

1903.
 AMAROHAND
 KILA MORAR.

the mortgage and the plaintiff given a decree for sale. There is obviously no bar of limitation or institution fee. The claim should be valued at the amount of the debt sought to be recovered: Transfer of Property Act, section 92, and *Hemraj v. Trimbak*.⁽¹⁾

We reverse the decrees of the lower Courts and remand the case to be disposed of in accordance with the above remarks. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903.
 July 4.

MANEKSHAH SORABJI GANDHI (APPLICANT-DEFENDANT), APPELLANT,
 v. DADABHAI JAMSHETJI (OPONENT-PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 344, 345, 588 (17) and 589—Application to be declared an insolvent—Subject-matter of the suit over Rs. 5,000 in value—First Class Subordinate Judge—Rejection of the application—Appeal—District Court.

In a suit, the subject-matter of which was over Rs. 5,000 in value, the plaintiff applied for execution. The defendant applied to be declared an insolvent under sections 344 and 345 of the Civil Procedure Code (Act XIV of 1882). The First Class Subordinate Judge rejected the application. An appeal was preferred to the High Court.

Held, dismissing the appeal and returning the memo. of appeal for presentation to the proper Court, that the appeal lay to the District Court under sections 588, clause (17), and 589 of the Civil Procedure Code (Act XIV of 1882).

Venkatrayar v. Jamboo Ayyan ⁽²⁾ not followed.

APPEAL from the order passed by Bhaskar Shridhar Joshi, First Class Subordinate Judge of Surat, on the 7th October, 1901, in Miscellaneous Application No. 37 of 1899.

The plaintiff Dadabhai Jamshetji obtained against the defendant, Manekshah Sorabji a decree in the Court of the First Class, Subordinate Judge of Surat. The subject-matter of the decree was

* Appeal No. 4 of 1902.

(1) P. J. 1897, p. 416.

(2) (1892) 17 Mad. 377.

over Rs. 5,000 in value. The plaintiff having applied for the execution of the decree, the defendant by an application prayed for a declaration of insolvency under section 345 of the Civil Procedure Code (Act XIV of 1882). The Court rejected the defendant's application and ordered execution to proceed. Against the said order the defendant appealed.

H. C. Coyaji (with *D. M. Daruvala*) for the respondent (plaintiff-opponent):—We have to urge a preliminary objection on the point of jurisdiction. Though the subject-matter of the decree was above Rs. 5,000 in value, still we contend that the defendant ought to have appealed to the District Court and not to this Court, because the present contention relates to the status of the defendant and not to the subject-matter of the suit. Further, the order is appealable under clause (17), section 588, of the Civil Procedure Code: see proviso to section 589 of the Code. The Court of the First Class Subordinate Judge of Surat is subordinate to the Court of the District Judge of Surat: see section 2 of the Code. Therefore the appeal ought to have been preferred to the District Court at Surat: *Debi Prasad v. Jamna Das*.⁽¹⁾

G. S. Rao (with *Ramdatt V. Desai*) for the appellant (defendant-applicant):—The subject-matter of the suit being over Rs. 5,000 in value, the Court of the First Class Subordinate Judge of Surat, so far as the suit or any orders passed therein were concerned, is subordinate to the High Court and not to the District Court at Surat. Where the subject-matter of the suit is less than Rs. 5,000 in value and where the valuation of the suit is not the test of jurisdiction, then the Court of the First Class Subordinate Judge would be subordinate to the District Court: *Venkatrayar v. Jamboo Ayyan*.⁽²⁾

JENKINS, C. J. :—This is an appeal from an order rejecting with costs an application whereby the present appellant prays that he may be declared to be an insolvent under sections 344 and 345 of the Code of Civil Procedure. Any appeal that may lie from such an order would be under clause (17) of section 588 of the Code of Civil Procedure. Now section 589 of the Code

(1) (1900) 23 All. 56.

(2) (1892) 17 Mad. 377.

1903.

MANEKSHAH
v.
DADABHAI.

1903.

MANEKSHAH

v.
DADABHAI.

provides that :—“ When an appeal from any order is allowed by this Chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made, or, when such order is passed by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court: provided that an appeal from an order specified in section 588, clause 17, shall lie—

(a) to the District Court where the order was passed by a Court subordinate to that Court, and

(b) to the High Court in any other case.”

The suit in relation to which the order of rejection has been made is one in which the subject-matter is over Rs. 5,000 in value. Mr. Coyaji for the respondents has taken a preliminary objection to the hearing of this appeal in the High Court on the ground that it should have been to the District Court. For the purposes of his argument he has referred us to section 2 of the Code which, among other things, provides that :—“ ‘ District’ means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a ‘ District Court’), and includes the local limits of the ordinary original civil jurisdiction of a High Court: every Court of a grade inferior to that of a District Court, and every Court of Small Causes, shall, for the purposes of this Code, be deemed to be subordinate to the High Court and the District Court.” So the question is, whether the Court that passed the order of rejection is of a grade inferior to that of the District Court? In my opinion it is, and I should have thought the point free from doubt but for the decision in *Venkatrayar v. Jamboo Ayyan* ⁽¹⁾, where a different view was taken. But, with all respect for that decision, we see no reason to read into the section words which have no place there. We feel the more justified in declining to follow the decision in *Venkatrayar’s* case inasmuch as the Allahabad High Court in *Debi Prasad v. Jamma Das* ⁽²⁾ has questioned the propriety of the Madras decision. In our opinion, therefore, the preliminary objection is sound, and we must accordingly dismiss this appeal. The memorandum of appeal will be returned

(1) (1892) 17 Mad. 377.

(2) (1900) 23 All. 56.

for presentation to the proper Court. Costs to abide the event of the appeal, if there is an appeal. If there is no appeal, then the appellant to pay the costs of this appeal.

1903.

MANEKSHAH
v.
DADABHAI.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Chandavarkar.

CHHAGANLAL HARIBHAI (ORIGINAL DEFENDANT 1), APPELLANT, *v.*
DHONDU CHUDAMAN RANGRI AND ANOTHER (ORIGINAL PLAINTIFF
AND DEFENDANT 4), RESPONDENTS.*

1903.

July 8.

Practice—Procedure—Pending suit—Another suit based on the defence in the first suit—Specific Relief Act (I of 1877), section 39—Cancellation of instrument.

On the 16th March, 1899, the firm of Chhaganlal Haribhai brought Suit No. 96 of 1899 against Dhondu and Baba to recover a sum due on a bond passed by them to the firm. The defence pleaded that the bond was void, being passed for the balance due on wagering transactions. While this suit was pending, on the 13th June, 1899, Dhondu (one of the defendants in the suit) brought Suit No. 167 of 1899, to have the above-mentioned bond cancelled and delivered up to him, under section 39 of the Specific Relief Act (I of 1877). The Subordinate Judge decided both the suits together; he dismissed the first suit and allowed plaintiff's claim in the second.

Held, that the form of specific relief provided for by section 39 of the Specific Relief Act (I of 1877) was founded upon the administration of protective justice for fear (*quia timet*); and that there could be no fear, in the second suit, that the plaintiff would suffer serious injury if he did not bring the suit, for the plea which was the foundation of the second suit was raised by him in the defence to the previous suit.

APPEAL from the decision of D. G. Gharpure, First Class Subordinate Judge of Dhulia.

Suit for cancellation of a bond under section 39 of the Specific Relief Act (I of 1877).

On the 16th March, 1899, Bhagwandas Narotamdas, Maganlal Dullabhdas, and Shamchandra Rampratap, trading under the name of Chhaganlal Haribhai, filed Suit No. 96 of 1899 against

* Appeal No. 62 of 1901.