have been heard either in person or by their respective pleaders or recognized agents, shall pronounce judgment in open Court either at once or on some future day, of which due notice shall be given to the parties or their pleaders."

It is said that the judgment in this case was not pronounced in open Court, and this is confirmed by the report for which we have called.

We strongly disapprove of any failure to observe the provisions of section 198 of the Code; and we desire to express our disapproval, because it has been represented to us that it is not an uncommon practice in the mofussil Courts to omit to pronounce judgment in open Court.

Apart from the fact that it is in direct opposition to an express provision of the law, the practice is highly inconvenient, and deprives the Court and the litigants of a valuable safe-guard against error.

It must often happen that some slip or error occurs in the course of a judgment which the advocate or pleader engaged in the case is able to point out to the Judge with the result that it can be rectified at once and the parties thus saved the expense, trouble and delay which would be involved in seeking a rectification by review or appeal. If the practice exists, we trust it will cease and that a judgment will always be pronounced, as the law requires, in open Court, and that pleaders will attend when judgment is pronounced, and assist the Court by pointing out any error that may occur.

G. B. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Russell.

1906.
February 22.

MADHAVJI BHANJI (ORIGINAL DEFENDANT 2), APPELLANT, *v.* RAMNATH DADOBA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Specific Relief Act (I of 1877), section 31—Sale—Suit for specific performance—Rectification—Mutual mistake—Clear proof.

To establish a right to rectification of a document it is necessary to show that there has been either fraud or mutual mistake. Under the terms of section

* Second Appeal No. 377 of 1905.

1906.

MADHAVJI
v.
RAMNATH.

31 of the Specific Relief Act (I of 1877), it is necessary that the Court should find it clearly proved that there was such mistake.

"A person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought."

Fowler v. *Fowler*(1) followed and applied.

SECOND appeal from the decision of H. S. Phadnis, Acting District Judge of Thana, reversing the decree of N. V. Atre, First Class Subordinate Judge.

The plaintiffs sued for specific performance of an agreement for sale and for possession of the property the subject of the contract. The property originally belonged to one Sundar Ramchandra. It was sold at a Court sale held on the 23rd and 24th December, 1901, and purchased by the defendants. The property which was sold comprised varkas land, Survey No. 8, and a house. On the 21st November following the defendants agreed to sell the property to the plaintiffs for Rs. 1,599 and executed a Satekhat (deed of agreement) to that effect and took from the plaintiffs Rs. 201 in advance to cover the charges of the conveyance which, it had been agreed, were to be borne by the plaintiffs. The material portion of the Satekhat was as follows:—

At the Court-sales on October 23rd and 24th, 1901, the immoveable property of Sundar Ramchandra was put to sale and purchased by us as the highest bidders. Its price Rs. 1,599 having been received in cash we sell (it). Its Survey numbers are as under:— * * * * *

Of the lands of the above written survey numbers, including the mango trees, grafted and *raival*, standing thereon, to-day, we, after receipt of rupees in cash, have sold to you the said written property.

The *Satekhat* was silent as to the varkas land, Survey No. 8, and the house. The conveyance was to be executed after the defendants obtained the certificate of sale from the Court. They got the certificate on the 15th January 1902 and thereafter some correspondence having passed between the parties, the plaintiffs on the 21st August 1902 wrote, through their pleader, to the defendants to the effect that the property agreed to be conveyed

(1) (1859) 4 D. & J. 250 at p. 264.

to them was *all the lands and house*, &c., of Sundar Pandurang put up to auction on the 23rd and 24th October. The defendants stated in reply: "It is evident that the vicious idea of claiming the house occurred to your clients after the 10th July last. The agreement was to sell to your clients that property alone that was mentioned in the *Satekhat*. In the *Satekhat* there is no agreement about the sale of the house." The plaintiffs, thereupon, brought the present suit alleging that they had acted according to the conditions of the *Satekhat* and the defendants refused to carry out those conditions. The plaintiffs, therefore, prayed for (*a*) specific performance of the agreement of sale, (*b*) a decree directing the defendants to execute a deed of sale for Rs. 1,599 and to register the conveyance and to pay to the plaintiffs the balance that would remain after deducting from the sum of Rs. 201 given to the defendants for the expenses of preparing the conveyance, (*c*) an order directing the defendants to get the properties in dispute transferred to the names of the plaintiffs, (*d*) possession of the said properties, and (*e*) mesne profits from the date of suit till the delivery of possession to the plaintiffs. They also sought in the alternative to recover Rs. 1,800 (1,599+201) paid to the defendants, as damages for breach of the contract in case the Court held that specific performance could not be decreed.

The defendants admitted the execution of the *Satekhat* and receipt of Rs. 1,800 and contended *inter alia* that the price was not settled at Rs. 1,599, that they had not agreed to sell the varkas land, Survey No. 8, and the house, that the said two properties had not even been mentioned in the *Satekhat*, that the properties agreed to be sold had been specified therein, that the suit for properties not mentioned in the *Satekhat* would not lie, that they had not broken the contract and were always ready to pass the conveyance, but the plaintiffs refused to take it and that the plaintiffs had not suffered any loss and the defendants were not liable to pay damages.

The Subordinate Judge found that the defendants had not agreed to sell to the plaintiffs the varkas land, Survey No. 8, and the house, that under the agreement of sale the plaintiffs

had to pay to the defendants Rs. 1,800 for the price of the property, that the plaintiffs had broken the contract, that they were not entitled to a declaration directing the defendants to have the lands transferred to the plaintiffs' name, and that the plaintiffs were entitled only to recover Rs. 1,800 from the defendants. He, therefore, passed a decree awarding to the plaintiffs Rs. 1,800.

On appeal by the plaintiffs the Judge found that the varkas land, Survey No. 8, only was agreed to be sold and not the house, that the omission of the varkas land from the *Satekhat* was the result of inadvertence on the part of the writer, that is, was the result of a mutual mistake, that the non-claim in the plaint for the rectification of the *Satekhat* was not fatal to the relief for specific performance with respect to the varkas land only and not the house, that Rs. 1,800 was the amount agreed between the parties as the price and that the plaintiffs were entitled to the transfer of the khata and possession of all the plaint property excepting the house and also to mesne profits the amount of which was to be determined in execution. He, therefore, reversed the decree and passed one in the following terms:—

Plaintiffs should apply under section 261 (of the Civil Procedure Code) for execution of a conveyance in the event of defendants failing to do so. The property to be mentioned in the conveyance as sold is all the plaint lands, but not the house.

On the execution of the conveyance, the plaintiffs are declared entitled to the khata of those lands; and they are entitled to get possession thereof, together with mesne profits from date of suit till possession or three years from this date, whichever be the earlier, the amount being determined in execution.

The following are extracts from the judgment:—

The defendants admitted the execution of the *Satekhat* and receipt of Rs. 1,800, and pleaded *inter alia* that the agreed price was not Rs. 1,599; that the house and the varkas land did not, either in the oral agreement or the *Satekhat*, form part of the subject-matter of the contract; that they were ever ready to pass a conveyance about the property specified in the *Satekhat*, but the plaintiffs refused to take it; that the plaintiffs have not paid the Rs. 108-1-7 mentioned in the plaint; had not suffered any damage and were not entitled to specific performance; * * * and that they were willing to repay the sum of Rs. 1,599.

On these pleadings issues were framed by the Additional Sub-Judge Mr. Sanjana. The most material of them was whether the defendants had agreed to sell to the plaintiffs the properties described in the lots Nos. 2 and 3 (*i. e.*, the house and the varkas land) in paragraph 1 of the plaint. The plaint being wholly silent on the point of the alleged omission in the *Satekhat* of the said two lots as the result of mutual mistake, and on the point of rectification, as one of the reliefs sought for, of the *Satekhat*, these two points found no place in the issues framed.

Had the matter stopped there, and the parties gone to trial on the understanding that the case as laid in the plaint was the *whole* of the plaintiffs' case, on which he (they ?) sought the several reliefs there is no question that the observations in the lower Court's judgment based on the provisions of section 92 of the Evidence Act would have been perfectly unexceptional. But it appears from Mr. Modi's minutes of the proceedings that the plaintiffs' true case, *i. e.*, mistaken omission of the house and land from the *Satekhat*, was brought to the notice of the Court and of the opposite side at an early stage before the case entered on the stage of evidence. Under date 21st February 1903 the following item appears in the minutes:—"Mr. Shavaksha (plaintiffs' pleader)—I shall adduce evidence that the description was written from the jahirnama and the writer did not turn over the leaf and did not see the writing on the other side . . . . The house appears on the other hind side of the other sheet. He has not turned on to that at all. The No. 8 varkas is also on the other side and has been omitted."

The most appropriate way of dealing with this amplification of the plaintiffs' case would have been to have it incorporated in the plaint by amendment and by the addition of a prayer for rectification. But the trial proceeded without any amendment as if the real case being known, no formal amendment was necessary. In these circumstances, I feel constrained to differ from the lower Courts' view, and to hold that the plaintiffs' case has been the one that was disclosed in the plaint and amplified *aliunde* by Mr. Shavaksha in his above quoted argument. In a suit for specific performance rectification of the instrument is virtually a subsidiary and ancillary relief (*vide* section 34 of the Specific Relief Act), and may well be awarded in the present case though not specifically asked, in view of the peculiar circumstances detailed above, and I propose to award it on condition of plaintiffs' paying in the requisite Court-fee, if any.

Assuming, therefore, that rectification is one of the reliefs claimed, I proceed to consider whether a case for that relief has been made out; in other words, whether the house and the varkas land or either of them were or was part of the property contracted to be sold and purchased.

* * * * *

From this it is obvious that, whatever might have been their real intention and the real agreement between them, the parties instructed the writer to write a *Satekhat* of the *lands* of Sundar Ramchandra put up to Court-sale and handed

1906.

MADHAVJI
v.
RAMNATH.

to him the proclamations to take down the description of those lands from, but did not tell him that a house also had been put to Court-sale and was to be included in the *Satekhat*. In other words, the contract for sale as communicated by the parties to the writer for being embodied in writing, related to and covered all the said lands of Sundar but no house. At any rate, the writer's evidence proves that the omission of the varkas land, if not also that of the house, was a pure inadvertence on his part.

* * * * * * *

It will be seen that the letter makes no mention of the exclusion of the varkas land from the property sold, and this omission is significant in view of the exception taken in relation to the house as soon as it was pointedly asserted by the vendees that all the property including "the house, &c.", was agreed to be sold. In this (Exhibit 26) and another letter (Exhibit 25), the amount of assessment claimed is Rs. 69-15-10, which is obviously inclusive of the assessment on the varkas land also (*vide* Exhibit 14 in appeal).

I therefore feel satisfied on all this evidence that the varkas land was included in the property agreed to be sold, and that its omission from the *Satekhat* was the result of inadvertence on the writer's part and not intentional, that is, was the result of mutual mistake. The *Satekhat* deserves rectification accordingly.

Defendant 2 preferred a second appeal.

Ramdatt V. Desai for the appellant (defendant 2):—The language of the *Satekhat* is clear enough. It shows that the property which was described by survey numbers was sold. The plaint starts with the assertion that the whole of the property of Sundar Ramchandra was agreed to be sold under the *Satekhat*. There is no allegation in the plaint that any property was omitted in the *Satekhat*.

Both the lower Courts have found as a fact that the *Satekhat* does not include all the properties. The parties went to trial on the question as to whether the *Satekhat* included the whole of the property or only a part thereof. The first Court having found that the *Satekhat* did not apply to the whole of the property, the plaintiffs in appeal made out a new case, namely, that the *Satekhat* was not properly drawn up and that it did not express the real agreement between the parties. Such a case was never made out in the first Court and the Judge in appeal was not justified in allowing it to be made for the first time. Under these circumstances the amendment of the plaint was not proper. In appeal the Judge did not arrive at any clear finding that

there was really a mistake which was common to both the parties. Under section 31 of the Specific Relief Act the Court must find it clearly proved that there has been a mistake in framing the instrument.

M. B. Chaubal for the respondents (plaintiffs):—The amendment of the plaint was not wrongly allowed. Although in the plaint itself no reference was made to the mistaken omission of the house and varkas land in the *Satekhat,* the pleadings show that we had brought the omission to the notice of the Court and the defendants. Therefore, when the amendment was allowed in appeal, it cannot be said that a new case was made out for us. The amendment only brought the record in conformity with the pleadings in the case. The defendants cannot be said to have been taken by surprise because they knew that that was our case from the commencement of the trial. Though no specific issue as to mutual mistake was raised, still the parties went to trial on that footing. The Judge in appeal has actually found that the omission of the varkas land from the *Satekhat* was due to mutual mistake. This is a finding of fact and no valid reason has been shown to discard it.

JENKINS, C. J.:—This is a suit for specific performance of an agreement for sale in which the plaintiffs are the purchasers. They allege that the agreement comprises, in addition to other pieces of property, some *varkas* land and a house.

It has been held by both the Courts that the written document of sale does not in terms comprise either the *varkas* land or the house.

Tne first Court on that ground dismissed the suit.

In the lower appellate Court the point was raised by Mr. Chaubal, who appeared for the plaintiffs, that if the document did not comprise both the *varkas* land and the house, then that was in consequence of a mutual mistake, and he accordingly applied for leave to amend so as to include in his plaint a claim for rectification. This application was made in January 1905.

The Judge of the lower appellate Court acceded to the application notwithstanding the protest of the defendants; and in the result he found that by mutual mistake *varkas* land had been wrongly omitted from the document; as to the house, however,

1906.

MADHAVJI v. RAMNATH.

he held against the plaintiffs' contention. The result was that in the lower appellate Court a decree for specific performance was passed extending to the *varkas* land.

One of the defendants now appeals to this Court, and he objects before us that the amendment should not have been allowed. We are unable to say that it was not within the discretion of the Judge to allow the amendment, but we think that it may be a question whether it should have been allowed unless the application was made within such time as not to deprive the defendants of any defence of limitation.

We have not sufficient materials before us to express an opinion one way or the other on that point, and we do desire not to conclude ourselves from upholding the amendment even if the defendant is thereby deprived of the defence of limitation until all the relevant materials are placed before us.

But, assuming for the sake of argument that the amendment was one which the Judge properly allowed, we still think that it was incumbent on the Court not to decide a case on the materials then before it, but to remand the suit in order that the parties might have an opportunity of adducing evidence on this point.

Now to establish a right to rectification it is necessary to show that there has been either fraud or mutual mistake. Fraud is out of the question. We only have to reckon with mutual mistake and under the terms of section 31 of the Specific Relief Act it is necessary that the Court should find it clearly proved that there was such mistake. We cannot discover in the judgment that the necessity for clear proof was present to the mind of the Court. It may be that the Judge was satisfied within the meaning of this section, but that does not appear on the face of his judgment.

Now this requirement that the Court should find it clearly proved is not a refinement introduced by section 31 for the first time. This section merely gives expression to what has been laid down by the Courts; and we refer in particular to a decision in *Fowler* v. *Fowler* (1), where it is said as follows :—

(1) (1859) 4 De G. & J. 250 at p. 264.

"The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. Lord *Thurlow's* language is very strong on this subject: he says, 'the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence'; *Lady Shelburne* v. *Lord Inchiquin*(1). And this expression of Lord *Thurlow* is mentioned by Lord *Eldon* in the *Marquis of Townshend* v. *Stangroom*(2), without disapprobation. If, however, Lord *Thurlow* used the word 'irrefragable', in its ordinary meaning, to describe evidence which cannot be refuted or overthrown, his language would require some qualification; but it is probable that he only meant that the mistake must be proved by something more than the highest degree of probability, and that it must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement."

This, we think, fully bears out what we have said as to the necessity that the Court should find it clearly proved that there had been a mistake.

Therefore we send down the following issues:—

(1) Whether it is clearly proved that there has been a mutual mistake in framing the document, Exhibit 9, which resulted in the omission therefrom of this piece of *varkas* land?

(2) When did the mistake first become known to the plaintiffs?

(3) What was the real intention of the parties in relation to the *varkas* land?

Parties to be at liberty to adduce further evidence.

Finding should be returned in two months.

(1) (1784) 1 Br. Ch. Ca. 341. (2) (1801) 6 Ves. 334.

1906.

MADHAVJI v. RAMNATH.

We would only wish to add that though we have raised an issue as to when the matter first became known to the plaintiffs, it does not mean that we now decide that the case falls within Article 96, Schedule II, of the Limitation Act, or that if it does, and the plaintiffs did become aware more than three years prior to the application, we will necessarily disallow the amendment. It is a matter which we leave open for discussion when the case again comes before the Court.

Issues sent down.

G. B. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1906. *February* 23.

AMOLAK BANECHAND AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* DHONDI VALAD KHANDU BHOSLE AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Land Revenue Code (Bom. Act V of 1879), sections 56, 57, 153†—Arrears of assessment—Forfeiture by Government—Mortgage—Land in possession of

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* Second Appeal No. 43 of 1905.

† Sections 56, 57, 153 of the Land Revenue Code (Bom. Act V of 1879).

56. Arrears of land revenue due on account of land by any holder shall be a paramount charge on the holding and every part thereof, failure in payment of which shall make the occupancy or alienated holding, together with all rights of the occupant or holder over all trees, crops, buildings and things attached to the land, or permanently fastened to anything attached to the land, liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy or alienated holding, freed from all tenures, incumbrances and rights created by the occupant or holder or any of his predecessors-in-title, or in anywise subsisting as against such occupant, or holder, or may otherwise dispose of such occupancy or alienated holding under rules or orders made in this behalf under section 214.

57. It shall be lawful for the Collector, in the event of the forfeiture of a holding through any default in payment or other failure occasioning such forfeiture under the last section or any law for the time being in force, to take immediate possession of the land embraced within such holding and to dispose of the same by placing it in the possession of the purchaser or other person entitled to hold it according to the provisions of this Act or any other law for the time being in force.

153. The Collector may declare the occupancy or alienated holding in respect of which an arrear of land revenue is due, to be forfeited to Government, and sell or otherwise dispose of the same under the provisions of sections 56 and 57, and credit the proceeds, if any, to the defaulter's account.