND appeal from the decision of Gilmour McCorkell, District Judge of Kanara, in appeal No. 132 of 1889 of the District File.

Timapa, the uncle of defendant No. 1, mortgaged his share in the joint family property to the plaintiff in 1867. On this mortgage the plaintiff obtained a decree, but before it was executed Timapa died. After his death, his share in the joint family property was attached in execution of the mortgage decree.

The defendant No. 1 objected to the attachment, on the ground that Timapa's interest in the property had ceased to exist. His objection was allowed, and the attachment was raised.

[674] The plaintiff thereupon filed the present suit for a declaration that the property in dispute was liable to attachment and sale in execution of his decree against the deceased Timapa.

Both the lower Courts rejected the plaintiff's claim, holding, on the authority of *Udaram Sitaram v. Ranu Panduji* (2), that on Timapa's death the family property had passed by survivorship to his co-parcener, defendant No. 1, and was not liable in his hands to satisfy the decree obtained against Timapa.

Against this decision the plaintiff preferred a second appeal to the High Court.

Ghanasham Nilkant Nadkarni, for appellant.—It is the settled law in this presidency that a co-parcener can alienate his share in the undivided

* Second Appeal No. 234 of 1890.

(1) 17 C. 875=17 I.A. 65 (69).

(2) 11 B.H.C.R. 76.