## APPELLATE CIVIL.

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*Before Mr. Justice Shah and Mr. Justice Hayward.*

1919.
*September* 29.

RAMCHANDRA VITHAL BHAT (ORIGINAL PLAINTIFF), APPELLANT *v.* GAJANAN NARAYAN DESHMUKH AND ANOTHER (ORIGINAL DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), sections 47, 66, Order II, Rule 2, Order XXI, Rules 69, 96—Civil Procedure Code (Act XIV of 1882), sections 294, 317, 319—Decree—Execution—Court-sale—Purchase by a* benamidar *of decree-holder—Leave to bid at Court-sale not obtained by mortgagee decree-holder from the Court—Effect of want of leave—Parties to suit—Decree-holder not a necessary party to a suit by the* benamidar *to recover possession of property—Splitting up of cause of action—Suit to recover a portion of property from one set of defendants—Suit to recover another portion of the property from another set of defendants—Maintainability of the suit.*

At a Court-sale held in execution of a decree on mortgage, the plaintiff purchased as a *benamidar* of the mortgagee (decree-holder) the mortgaged property which consisted of a two annas share in a *khoti takshim* together with *khasgi* lands appertaining to the share. No leave to bid at the Court-sale was taken under section 294 of the Civil Procedure Code of 1882. A certificate of sale was issued to the plaintiff in due course. The plaintiff recovered possession of the *khoti takshim* under section 319 of the Code of 1882. In 1910, the plaintiff sued to recover possession of two survey numbers of the *khasgi* lands from some of the defendants in the mortgage suit and obtained a decree. Defendants Nos. 2 and 3 were unnecessarily made party-defendants to the suit. In 1914, the plaintiff brought another suit to recover possession of other survey numbers which were covered by the certificate of sale and which were in the possession of defendant No. 1 as tenant of defendants Nos. 2 and 3:

*Held*, that the plaintiff, though a *benamidar*, could sue in his own name to recover possession of the property vested in him as a *benamidar*; and that the mortgagee decree-holder was not a necessary party to the suit.

*Gur Narayan* v. *Sheo Lal Singh*[1], followed.

*Held*, further, that the omission on the part of the decree-holder to obtain leave to bid at the Court-sale, under section 294 of the Civil Procedure Code of 1882, had not the effect of rendering the *benami* purchase void; though such a purchase was liable to be set aside under the provisions of the Code.

* Second Appeal No. 175 of 1917.

(1) (1916) L. R. 46 I. A. 1.

1919.

RAMCHANDRA VITHAL v. GAJANAN NARAYAN.

*Held*, also, that the suit was not barred under the provisions of Order II, Rule 2 of the Civil Procedure Code of 1908, since the cause of action was not the same as that in the suit of 1910 in which different properties were involved and different defendants were in possession.

*Held*, moreover, that the suit was not barred under section 47 of the Civil Procedure Code of 1908, inasmuch as the plaintiff auction purchaser was not the decree-holder for the purposes of procedure.

*Sadashiv bin Mahadu* v. *Narayan Vithal*[1], distinguished.

SECOND appeal from the decision of J. D. Dikshit, District Judge of Thana, reversing the decree passed by T. M. Bhagat, acting Subordinate Judge at Roha.

Suit to recover possession of lands.

The father of defendants Nos. 2 and 3 obtained a decree on his mortgage ; and in execution of the decree he brought to sale the mortgaged property which consisted of a two annas share in *khoti takshim* and *khasgi* lands appertaining to the share. At the Court sales, the decree-holder did not obtain from the Court permission to bid ; and yet the property was knocked down to the plaintiff who was a *benamidar* of the decree-holder, for Rs. 1,200. A certificate of sale was issued to the plaintiff in due course.

In 1908, the plaintiff obtained possession of the *khoti takshim* alone under section 319 of the Civil Procedure Code of 1882.

In 1910, the plaintiff brought a suit (suit No. 118 of 1910) to recover possession of two survey numbers of the *khasgi* land from some of the defendants in the mortgage suit. The defendants Nos. 2 and 3 were needlessly made parties. The suit ended in a decree in the plaintiff's favour.

The present suit was brought by the plaintiff in 1914 to recover possession of other lands covered by the

(1) (1911) 35 Bom. 452.

1919.

RAMCHANDRA VITHAL *v.* GAJANAN NARAYAN.

certificate of sale, from the possession of defendant No. 1, who held as a tenant of defendants Nos. 2 and 3.

The Court of first instance held that the plaintiff had become owner of the property in suit in virtue of the auction purchase; that the plaintiff was not a *benamidar* of the mortgagee; that the mortgagee was not a necessary party to the suit; and that the suit was not barred by Order II, Rule 2 of the Civil Procedure Code. The plaintiff's suit was, therefore, decreed.

On appeal, the District Court held that the plaintiff was a mere *benamidar* for the mortgagee with respect to the property that was intended to be sold and purchased at the auction sale; that the suit was not maintainable in the absence of the mortgagee who was a necessary party to the suit; and that the suit was not barred under Order II, Rule 2 of the Civil Procedure Code of 1908. The suit was accordingly dismissed.

The plaintiff appealed to the High Court.

*Jayakar* with *P. V. Kane*, for the appellant:—I submit that the learned District Judge was wrong in holding that a *benamidar* cannot sue in his own name for possession of immoveable property. In *Dagdu* v. *Balvant Ramchandra Natu*[1] it was held that a *benamidar* could sue in his own name for possession. In *Gur Narayan* v. *Sheo Lal Singh*[2] the Privy Council has laid down that a *benamidar* can sue in his own name to recover immoveable property.

The lower Court further holds that the suit is barred under section 47 of the Civil Procedure Code and even if it be treated as an application it would be barred as more than three years have elapsed since the date of the delivery of possession through Court. I submit that the lower Court erred in raising this point, which was neither raised in the written statement nor taken in the memo of appeal. The plaintiff was never

(1) (1897) 22 Bom. 820.

(2) (1918) L. R. 46 I. A. 1 at p. 9.

given an opportunity to meet his case. The Court examined for itself some papers called from its records and came to the conclusion that there were irregularities in the execution proceedings and that neither symbolical nor actual possession was delivered to the auction purchaser. Such a new point depending on evidence for decision cannot be sprung upon the plaintiff for the first time in appeal.

*G. S. Rao*, with *W. B. Pradhan*, for the respondents:—The Privy Council lays down in the recent decision relied on by the appellant that "so *long*...as a *benami* transaction does not contravene the provisions of law the Courts are bound to give it effect." In this case the *benamidar* who purchased for the decree-holder never took the permission of the Court to bid, as required by section 294 of the old Code corresponding to Order XXI, Rule 72. Therefore he cannot sue in his own name. The plaintiff's suit is further barred by Order II, Rule 2. He had brought a suit in 1910 against his judgment-debtors including the present defendants for actual possession of two lands. He should have included the lands in dispute now in that suit. The cause of action is one, viz., based on the sale certificate and the symbolical possession given to him by the Court. It has been laid down by the Privy Council that "the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour"[1].

Although the present defendants would be barred if they applied now to set aside the sale, we submit that as defendants are resisting plaintiff in his suit for

[1] (1888) 16 Cal. 98 at p. 102.

1919.

RAMCHANDRA VITHAL v. GAJANAN NARAYAN.

possession, we can urge the defence of fraud and the irregularities even after the period of limitation. We rely on the cases of *Rangnath Sakharam* v. *Govind Narsinv*[1]; *Minalal Shadiram* v. *Kharsetji*[2]; *Chand Kour* v. *Partab Singh*[3] and *Thathu Naick* v. *Kondu Reddi*[4].

*Kane*, in reply :—The words of the Privy Council relied upon by the respondents are to be applied to absolute prohibitions like the one in Order XXI, Rule 73 or in section 136 of the Transfer of Property Act. The Legislature itself contemplates that a purchase at a Court-sale without permission is only voidable under Order XXI, Rule 72. It requires that an application be made for setting aside that sale and the rule confers an absolute discretion in the Court even when an application is made. The application must be made within thirty days under Article 166 of the Indian Limitation Act of 1908. If no such application be made the sale becomes indefeasible: see *Ganesh Narayan* v. *Gopal Vishnu*[5]. Further, the cause of action here and that in the suit of 1910 are different. The same evidence would not be sufficient to decide the two suits. I rely on *Sonu valad Khushal* v. *Bahinibai*[6]. As regards fraud, no fraud was alleged in the written statement and none was proved. The mere fact that the property roughly estimated at Rs. 1,500 was sold for Rs. 1,200 would not amount to fraud. The decisions therefore relied on by the respondents are not applicable to the facts of the case. Further, they are not good law. They nullify the provisions of the Indian Limitation Act.

SHAH, J. :—It will be convenient to set forth the facts which have given rise to this second appeal.

(1) (1904) 28 Bom. 639.
(2) (1906) 30 Bom. 395.
(3) (1888) 16 Cal. 98 at p. 102.
(4) (1909) 32 Mad. 242.
(5) (1916) 41 Bom. 357.
(6) (1915) 40 Bom. 351.

One Narayan and his other brothers mortgaged a two-anna share in the Khoti Takshim to one Vinayak Tilak with all the Khasgi lands and other rights appertaining to the Takshim. The mortgagee filed suit No. 194 of 1902 on his mortgage and obtained a decree. In pursuance of that decree the property mortgaged was sold by the Court and the present plaintiff purchased it at the Court-sale on the 16th of June 1908 for Rs. 1,200. The sale was confirmed in July 1908. The auction purchaser applied to have possession of the property and he recovered possession in December 1908 of the Takshim. It was stated, however, at the time by him that certain properties to which the sale certificate related were in the actual possession of the defendants and that he had not received possession of those properties. Those properties were not specified; but generally speaking the main property described in the sale certificate, viz., the Khoti Takshim, was taken possession of under section 319 of the Code of Civil procedure which was then in force. The present plaintiff filed suit No. 118 of 1910 against some of the defendants to the mortgage-suit for possession of certain survey numbers which were in the possession of those defendants. To that suit the present defendants Nos. 2 and 3 were joined as parties, but they had nothing to do with the lands then in suit. In that suit it was found that the plaintiff was not a Benamidar for the original mortgagee and decree-holder, and that the lands then in suit were covered by the sale certificate. Accordingly, a decree was passed in his favour for possession of the lands, and that was upheld by both the appellate Courts in appeals preferred by the defendants in that case who were in possession of the lands then in suit. The plaintiff filed the present suit in 1914 against defendants Nos. 2 and 3 alleging that the 1st defendant who was the tenant of

1909.

RAMCHANDRA VITHAL v. GAJANAN NARAYAN.

defendants Nos. 2 and 3 was really in occupation of the land in suit at the date when he recovered possession in 1908 under the sale certificate and that subsequently he had transferred possession wrongfully to defendants Nos. 2 and 3. Defendant No. 1 did not claim any interest in the property, and defendants Nos. 2 and 3 contended that the land in suit was not included in the sale certificate, that it was a Khoti *Kulargi* land, that the plaintiff was a Benamidar for the original decree-holder and that the suit was barred under Order II, Rule 2 by the previous suit No. 118 of 1910. The trial Court came to the conclusion that the plaintiff was not a Benamidar and that he was entitled to recover possession of the lands in suit as the terms of the sale certificate were sufficient to convey the lands to the plaintiff. The objection based on Rule 2 of Order II of the Code of Civil Procedure was overruled with the result that a decree was passed in favour of the plaintiff. The defendants Nos. 2 and 3 appealed to the District Court. That Court came to the conclusion that the plaintiff was a Benamidar for the original decree-holder, that the latter was a necessary party to the suit, and that the present suit was not maintainable. The learned District Judge accordingly dismissed the plaintiff's suit with costs throughout. The plaintiff has appealed to this Court.

The appeal has been argued before us on the footing that the plaintiff is a Benamidar for the original mortgagee and the decree-holder as found by the lower appellate Court. It is also now common ground between the parties that the land in suit though not expressly mentioned in the sale certificate is included therein, and that the purchaser has a title under the sale certificate to the lands in suit as he has to the two-anna Takshim.

The first question that arises in this appeal is whether the lower appellate Court is right in holding that the original mortgagee was a necessary party to the suit and that in his absence the plaintiff could not maintain the suit. It is clear in my opinion that the original mortgagee for whom the plaintiff is supposed to have purchased the property at the Court-sale is not a necessary party and that the plaintiff, though a Benamidar, can sue in his own name to recover the property vested in him as a Benamidar. The judgment in *Gur Narayan* v. *Sheo Lal Singh*[1] is a clear authority in favour of this view. Their Lordships observe at page 9 of the report that "so long, therefore, as a Benami transaction does not contravene the provisions of the law the Courts are bound to give it effect. As already observed, the Benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the Benamidar in respect of the property although the beneficial owner is no party to it. The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the Benamidar, the person beneficially entitled is fully affected by the rules of *res judicata*. With this view their Lordships concur. It is open to the latter to apply to be joined in the action; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him." This was a case of a private Benami purchaser. But in my opinion it makes no difference that in the present case the plaintiff is a purchaser at a Court-sale. In the case of *Ravji* v. *Mahadev*[2]

(1) (1918) L. R. 46 I. A. 1. (2) (1897) 22 Bom. 672 at p. 679.

1919.

RAMCHANDRA VITHAL v. GAJANAN NARAYAN.

Mr. Justice Ranade, after reviewing the various reported cases, summed up as follows :—"This review of the authorities shows clearly that appellant No. 1 as *benami* purchaser had full right to bring the suit. If the true owner holds back, a decree against the *benamidar* owner would bind him as *res judicata*. The present suit was, therefore, properly instituted. The addition of appellant No. 2's name made no difference in the character of the suit." This was said with reference to a case in which the plaintiff was a purchaser at a Court-sale.

It is urged, however, on behalf of the respondents that this rule holds good so long as the Benami transaction does not contravene the provisions of the law and that in the present case the provisions of section 294 of the Code of 1882 have been contravened in so far as the decree-holder did not obtain any leave to bid for or purchase the property. It seems to me that the omission on the part of the mortgagee to obtain such a leave does not render the purchase by the Benamidar invalid or unlawful. It is clear that so far as the apparent title of the Benamidar is concerned, the sale, when it has been confirmed, has the effect of vesting the property in the purchaser and that under section 66 of the present Code of Civil Procedure and the corresponding provisions of the Code of 1882 even the real owner cannot maintain a suit againt the Court-purchaser. Further, section 294 of the Code of 1882 and the corresponding provisions in the present Code show that the omission on the part of the decree-holder to obtain the necessary leave has not the effect of rendering the Benami purchase void; but such a purchase is liable to be set aside. It is an admitted fact in this case that none of the defendants in the mortgage suit applied under section 294, paragraph 3 to have the sale set aside. The application for setting aside a sale under that

paragraph could have been made within the period prescribed by the law of limitation. No such application was made, and having regard to the fact that the original mortgagors were all brothers and that some of the defendants, who were parties to the suit of 1910, had specifically raised the point that the plaintiff was a Benamidar for the original decree-holder, it cannot be said that the defendants were really ignorant of any fact which could have prevented them from making a proper application for setting aside the sale. There is no allegation in the present case that the defendants were ignorant of the real nature of the purchase by the plaintiff during all the time preceding the present suit. The sale certificate therefore must be taken as a valid certificate giving the plaintiff a title to the land in suit which he is entitled to enforce.

It is further urged that though the present defendants Nos. 2 and 3 may not be in a position to have this sale set aside by a proper application under para. 3 of section 294 or under the corresponding provisions in the present Code on account of the bar of limitation, it is open to them to plead by way of defence that the title of the plaintiff is vitiated by fraud. In support of this contention reliance is placed upon *Rangnath Sakharam* v. *Govind Narsinv* [1] and *Minalal Shadiram* v. *Kharsetji*[2]. It is not necessary in this case to express any opinion as to whether such a plea could be raised by way of defence though any suit based on that ground would be time-barred. Assuming in favour of the defendants that such a defence is open to them, it seems to me that on the merits that defence must fail. In the first place no such plea of fraud was raised in the written statement; and the only fraud suggested in the argument before us

(1) (1904) 28 Bom. 639.

(2) (1906) 30 Bom. 395.

1919.

RAMCHANDRA VITHAL v. GAJANAN NARAYAN.

is that the property which was roughly valued at Rs. 1,500 fetched only Rs. 1,200 at the Court-sale. In my opinion this is no fraud whatever. In the first place there is nothing to show that the property was really worth Rs. 1,500. It only shows that in execution proceedings the Court had estimated the value at that figure, and the difference between the estimated value and the price actually realized is not so great as to indicate any kind of fraud on the part of the decree-holder or any other person. In connection with this point the learned pleader for the respondents relied upon the case of *Thathu Naick* v. *Kondu Reddi*[1]. The facts of that case were quite different and I do not see how that case could be treated as an authority in favour of the view that in the present case the fact of the property having fetched Rs. 300 less than its estimated value amounts to fraud.

It is urged in support of the decree of the lower appellate Court on behalf of the respondents that the present suit is barred under Rule 2 of Order II. The contention is that the plaintiff should have included in the suit of 1910 his claim for the possession of all the properties to which he acquired a title under the sale certificate and that if he failed to do so, this present suit would be barred. It is urged that the plaintiff having omitted to sue in respect of the property now in suit in 1910, he cannot now sue in respect thereof. The question is whether the cause of action in the present suit is the same as that in the previous suit. Several cases have been cited in the argument in connection with this point; but I do not consider it necessary to refer to these cases. The point, it seems to me, must be decided with reference to the facts of this case. It is clear that the cause of action in the present suit cannot be treated as the same as that in the previous suit.

(1) (1909) 32 Mad. 242.

The plaintiff no doubt acquired a title to several properties under a general description of the Khoti Khasgi lands under one and the same sale certificate. But his cause of action in respect of the lands in the possession of different persons cannot be treated as the same. It was open to him to have sued the several defendants in possession of the different lands including the present defendants in the suit of 1910; but I do not think that the plaintiff was bound to do so. The property in this suit is different. The parties in possession sued now are different, and the cause of action alleged is also different. For the purposes of this point, however, I assume that the cause of action is simply that the defendants have withheld possession from him although he is entitled thereto under the sale certificate and leave out of consideration the special allegations which the plaintiff has made. With regard to these special allegations as to the land being in the possession of defendant No. 1 and the possession having been subsequently transferred by defendant No. 1 to defendants Nos. 2 and 3 the trial Court found in favour of the plaintiff and the appellate Court does not seem to me to have recorded any specific finding on that point. In the view I take of the case, I consider this allegation to be immaterial and it is not necessary to have any finding on that question. Assuming that there was no intervention of defendant No. 1 and the position of defendants Nos. 2 and 3 was throughout as I have stated it I think that the cause of action would not be the same as that in the suit of 1910 in which different properties were involved and different defendants were in possession of the properties in that suit. The evidence in the present case may be similar, but it cannot be said to be identical. Besides, the plea raised by the defendants that the land in suit is Kulargi land shows that the evidence in this suit must be different. Taking the meaning of

1919.

RAMCHANDRA VITHAL *v.* GAJANAN NARAYAN.

the expression "cause of action" most favourable to the defendants' contention, I am satisfied that the cause of action in the present case is not the same as that in the suit of 1910 and that Rule 2 of Order II presents no bar to the maintainability of the present suit.

It remains only to notice the point which has been made by the lower appellate Court but which has not been expressed before us. The learned Judge has held relying on *Sadashiv* v. *Narayan*[1], that the proper remedy of the plaintiff is not a suit but an application in execution under section 47 of the Code of Civil Procedure. That was, however, a case in which the decree-holder himself was the purchaser. The view taken in that case has not been applied to a case in which the decree-holder himself is not the purchaser but where a third person has purchased Benami for him. For the purposes of procedure the auction purchaser, even though a Benamidar for the decree-holder, is a third party. The ruling in *Sadashiv bin Mahadu* v. *Narayan Vithal*[1] really can apply to a case where the decree-holder himself is the purchaser at the Court-sale. The present suit is a suit by an auction-purchaser, who is not the decree-holder for the purposes of procedure and who is therefore entitled to sue to recover possession of the property which he has purchased.

In my opinion, therefore, this appeal should be allowed, the decree of the lower appellate Court reversed and that of the trial Court restored with costs here and in the lower appellate Court on defendants Nos. 2 and 3.

HAYWARD, J. :—I concur. I have no doubt that the Benamidar was entitled to sue. The certificate of sale was good title until set aside in regular proceedings. The general proposition of law has clearly been wrongly stated by the lower appellate Court. It would be

(1) (1911) 35 Bom. 452.

1919.

RAMCHANDRA VITHAL v. GAJANAN NARAYAN.

sufficient to refer to the Privy Council case of *Gur Narayan* v. *Sheo Lal Singh*[1]. But it has been argued that the Benamidar had no permission to bid at the sale and that it was therefore a nullity. But no steps were taken to avoid the sale as they might have been in execution on that account, nor was it alleged in the written statement that there was any fraud. It was not even alleged in the first appeal Court. It has, as a final resource, been alleged here, but it has in my opinion not been established. It would appear to me, therefore, no good reason for treating the sale as a nullity, whether or no it was open to the defence to raise the plea of fraud, in view of the provisions of Article 166 of the Schedule of the Limitation Act.

It has been somewhat difficult to follow the line of reasoning in the remainder of the judgment of the first appeal Court. The learned Judge devoted a material part of his judgment to the proposition not raised as an issue that the real remedy for recovering possession was by execution and not by way of suit and he held that there was no real possession recovered in execution, and apparently (the point was not clearly stated) that there was no remedy left by suit. But he did not explain precisely why even in default of recovery of possession in execution there should not have been a regular suit to recover possession upon the title deed, that is to say, the certificate of sale of the Court.

The learned Judge held on the other hand on the issue raised that there was no bar to the suit under Order II, Rule 2 of the Schedule of the Civil Procedure Code. But he has not given, so far as it would appear from the judgment, any reasons for that conclusion. It would appear to me, however, to have been correct. For he has found as a fact that the previous suit was to

(1) (1918) L. R. 46 I. A. 1 at p. 9.

1919.

RAMCHANDRA VITHAL v. GAJANAN NARAYAN.

recover possession of different properties from different defendants. If that were so, it was, in my opinion, clear that recourse could not be had to Order II, Rule 2 of the Schedule of the Civil Procedure Code. My detailed reasons for holding this need not be further stated as they have already been given in the case of *Sonu valad Khushal* v. *Bahinibai*[1].

It seems to me, therefore, that we ought to restore the decree of the trial Court and reverse that of the first appeal Court.

*Appeal allowed.*

R. R.

[1] (1915) 40 Bom. 351 at p. 357.

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## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice.*

1919. September 30.

IBRAHIM WALAD GOOLAM HUSENBUX (ORIGINAL DEFENDANT), APPELLANT *v.* NIHALCHAND WAGHMUL AND ANOTHER, PARTNERS OF THE FIRM OF WAGHMUL VURDHAJI (ORIGINAL EXECUTION-CREDITORS) RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 14—Mortgage—Property mortgaged with possession—Simultaneous execution of a rent note by mortgagor—Decree obtained by mortgagee on the rent note—Execution of the decree by sale of mortgaged property—Claim arising out of mortgage transaction—Mortgagee's right to bring the mortgaged property to sale otherwise than by suit.*

One H mortgaged with possession his property to F, and on the same date executed a rent note in favour of F for a period of twelve months. H having failed to pay the rent under the rent note, the mortgagee F filed a suit and obtained a decree for the rent due. The mortgagee sought to execute the decree by sale of the mortgagor's equity of redemption in the mortgaged property. It was contended that the mortgagee could not be allowed to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage under Order XXXIV, Rule 14 of the Civil Procedure Code, 1908:

* Second Appeal No. 1144 of 1918.