

inconsistent with the ruling in *Simbhunath v. Golab Singh*, was on a bond which made the debt a charge on the land. In *Nanomi Babuasin v. Modun Mohun*(1) and *Meenakhsi Naidu v. Immudi Kanaka*(2) and *Mahabir Pershad v. Moheshvar Nath*(3) there were other special circumstances which the Court thought conclusively pointed to all parties having considered that the entire estate was put up for sale and purchased.

In this case it is not suggested that the Court has any other materials for coming to a conclusion than such as are afforded by the contents of the execution documents which are identical with those in *Hurdey Narain's case*(4). We must, therefore, reverse the decree of the Court below, and restore that of the Subordinate Judge, with costs on the defendant here and in the Court below.

Decree reversed.

15 B. 89.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

RAMKRISHNA JAGANNATH (*Plaintiff*) v. VITHAL RAMJI AND TWO OTHERS (*Defendants*).^{*} [23rd June, 1890.]

Res judicata—Mortgage—Sale by mortgagees—Suit by purchaser against mortgagee for possession—Issue raised by mortgagor impeaching bona fides of sale—Decree for plaintiff without recording finding on issue—Subsequent suit for redemption by mortgagor against mortgagees impeaching sale as fraudulent and void.

In 1874 the plaintiff mortgaged certain property to Ramji Dadu and Ramji Lala. In 1877 the mortgagees sold it by auction to one Khandu Mahadu, who in the following year sued the mortgagors for possession. The defendants in that suit filed a written statement impeaching Khandu's title under the alleged sale, and at the hearing an issue was raised as to whether the plaintiff (Khandu) was [90] the purchaser of the premises *bona fide* and for valuable consideration. The plaintiff (Khandu) obtained a decree in that suit, but no finding on the said issue was recorded. The plaintiff in the present case was the son of the mortgagee, and he now sued to redeem the property and for a declaration that the alleged sale by the mortgagees was fraudulent and void as against him. He contended that in the former suit he did not intend to allege that the sale was not *bona fide*, but merely that it took place without due notice and was impeachable on that ground, and he relied on the fact that there had been no finding on the issue.

Held, that the present suit was barred by the issue and decree in the former suit. In that suit the plaintiff (Khandu) had given evidence that he was the *bona fide* purchaser of the property. Though no actual finding on that issue was recorded, the decree passed for the plaintiff necessarily involved the finding of the issue in the affirmative.

[R., 25 B. 115 (124); 6 Bom. L.R. 288 (290).]

THE first two defendants (Vithal Ramji and Keshav Ramji) were the sons of one Ramji Lala, who died in December 1883. The third defendant was one Ramji Dadu.

The plaintiff stated that on the 18th June 1874 his father, Jagannath Vithoba, mortgaged a certain house and premises in Bombay to the third

^{*} Suit No. 659 of 1889.

(1) 13 I.A. 1=13 C. 21.

(3) 17 C. 584 (589)=17 I.A. 11.

(2) 16 I.A. 1=12 M. 142.

(4) 11 I.A. 26=10 C. 626.

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defendant, Ramji Dadu, and the said Ramji Lala, since deceased, for Rs. 3,500. He alleged that in January 1877 the mortgagees pretended to sell the said property by auction to one Khandu Mahadu, to whom a conveyance was executed, but that the sale was really to themselves, although in his name, and that in 1882 by a formal deed he had re-conveyed the property to them. He stated that since the sale in 1877 the mortgagees had been in possession of the property and in receipt of the rents and profits, and he contended that the sale was fraudulent and void. He prayed that the said sale should be declared void as against him, and that the mortgage should be declared to be still existing; that he should be allowed to redeem; for accounts and possession, &c.

The defendants in their written statement alleged (*inter alia*) that the purchase of the property by Khandu Mahadu in 1877 was a *bona fide* purchase. They further submitted that the present suit was barred by the proceedings in suit No. 1 of 1878, and that the question now raised by the plaintiff was *res judicata*.

It appeared that suit No. 1 of 1878 had been brought by Khandu Mahadu, the alleged purchaser, against the present plaintiff, Ramkrishna Jagannath, and his father, Jagannath Vithoba [91] to obtain possession of the said property. The plaintiff in that suit (Khandu Mahadu) alleged that he had purchased the house from the mortgagees (Ramji Lalla and Ramji Dadu), and that Ramkrishna and his father refused to hand it over.

Ramkrishna filed a written statement in that suit impeaching the title of Khandu Mahadu under the alleged mortgage sale.

The following issue was raised at the hearing of that suit:—

“Is the plaintiff (Khandu Mahadu) the purchaser *bona fide* and for valuable consideration of the premises described in the plaint?”

Evidence was taken at the trial, and a decree was passed for the plaintiff, but no finding on the above issue was recorded.

Vicaji and *Anderson*, for the plaintiff.—They contended that the present suit was not barred by the previous suit; that no finding on the above issue being recorded, the question of the *bona fides* of the sale was still open.

Macpherson (Acting Advocate-General) and *Starling*, for defendants.

JUDGMENT.

FARRAN, J.—In my judgment the maintenance of this suit is barred by the issues raised for decision and by the decree in suit No. 1 of 1878. That suit was brought by Khandu Mahadu against the now plaintiff Ramkrishna Jagannath and his father for possession of the premises sought to be recovered in this suit, which Khandu alleged that he had purchased from the mortgagees of them under a mortgage created by Jagannath, Ramkrishna's father, and binding on Ramkrishna. The plaintiff Ramkrishna impeached the validity of the sale by the mortgagees to Khandu Mahadu. The grounds on which the sale was impeached are ambiguously and obscurely stated in the written statement, but there is no such ambiguity or obscurity in the issue which was raised by the Court and which the plaintiff Ramkrishna must be taken to have adopted, *viz.*, “Is the plaintiff (Khandu Mahadu) the purchaser *bona fide* and for valuable consideration of the premises described in the plaint?”

In that suit evidence was given on the part of the plaintiff therein, that he was such *bona-fide* purchaser and for value. This evidence was

not shaken in cross-examination, and the present [92] plaintiff Ramchandra called no evidence to rebut it. Though no actual finding was recorded on the issue, a decree was passed in favour of the plaintiff Khandu, which necessarily involved the finding of the issue in the affirmative.

The plaintiff Ramkrishna alleges that he can now bring forward evidence and circumstances which will prove conclusively that Khandu Mahadu was not a *bona fide* purchaser for value of the premises, but was a mere nominee of the mortgagees and purchased on their behalf, no consideration really passing between them; and that this evidence and these circumstances were unknown to him when he defended the former suit; and that in the former suit he did not intend to allege that the sale was not *bona fide*, but merely that the sale took place without due notice and was impeachable on that ground. On the last point I think that the issue cannot be construed to mean less than it expresses, and that Ramkrishna cannot be allowed to contradict the record. If he was not prepared to negative the issue, he ought not to have allowed it to be raised, and it must be taken to have been properly raised. If since then he has discovered evidence and circumstances which would show that the issue was wrongly decided in that suit, he ought to have moved for a new trial.

The issue must be taken to have been properly framed, and that finding remaining unimpeached, it decides the present suit: see *Krishna Behare Roy v. Chowdranee* (1). The present defendants claim through Khandu. I find the second issue in the affirmative and for defendants, and dismiss the suit with costs.

Attorney for the plaintiff:—Mr. D. S. Garud.

Attorneys for the defendant:—Messrs. Payne, Gilbert and Sayani.

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[93] ORIGINAL CIVIL.

Before Mr. Justice Telang.

RAMPURTAB SAMRUTHROY AND ANOTHER (*Plaintiffs*) v. PREMSUKH CHANDAMAL AND OTHERS (*Defendants*).*

[20th, 21st and 24th November, 1890.]

Practice—Jurisdiction—Leave to sue under cl. XII of the Letters Patent, 1865—Amendment of plaint in cases in which leave to sue under cl. XII is necessary—Cause of action—Part of cause of action arising outside the jurisdiction—Hundi—Suit by drawee within the jurisdiction against the drawer outside the jurisdiction—Leave to sue under cl. XII of the Letters Patent.

In suits for which leave to sue under cl. XII of the Letters Patent, 1865, is necessary the plaint cannot be afterwards amended. The grant of leave must be taken to relate to the suit as put forward in the plaint on which leave is endorsed by the Judge accepting it.

The grant of leave under cl. XII of the Letters Patent, 1865, is a judicial act, which must be held to relate only to the cause of action contained in the plaint, as presented to the Court at the time of the grant. Such leave, which affords the very foundation of the jurisdiction, is not available to confer jurisdiction in respect of a different cause of action which was not judicially considered

* Suit No. 156 of 1889.

(1) 2 I. A. 283.