

## APPELLATE CIVIL.

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

RUSTOMJI ARDESHIR IRANI (ORIGINAL PLAINTIFF), APPELLANT, *v.*  
VINAYAK GANGADHAR BHAT AND OTHERS (ORIGINAL DEFENDANTS),  
RESPONDENTS.\*

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July 15.

*Civil Procedure Code (Act V of 1908), Order XXI, rule 91—Contract Act (IX of 1872), section 18, clause (3)—Stamp Act (II of 1899), section 35—Court-sale—Discovery that the judgment-debtor had no saleable interest—Failure of consideration—Suit by auction-purchaser for possession or return of purchase money—Relations of the judgment-creditor and auction-purchaser—Suit not cognizable by Small Causes Court—Unstamped document regarded as non-existent.*

A Court-sale purchaser having discovered that the judgment-debtors had no saleable interest in the property sold brought a suit against the judgment-creditor for recovery of possession of the property, or in the alternative, return of the purchase money on the footing of total failure of consideration. A question having arisen as to whether the suit was maintainable,

*Held*, the suit was maintainable inasmuch as under the Civil Procedure Code (Act V of 1908) there was an implied warranty of some saleable interest when the right, title and interest of a judgment-debtor was put up for sale, and the purchaser's right based on such implied warranty to a return under certain conditions of the purchase money which had been received by the judgment-creditor was recognized. The relations of the parties, namely, the judgment-creditor and the Court-sale purchaser were in the nature of contract.

*Held*, further, that such a suit, though the subject-matter was less than Rs. 500, was not cognizable by a Court of Small Causes, there being a prayer for possession of immoveable property.

An unstamped document being inadmissible in evidence must be taken as non-existent.

SECOND appeal from the decision of K. Barlee, Acting District Judge of Poona, reversing the decree of T. N. Sanjana, Subordinate Judge of Haveli, at Poona.

One Vinayak Gangadhar Bhat and his five co-parceners obtained a money decree, No. 157 of 1898, in the Court of the First Class Subordinate Judge of Poona against Shapurji Hormasji and his son Pestonji. In execution of the said decree the

\* Second Appeal No. 472 of 1909.

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judgment-creditors presented a darkhast, No. 629 of 1900, for the realization of their judgment-debt by sale of the interest of the judgment-debtors under a trust-deed in certain properties. At the Court-sale one of the properties was purchased by one Rustomji Ardeshir Irani for Rs. 350, and on his attempting to take possession he was obstructed by the agent of Shapurji's sister Navajbai. The auction-purchaser Rustomji Ardeshir Irani, thereupon, applied for the removal of Navajbai's obstruction but the Court found that the judgment-debtors Shapurji and Pestonji had no saleable interest in the property and rejected his application on the 19th March 1904. He, therefore, brought the present suit against the judgment-creditors Navajbai and her agent to recover possession of the property, or in the alternative for the refund of the purchase money, Rs. 350 with interest.

Defendants 1—6, that is, the judgment-creditors Vinayak Gangadhar Bhat and his five co-parceners contended *inter alia* that the suit as it was brought was not maintainable, that it was not true that the judgment-debtors had no saleable interest in the property, and that on the principle of *caveat emptor* it was the duty of the plaintiff to make inquiries before he purchased the property at the Court-sale.

Defendant 7, Navajbai, answered that the judgment-debtors had no right, title and interest in the property at the date of the auction-sale, and that the plaintiff had not acquired any interest in the property by his purchase.

The Subordinate Judge found that the suit was maintainable in the form in which it was brought, that the judgment-debtors had no saleable interest in the property and that the plaintiff was entitled to a refund of his purchase money. He, therefore, passed a decree directing the plaintiff to recover from the judgment-creditors, defendants 1—6, Rs. 448-8-0 with interest at 9 per cent. on Rs. 350 from the date of the suit till payment of the amount and costs.

In his judgment the Subordinate Judge observed as follows :—

The chief dispute in the case is, whether the judgment-debtors had any saleable interest in the property or not. In either case, as the plaintiff has

brought his suit in the alternative, he is entitled to succeed. If the judgment-debtors had saleable interest he ought to have possession of either the whole or part of the property. If they have no saleable interest he ought to recover back his purchase money. The plaintiff in his evidence said: "I want my money back. I do not want the bungalow. I don't want the house, even if the Court gives it to me. There will be a good deal of expenditure. I have no means." The learned pleader for the judgment-creditors contended on the strength of this statement that it amounted to a withdrawal of the plaintiff's claim for possession and that, consequently, there remained the claim for refund of the money which was cognizable by the Small Causes Court and that, consequently, the Court had no jurisdiction. The argument is, I think, not correct. His statement did not amount to a withdrawal of the claim. What he meant to say was, if an option was given to him he would like to have his money back rather than have the bungalow which would put him to a heavy expenditure. Even if it amounted to a withdrawal, that does not oust the jurisdiction of this Court. The jurisdiction of the Court depends on the suit as originally framed. When once the Court became possessed of jurisdiction the subsequent withdrawal of a part of the claim does not oust its jurisdiction.

On appeal by the judgment-creditors, defendants 1—6, the District Judge reversed the decree and dismissed the suit on the following ground:—

Now the appellant (respondent?) has purchased Pestonji's interest, that is, any interest he has through the second trust-deed; what this may be is unknown. He now wants to get out of his bargain, and the learned Subordinate Judge has found that he may do so as Pestonji had no saleable interest. There can be no doubt that the burden of proof lies on respondent (auction-purchaser). He has to prove that he was not able to get possession and that the interest was unsaleable (*vide* section 315, Civil Procedure Code, and 16 M. 316). If Pestonji has an interest, however small, respondent cannot have his money back (*vide* I. L. R. 23 Cal. 235). It has been settled by the Bombay High Court (32 Bom. 783) that his cause of action does not arise until he has shown that the judgment-debtors had no saleable interest. The learned Subordinate Judge has found that he has discharged the burden by showing that the second trust-deed has been impounded, that is, by showing that it was not a legal document, and that there is no legal valid document in existence. I am unable to agree with this view. This document is not shown to be invalid for want of registration but for want of stamp. Once properly stamped will-presumably be admissible. Pestonji by paying the stamp duty may sue upon it and the respondent can do the same. Briefly stated, he has bought a right to sue, and I do not think he is to be pitied if he has to pay legal expenses. It is difficult to see how he can have expected to have for Rs. 350 the right to a house which, he says, brings in Rs. 150 a month rent. It may turn out that the right he

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has bought is non-existent or not with the money he will have to spend. In the first case he can ask for a refund of his money; in the latter he will be no worse off than many other speculators.

The plaintiff, auction-purchaser, preferred a second appeal.

*N. M. Patvardhan* for the appellant (plaintiff, auction-purchaser).

*P. D. Bhide* for the respondents (defendants, judgment-creditors).

SCOTT, C. J. :—The plaintiff sues as the purchaser at a Court sale of the interest of two judgment-debtors Shapurji and Pestonji in a certain land and bungalow under a trust-deed of Hormasji Sorabji dated the 23rd of December 1893. His cause of action as alleged in the plaint is the discovery that neither of the judgment-debtors whose interest the Court purported to sell, had any saleable interest in the property. The relief which he prayed for was, possession of the property described in the plaint, or in the alternative, return of the purchase money on the footing of a total failure of a consideration.

His claim succeeded as regards the return of the purchase money in the first Court, but in the lower Appellate Court his suit was dismissed.

A preliminary objection was taken that, as the amount decreed in respect of purchase money and interest in the first Court amounted to less than Rs. 500, this was a matter which could not be the subject of a second appeal.

This argument ignores the fact that the claim was not only for money, but also for possession and, therefore, the suit was not as framed cognizable by a Court of Small Causes.

The failure of consideration upon which the plaintiff relies, arises as regards the judgment-debtor Shapurji from the fact that the whole of his interest had already been sold in execution of a previous decree against him, and also from the fact that a trust-deed under which it was alleged that he had an interest was not stamped.

This latter objection also applied to the interest of the judgment-debtor Pestonji.

The Subordinate Judge held, that in the absence of proof of the trust-deed upon which depended the existence of the alleged interest of the judgment-debtors, it must be assumed that the judgment-debtors had no interest in the property, the subject of the sale.

The lower Appellate Court however took the view that the document not being shown to be invalid for want of registration, but merely for want of stamp, it would presumably be admissible as soon as it was properly stamped, and that the purchaser by paying the stamp duty might sue upon it.

We think, that, in coming to this conclusion the lower Appellate Court was in error. Section 35 of the Stamp Act provides, that no instrument chargeable with duty shall be admitted in evidence for any purpose, unless such an instrument is duly stamped.

As the document cannot be admitted in evidence, it must in this suit be taken to be non-existent; for, as was observed by Lord Halsbury in *Seaton v. Burnand*<sup>(1)</sup> "Of things that do not appear and things that do not exist the reckoning in a Court of law is the same." We assume, therefore, as did the learned Subordinate Judge, that the plaintiff has made out his allegation that there is no trust-deed before the Court under which the judgment-debtor can be said to have any interest.

It is then objected by the respondents that such a suit as the present will not lie; that there is no provision in the Civil Procedure Code enabling a purchaser to maintain such a suit, and that apart from the Civil Procedure Code, as shown by the decision in Privy Council in *Dorab Ally Khan v. Abdool Azeez*<sup>(2)</sup>, no suit will be maintainable.

We think, however, that the right of the plaintiff to maintain a suit is made clear by the provisions of the Civil Procedure Code in the manner indicated in *Sundara Gopalan v. Venkatarada Ayyangar*<sup>(3)</sup>. Under the Civil Procedure Code an implied warranty of some saleable interest when the right, title and

(1) (1900) A. C. 135.

(2) (1878) L. R. 5 I. A. 116.

(3) (1893) 17 Mad. 223.

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interest of a judgment-debtor is put up for sale is implied, and the purchaser's right based thereon to a return under certain conditions of the purchase money which has been received by the judgment-creditor is recognized. The liability of the judgment-creditor under the circumstances to refund the purchase money which has been paid to him at a Court-sale being thus established, there can be no objection to treating the relations of the parties, namely, the judgment-creditor and the Court-sale purchaser, as relations in the nature of contract. This appears to have been done in the case of *Mahomed Kala Mea v. Harperink*<sup>(1)</sup>, where a suit brought by an auction-purchaser at a Court-sale against execution-creditors and the judgment-debtor, succeeded on the ground of misrepresentation on the part of the auctioneer, amounting to misrepresentation as defined by section 18, clause (3) of the Contract Act.

In the present case upon the facts found we have a similar misrepresentation. The purchaser has been caused, however, innocently to make a mistake as to the substance of the thing which was the subject of the sale. He was led to believe that he was purchasing a right under a trust-deed, whereas, so far as it appears from the facts proved, no trust-deed was in existence. There has, therefore, been an entire failure of consideration. The money, it is not disputed, has come into the hands of the judgment-creditor and the first Court made a decree for its return with interest.

An objection is taken in appeal that the suit is barred by limitation, but we have no facts before us to enable us to decide that point in favour of the respondents. For, although the sale took place in the year 1900, it was not confirmed until the 3rd of November 1902, and although long prior to that date the purchase money had been paid into Court no order was made that it should be paid to the decree-holders until the 3rd of February 1902. The respondents are unable to tell us when the decree-holders received the purchase money. We therefore cannot tell at what date they received the money to the use of the plaintiff, and we cannot say that the suit is barred by

(1) (1903) L. R. 36 I. A. 32.

article 62 which appears to be the article which would be applicable to the case.

We therefore reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge with costs throughout.

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*Decree reversed.*

G. B. R.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

WANA MARD RAVJI (ORIGINAL PLAINTIFF), APPELLANT, v. NATU WALAD MURHA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.\*

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*Civil Procedure Code (Act V of 1908), O. XXI, r. 1—Decree—Payment of money ordered in a decree—Payment ordered on a fixed date—Delay in making payment into Court owing to closing of Court—Payment on the opening day—General Clauses Act (X of 1897), section 10—Practice.*

A decree provided as follows: "The plaintiff should pay, by the 10th day of April 1909, to the defendant Rs. 100. If the moneys are not paid by the plaintiff as agreed upon, the property in dispute will remain with the defendants by right of ownership and the plaintiff will have no right of ownership over the same." The plaintiff chose to pay the money into Court, and finding it closed on the 10th, she paid the money on the 14th April 1909, the day on which the Court re-opened. A question having arisen whether the payment so made was within the terms of the decree,

*Held*, that the payment was properly made, for O. XXI, r. 1 of the Civil Procedure Code, 1908, intended to enact and did enact that payment into Court was a valid compliance with the decree even though the decree directed payment to the decree-holder.

SECOND appeal from the decision of H. S. Phadnis, District Judge of Khandesh, confirming the order passed by K. G. Tilak, Subordinate Judge of Yaval.

Proceedings in execution.

\* Second Appeal No. 88 of 1910.