

1892  
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APPEL-  
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17 B. 771.

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## [771] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

GOVIND VENKAJI KULKARNI (*Original Plaintiff*), Appellant v.  
SADASHIV BHARMA SHET and another (*Original Defendants*),  
Respondents.\* [19th October, 1892.]

*Encroachment on land—Injunction—Damages—Legal rights of owner of land—Owner not compellable to accept compensation instead of removal of encroachment.*

In a suit to recover land adjacent to a temple belonging to the defendants, on which land the defendants had encroached by building verandahs, the lower Courts found that the land sued for was the property of the plaintiff subject to the defendants' right of access to the temple, and directed the defendants to pay compensation to the plaintiff for the encroachment. The plaintiff appealed to the High Court.

*Held*, that the land being found to be the plaintiff's, the Courts could not compel him to part with his legal rights and accept compensation against his will, however reasonable it might appear to be. The defendants were accordingly ordered to remove the verandahs complained of.

[R., 28 B. 298=6 Bom, L. R. 86 (88).]

THIS was a second appeal from the decision of Dr. A. D. Pollen, District Judge of Belgaum.

The plaintiff sued to establish his title to and recover possession of certain portions of land adjacent to a temple on which land the defendants had encroached by building verandahs; the temple belonging to the defendants, and the land all around it belonging to the plaintiff.

The defendants denied plaintiff's title and pleaded limitation.

The Subordinate Judge found that the land in dispute belonged to the plaintiff, and directed the defendants to pay compensation to the plaintiff for their encroachment.

Plaintiff appealed, and the District Judge having found that the ground round the temple belonged to the plaintiff, subject to defendants' right of access to and of using the temple, passed a decree in the following terms:—

"I vary the decree by finding that plaintiff is the owner of the land in dispute on the north and east sides of the temple as claimed in the plaint, and by awarding his costs throughout. I otherwise confirm the decree."

[772] The plaintiff preferred a second appeal.

*Balaji Abaji Bhagvat*, for the appellant.

*P. M. Mehta* (with *B. N. Bhajekar*), for the respondents.

## JUDGMENT.

SARGENT, C. J. :—Both the Courts below have found that the land in question belongs to the plaintiff; but subject, as the Court of appeal has found, to a right of access to the temple. Such being the findings as to the property in the land, the Courts could not compel the plaintiff to part with his legal rights and accept compensation against his will, however reasonable it might appear to be.

\* Second Appeal, No. 429 of 1891.

We must, therefore, reverse the decree of the Court below, except as to the order as to costs, and order the defendants to remove the verandahs complained of by the plaintiff. Defendants to pay plaintiff his costs of this appeal.

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*Decree reversed.*

*N.B.*—After the High Court's judgment was delivered, the plaintiff presented a petition of review praying for a direction in the decrees for delivery of possession. The Court, thereupon, on the 20th April, 1893, amended the decree by adding "and to restore possession of the land to plaintiff" after the words "remove the verandahs complained of by the plaintiff."

17 B. 772.

APPELLATE CIVIL.

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

IRANGOWDA (Original Defendant), Appellant v. SESHAPA (Original Plaintiff), Respondent.\* [19th October, 1892.]

*Practice—Procedure—Suit by decree-holder to declare a house subject to attachment in execution as being the property of the judgment-debtor—Decree for plaintiff on ground that judgment-debtor, though not the owner of the house, had an attachable interest in it as permanent tenant—Court cannot make out a new case for plaintiff.*

The plaintiff's case being that a certain house was the absolute property of his judgment-debtor, and that, therefore, he (the plaintiff) was entitled to attach it in execution of his decree, the Subordinate Judge found that the judgment-debtor was not the owner of the house, and rejected the plaintiff's claim. The appellate Court held that (though the judgment-debtor was not the owner) he had an attachable interest in the house as permanent tenant, and allowed the plaintiff's claim. On appeal to the High Court by the defendant,

[773] *Held*, that the order of the appellate Court made out an entirely new case for the plaintiff which he had not made himself at any period of the trial, and that the decree of the lower appellate Court should be reversed.

SECOND APPEAL from the decision of Rao Bahadur Kashinath Balkrishna Marathe, First Class Subordinate Judge, with appellate powers, of Dharwar.

Suit to set aside an order removing attachment.

The plaintiff alleged that he had obtained a decree against one Sanganasapa and in execution thereof attached the house in dispute as the property of Sanganasapa. The defendant, thereupon, presented an application for the removal of the attachment on the ground that the house belonged to him and not to Sanganasapa and got an order for the removal of the attachment. The plaintiff then brought the present suit to set aside that order, and for a declaration that the house was liable to be attached and sold as the property of Sanganasapa in execution of the plaintiff's decree against him.

The defendant alleged that the house was his ancestral property and Sanganasapa his tenant; it was therefore, not liable to be attached and sold for Sanganasapa's debt.

The Subordinate Judge found that the house was not the property of Sanganasapa, and that, therefore, it was not liable to be sold in execution of the plaintiff's decree.

On appeal by the plaintiff the defendant Sanganasapa was the owner as admittedly he was in possession, the Subordinate Judge with appellate

\* Second appeal, No. 744 of 1891.