

1899 JUNE 12. to do so by an administration suit; and (2) that this suit must be dismissed with costs throughout.

APPELLATE CIVIL.

18 B. 337.

This finding renders it unnecessary to go into the other questions argued on the appeal, and we, therefore, think it needless to express an opinion as to the validity of the alleged equitable mortgage or the effect of the alleged payment of interest by Framji. As, however, serious aspersions were thrown on Framji's character in reference to the disappearance of the books, and the whole of the evidence on this point was fully discussed, we think it right to say that that evidence, though it gives rise to some suspicion, does not appear to us to prove conclusively that the missing books were stolen or abstracted by him.

Decree reversed.

18 B. 342.

APPELLATE CIVIL.

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

HARI BALKRISHNA JOGLEKAR (Original Defendant), Appellant v.

NARO MORESHVAR JOGLEKAR (Original Plaintiff), Respondent.*

[15th June, 1893.]

Contract—Contract Act (IX of 1872), s. 23—Unlawful consideration—Agreement by plaintiff and defendant not to bid against each other at an auction—Specific Relief Act (I of 1877), s. 35—Void contract.

There is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction sale.

[343] In order that a contract should be set aside under s. 35 (1) (b) of the Specific Relief Act (I of 1877), the plaintiff should be shown to have been less to blame in the transaction than the defendant.

[F., 37 P.R. 1901=97 P.L.R. 1901; R., 24 B. 622 (627)=2 Bom. L.R. 483; 1 C.L.J. 85 (89); U.B.R. (1897-1901) 317.]

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

Suit for the cancellation of a bond.

The plaintiff alleged that certain land, portion of which had been mortgaged to him and the rest to the defendant Balaji Keshav, was attached by one Govind Nagesh in execution of a money decree which he

* Second Appeal No. 1000 of 1891.

(1) Section 35, Specific Relief Act (I of 1877) :—

Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely :—

(a) where the contract is voidable or terminable by the plaintiff;

(b) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;

(c) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.

(Govind) had obtained against Balaji Keshav; that, after the attachment had been levied, he and the defendant had agreed that they would together pay off the debt due to Govind, plaintiff paying Rs. 200 of it and the defendant the remainder; that Govind should apply to the Court to sell the mortgaged land in separate lots, and that the plaintiff and the defendant would not bid against each other at the sale, but that each would purchase the portion of the land which had been mortgaged to him; that, of the Rs. 200 promised by the plaintiff, Rs. 100 should be paid by him immediately and the other Rs. 100 after the sales had taken place.

At the time of the agreement, however, the plaintiff had no money with him. It was arranged, therefore, that the defendant should at once pay this Rs. 100 to Govind, and the plaintiff executed a bond to the defendant for that amount.

[344] The plaintiff alleged that at the auction sale, which afterwards took place, the defendant, in breach of the above agreement, purchased some of the land which had been mortgaged to the plaintiff, and thus failed to fulfil the condition under which the bond had been passed. The plaintiff, therefore, brought this suit to have the bond for Rs. 100 cancelled.

The defendant denied that any agreement of the nature alleged by the plaintiff had been made, and alleged that when the lands of Balaji Keshav were attached by Govind Nagesh, the plaintiff applied to have the attachment raised, and had promised to pay Govind Nagesh Rs. 100 if he would not oppose the application; that as the plaintiff had at the time no ready cash with him, he got the defendant to pay the money for him, and for this payment had executed the bond to the defendant. He further contended that the agreement alleged by the plaintiff was illegal.

The Subordinate Judge (Rao Saheb M. G. Phatak) found that the plaintiff's allegations were proved, and that the consideration and object of the agreement were unlawful under s. 23 of the Contract Act (IX of 1872), and that the bond was, therefore, void and should be cancelled (1). He passed a decree for the plaintiff. In his judgment he said:—

“The agreement alleged and proved by the plaintiff is without any consideration, or at least the consideration or object of the agreement was unlawful. The parties had agreed to purchase the lands mortgaged to them alone, and were not to interfere [345] with the bids of each other. This was certainly injurious to the interest of the judgment-debtor, as the parties by their agreement had consented to allow each other to purchase the property at the lowest possible bids amongst themselves. The consideration or object of the agreement becomes unlawful under s. 23 of the Contract Act, as it implies injury to the property of the third person. Any bond executed in pursuance of such an agreement inherits the defect of the original agreement, and must on that account be held to be void.”

(1) Section 23 of the Contract Act (IX of 1872):—

The consideration or object of an agreement is lawful unless—

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or

involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Section 24.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

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On appeal by the defendant the Court confirmed the decree on the following grounds:—

"Under s. 24 of the Contract Act, where any one of the objects, or any part of the consideration, is illegal, the contract is void. Under the circumstances disclosed by the evidence, an illegal object has entered into the transaction, of which the bond sued on is a part, and the bond is, therefore, void on account of its not being executed for a purely legal consideration * *. The parties are *in pari delicto*."

The defendant preferred a second appeal.

Ganesh Krishna Deshmukh, for the appellant (defendant).—The lower Courts have made out a case for the respondent which he himself did not make. He wanted to have the bond rescinded on the ground that we had failed to perform our part of the agreement, while the lower Courts have set it aside as illegal. The plaintiff never alleged that the bond was illegal. We submit that such an agreement is not illegal—*Doorga Singh v. Sheo Pershad Singh* (1). Even assuming that the agreement is illegal, still the plaintiff cannot sue to set it aside under s. 35, cl. (b), of the Specific Relief Act. The contract is unlawful for causes not apparent on its face, and the plaintiff and the defendant have been held equally to blame.

Mahadeo Chimnaji Apte, for the respondent (plaintiff).—The objection as to the making out of a new case and the point in connection with the Specific Relief Act have been urged for [346] the first time in second appeal. They ought to have been urged by the defendant in the lower appeal Court. In his written statement the defendant contended that the agreement was illegal; therefore, he cannot now turn round and say that it was legal. Clause (a), s. 35, of the Specific Relief Act is applicable, and not cl. (b). The appellant failed to comply with the conditions of the agreement, and, therefore, it became voidable or terminable at our option.

JUDGMENT.

SARGENT, C. J.—Both the Courts below have dealt with this case as one of an unlawful contract which the plaintiff was on that ground entitled to rescind. But there is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction-sale:—see *Doorga Singh v. Sheo Pershad Singh* (1). Nor, assuming the contract in this case to have been unlawful, has the other condition been satisfied, under which alone it could be rescinded under s. 35 (b) of the Specific Relief Act, namely, that the plaintiff should have been shown to have been less to blame in the transaction than the defendant. On the contrary, the Judge of the Court of appeal says that plaintiff and defendant were *in pari delicto*.

Mr. Apte, however, has argued that his case, as stated in the plaint, really falls under s. 35 (a) and not s. 35 (b) of the Specific Relief Act. He argues that the conditions, which under the terms of the agreement were to be performed by the defendant, have not been performed by him; and the agreement being thus "voidable or terminable" at plaintiff's option, he is entitled to claim rescission on that ground. This point has really not been gone into by the Courts below; and though there are expressions here and there in their judgments touching upon it, we cannot accept them

as amounting to findings. We must, therefore, send down the following issue to the Court below :—

1. Whether the contract, the subject of the suit, had, at the date of the institution of the suit, become on any ground voidable or terminable by the plaintiff?

Finding to be returned within two months.

Issue sent down.

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18 B. 347.

[347] APPELLATE CIVIL.

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

RAYACHAND MAYACHAND (*Original Plaintiff*), Appellant v. SULTAN RAHIMBHAI AND ANOTHER (*Original Defendants*), Opponents.*
[19th June, 1893.]

Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1879)—Special Judge—Finding of fact—Civil Procedure Code (XIV of 1882), s. 622—Practice—Procedure.

When the Special Judge under the Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1879) entertains a clear opinion that the findings of the Subordinate Judge on the questions of fact are erroneous, and exercises his discretion in setting aside the decree, the High Court will not in its extraordinary jurisdiction, interfere with that discretion, except under most exceptional circumstances.

[R., 19 B. 256 (288).]

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Bahadur Mahadeo Govind Ranade, Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The plaintiff sued the defendants, Sultan, Sakkar and their surety Sakharam to recover seventy-seven rupees alleged to have been due under an oral agreement.

Defendants Sultan and Sakkar denied their liability. Defendant Sakharam admitted the claim.

The Subordinate Judge found the claim proved, and passed a decree for the plaintiff and against all the defendants.

Sultan and Sakkar being dissatisfied presented an application for revision to the Special Judge under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Special Judge examined the evidence, and varied the decree by rejecting the claim against Sultan and Sakkar.

The plaintiff applied to the High Court under its extraordinary jurisdiction, and contended that the Special Judge had no jurisdiction, in his revisional powers, to interfere with the findings of fact of the Court of first instance.

Vishnu K. Bhatavdekar with *G. L. Chandorkar*, appeared for the applicant (plaintiff). They relied on *Shidu v. Bali* (1).

JUDGMENT.

[348] SARGENT, C. J.—When the Special Judge entertains a clear opinion that the findings of the Subordinate Judge on the questions of

* Application No. 46 of 1893 under extraordinary jurisdiction.