

the property shall not by means of a suit be applied in liquidation of the debt. We think there is not.

The case is very similar to those of *Mahadaji v. Joti* ⁽¹⁾ and *Ramchandra v. Tripurabai* ⁽²⁾. There is a distinct covenant to pay after fifteen years, with an option to pay within that period, the money borrowed on the premises.

It is an agreement of a different class from those which were under consideration in *Shaik Idrus v. Abdul Rahiman* ⁽³⁾ and *Sadashiv v. Vyankatrao* ⁽⁴⁾. In these cases there was no promise by the mortgagor to pay, but it was provided that he should be free to take possession whenever he chose to pay after the fixed period agreed upon for the mortgagee's enjoyment. In the case of *Krishna v. Hari*, ⁽⁵⁾ relied upon by the learned Judge in the Court below the agreement was of the same kind as that in *Shaik Idrus* case ⁽³⁾.

We reverse the decree of the lower appellate Court and restore that of the first Court with costs throughout other than the costs of cross-objections.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

GANESH NARAYAN SATHE (ORIGINAL OPPONENT), APPLICANT, v.
PURUSHOTTAM GANGADHAR KARVE (ORIGINAL APPLICANT),
OPPONENT.*

Civil Procedure Code (Act V of 1908), section 151—Decree of Small Cause Court—Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a

* Application No. 120 of 1909 under extraordinary jurisdiction.

(1) (1892) 17 Bom. 425.

(3) (1891) 16 Bom. 303.

(2) (1898) P. J., p. 43.

(4) (1895) 20 Bom. 296.

(5) (1908) 10 Bom. L. R. 615.

1909.

GANESH
NARAYAN
v.
PURUSHOT-
TAM
GANGADHAR.

declaration that the attachment was invalid and for refund of money—Decree accordingly—Proceedings in the Small Cause Court and order for refund by that Court—Order not sustainable.

The plaintiff brought a suit in the Court of the First Class Subordinate Judge and finally obtained a decree declaring that an attachment on certain money, already lying in deposit in that Court, levied by the defendant in execution of his Small Cause Court decree was invalid and decreeing that the defendant should repay the same to the plaintiff. In execution of the said decree in the suit of the Court of the First Class Subordinate Judge the plaintiff applied to the Small Cause Court for the refund of the money and that Court passed an order for the refund. The defendant, thereupon, preferred an application to the High Court under the extraordinary jurisdiction.

Held, setting aside the order, that such an order could only be made if it was necessary for two purposes, namely, for the ends of justice or to prevent the abuse of the process of the Court. The plaintiff had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decision of V. V. Tilak, Judge of the Court of Small Causes at Poona.

One Ganesh Narayan Sathe obtained three money decrees, Nos. 597, 598 and 599 of 1904, in the Court of Small Causes at Poona against Yamunabai, widow and legal representative of her deceased husband Mahadev Gangadhar Karve. In execution of the said decrees, Ganesh Narayan Sathe attached a sum of Rs. 3,000 lying in deposit in the Court of the First Class Subordinate Judge of Poona as the price of the share of the deceased Mahadev Gangadhar Karve in a certain house. Thereupon Purushottam Gangadhar Karve, the brother of the deceased, applied to the Court of Small Causes as well as to that of the First Class Subordinate Judge for the removal of the attachment, but his applications being rejected, he filed three suits, Nos. 264, 265 and 266 of 1905, in the Court of the First Class Subordinate Judge for a declaration that the sum of Rs. 3,000 was not liable to attachment and for a decree ordering Ganesh Narayan Sathe to refund the money, if any, received by him. The suits were dismissed by the First Class Subordinate Judge, but his decrees were reversed by the District Court in appeals and the decrees of the District Court were confirmed by the High Court in second appeals. In the meanwhile Ganesh Narayan Sathe

having recovered the money under attachment, Purushottam Gangadhar Karve applied to the Court of Small Causes for an order directing Ganesh to repay the money into Court for the purpose of depositing it in the Court of the First Class Subordinate Judge.

The opponent Ganesh Narayan Sathe contended *inter alia* that the Court of Small Causes had no jurisdiction to entertain the application and that it should have been made to the Court of the First Class Subordinate Judge.

The Judge of the Court of Small Causes overruled the opponent's contention and granted Purushottam's application. He passed an order directing Ganesh to refund the money and on his failure to do so, the applicant to apply for the execution of the order for the following reasons :—

It will be observed that the order of attachment was made by this Court and not by the First Class Subordinate Judge. It will also be observed that the three declaratory suits were brought in the First Class Subordinate Judge's Court as this Court has no jurisdiction to entertain such suits. Ganesh argues that this Court not being "the Court of first instance" within the meaning of section 144 of the new Code has no jurisdiction to order refund in pursuance of the decrees of the High Court in the three declaratory suits. But if petitioner applies to the First Class Subordinate Judge his jurisdiction may be questioned on the ground that the order of attachment and the subsequent order of payment to Ganesh were not made by him. It would be absurd to contend that such is the effect of the law as it stands. I think that under section 151 of the new Code I have an inherent right to order refund and to do everything and to make every order fairly and properly consequential on the confirmation by the High Court of the decrees passed by the appellate Court in the three declaratory suits.

The opponent Ganesh Narayan Sathe preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging that as Purushottam Gangadhar Karve was not a party to the Small Cause suits, the lower Court erred in exercising the jurisdiction which was not vested in it by law. A *rule nisi* was issued requiring Purushottam Gangadhar Karve to show cause why the said order should not be set aside.

R. R. Desai for the applicant (original opponent) in support of the rule :—After the decree of the Small Cause Court was

1909.

GANESH
NARAYAN
v.
PURUSHOT-
TAM
GANGADHAR.

1909.

GANESH
NARAYAN
v.
PURUSHOT-
TAM
GANGADHAR.

executed by attachment and recovery of the amount deposited in the Court of the First Class Subordinate Judge, the Small Cause Court became *functus officio* and it had no power to make any further order, namely, the order for the refund. This is not a case of restitution. The opponent was not a party to the decrees of the Small Causes Court and no order could be passed on his application to that Court. Section 151 of the Civil Procedure Code has no application to the facts of the case. That section applies to cases in which such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

M. R. Bodas for the opponent (original applicant) to show cause:—We contend that the order can be supported under section 151 of the Civil Procedure Code. That section is intended to prevent injustice. If we had applied to the Court of the First Class Subordinate Judge, the present applicant would have objected on the ground that the orders for attachment and payment to him of the money were not passed by that Court and therefore it had no jurisdiction to entertain our application. Moreover, the ends of justice would be equally satisfied whether the amount is refunded by the order of the Small Cause Court or by that of the Court of the First Class Subordinate Judge.

SCOTT, C. J.:—In this case the applicant obtained a decree declaring that an attachment upon certain money effected through the Small Cause Court was invalid and decreeing that the defendant should repay the same to the plaintiff. That was a decree which was confirmed by the High Court and would in ordinary course be executed by the First Class Subordinate Judge in whose Court the suit was filed. Instead, however, of proceeding to execute in that Court the opponent proceeded to the Small Cause Court which, prior to the filing of the suit in the First Class Subordinate Judge's Court, had finished with the litigation so far as it was concerned. Notwithstanding the fact that the opponent was entitled to execute the decree obtained by him, the Judge of the Small Cause Court purporting to act under section 151 of the present Civil Procedure Code, directed the applicant, who was the defendant in the First Class Subordinate

Judge's Court, to refund the money obtained by him in execution from the Small Cause Court. Such an order could only be made if it was necessary for the ends of justice or to prevent the abuse of the process of the Court. We do not think that it can be said to have been necessary for either purpose because the opponent had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court. We, therefore, set aside the order with costs.

1909.

GANESH
NARAYAN
v.
PURUSHOT-
TAM
GANGADHAR.

Order set aside.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

KRISHNA TANHAJI (ORIGINAL DEFENDANT), APPELLANT, v. ABA SHETTI PATIL (ORIGINAL PLAINTIFF), RESPONDENT.*

1909.

July 13.

Transfer of Property Act (IV of 1882), section 5A—Sale—Compromise—Land worth less than Rs. 100—Registration of deed, or delivery of possession not necessary.

The terms of a compromise affecting a claim to land of the value of less than Rs. 100 were reduced to writing. The document was not registered, nor was the transaction accompanied by delivery of possession. The material provisions of the deed were as follows :—

“ You and we are co-sharers. In your and our land, Survey No. 20, there is a well. Therein you and we have a joint share. Partition is to be made including it. After the said (survey) number is divided, we shall give 9 *pands* more from our share and both of us should put up a *bandh* (embankment) in the middle of the well, and possession and enjoyment should be carried on according to our respective shares. According to this condition we should not cause obstruction to each other. One who will act in contravention of this agreement will be able to reimburse loss which may be caused.”

The lower appellate Court regarded the transaction as a sale which under the provisions of the Transfer of Property Act (IV of 1882) required delivery of possession in order to validate it.

Held, that the terms of the deed did not bring the transaction within the category of a sale, as defined in the Transfer of Property Act (IV of 1882).

* Second Appeal N. 934 of 1908.