

## APPELLATE CIVIL

1882

February 10.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield,

PARAM AND OTHERS (PLAINTIFFS) v. ACHAL (DEFENDANT).\*

*Co-sharers, suit by some of several—Error in frame and valuation of suit—Error not affecting jurisdiction or merits—Act X of 1877 (Civil Procedure Code), s. 578.*

The plaintiffs in this suit, alleging that they were co-sharers of a certain village : that certain land situate in such village was the property of the co-sharers and that such land had been improperly sold by the persons occupying it to one of the co-sharers, sued the vendors and the purchaser and the other co-sharers for possession of their share of such land and the setting aside of the sale so far as their share was concerned, and valued the suit according to their share. *Held* that the error in the frame and valuation of the suit, inasmuch as it did not affect the jurisdiction of the Court in which the suit was instituted or the merits of the case, was not, under s. 578 of the Civil Procedure Code, a ground on which the appellate Court should have reversed the decree of the Court of first instance. *Unnoda Persad Roy v. Erskine* (1) distinguished.

THE plaintiffs in this suit, the defendant No. 1 (Achal), and the defendants Nos. 6 to 17 were co-sharers of a certain village. On the 26th August, 1879, the defendants Nos. 2 to 5 sold a plot of land, numbered No. 261, situate in the village, to the defendant No. 1. The plaintiffs, alleging that such land was the property of the co-sharers of the village, claimed in this suit possession of their share of such land, and the cancellation of the deed of sale in so far as it affected such share. They valued such share at Rs. 100, and instituted the suit in the Munsif's Court. The defendants Nos. 6 to 17 were made defendants because they refused to join with the plaintiffs in bringing the suit. The Munsif gave the plaintiffs a decree for the cancellation of the deed of sale in so far as it affected the share claimed, but dismissed the claim for possession of such share. On appeal by the defendant No. 1 the District Judge held that the suit was not maintainable in the form in which it was brought. The District Judge's reasons for so holding were as follows: "The plaintiffs sue to have the deed of sale executed in Achal's (defendant No. 1) favour cancelled on the ground that the land sold was held rent-free in lieu of service, and that the seller had

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\* Second Appeal, No. 799 of 1881, from a decree of H. A. Harrison, Esq., Judge of Allahabad, dated the 2nd June, 1881, reversing a decree of Munsif Manmohan Lal, Munsif of Kanauj, dated the 16th April, 1881.

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no right of sale : the suit is, however, only to cancel the sale-deed in so far as the plaintiffs' share in No. 261 is concerned ; it is not to cancel it altogether : the Court does not think the suit will lie in the form brought : the case of *Unnoda Persad Roy v. Erskine* (1) is referred to ; the plaintiffs have made the sharers defendants, *i.e.*, those who are not joining them in the suit, but they have sued for possession of their own share only, and for cancelment of the deed of sale in so far as it affects that share ; the cause of action was the sale of the whole field ; the plaintiffs have sued in respect of part only of the cause of action, namely, that which applied to them : the suit should be framed on the sale of the whole property and valued accordingly, so that the rights of all the parties interested in setting aside the sale might be declared in one suit." The plaintiffs appealed to the High Court, contending that they were competent to sue for the cancellation of the sale-deed to the extent of their interest in the subject-matter of the sale, and were not obliged to sue for the cancellation of the sale-deed in its entirety ; and that, as all the co-sharers were parties to the suit, there was no objection to the granting of the relief claimed, and none of the co-sharers could be prejudiced by such relief being granted.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Babu *Sital Prasad Chattarji*, for the respondent.

The judgment of the Court (STUART, C. J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.— It appears that some of the defendants, occupiers of a piece of land in the mauza, have sold it to one of the shareholders of the mauza, and the plaintiffs who are co-shareholders bring this suit against the vendors, the vendee, and all the co-shareholders who have not joined in suing, to set aside the sale in respect of the plaintiffs' share in the land, and for possession of so much of the land as represents their share. The Court of first instance decreed the claim in part, and the Judge has dismissed the suit on the ground that it will not lie in the form in which it has been brought. He observes that the cause of action is the sale of the whole field, and the plaintiffs sue in respect only of a part of the cause of action, namely, that which applied to them, and the suit should be

(1) 12 B. L. R. 370.

framed on the sale of the whole property and valued accordingly, so that the right of all the parties interested in setting aside the sale might be declared in one suit, and he refers for authority to a Full Bench ruling of the Calcutta Court—*Unnoda Persad Roy v. Erskine* (1).

We are of opinion that the case referred to is not in point. In that case the material ground for dismissing the suit was that the plaintiff by the valuation of his suit was limited to the setting aside the sale of his own share, and by framing it in that way he had brought it in a Court in which he could not have brought it if it had been a suit to set aside the sale as to the entire property, and as the suit ought to have been framed and valued on the sale of the whole property, and ought to have been brought in a Court competent to declare the rights of all parties interested in setting aside the sale, the Court dismissed it. The material ground therefore was one affecting the jurisdiction of the Court. But the case before us is not obnoxious to this objection; the Court in which it has been brought is competent to determine the rights of all the parties interested in the sale, and the error in framing the suit or its valuation does not affect the jurisdiction of the Court or the merits of the case, and should not, with reference to s. 578, Civil Procedure Code, be a ground for interfering with the decree of the Court of first instance. We decreed the appeal and reverse the decree of the lower appellate Court, and remand the case for disposal on the merits; costs to abide the result.

*Cause remanded.*

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*

PRAG CHAUBEY (PLAINTIFF) v. BHAJAN CHAUDHRI AND OTHERS\* (DEFENDANTS).\*

*Mortgage—Conditional sale—Pre-emption—Act XV. of 1877 (Limitation Act), sch. ii, No. 10—Time from which period begins to run.*

A conditional vendee, who was in possession, applied under Regulation XVII. of 1865 to have the conditional sale made absolute. The year of grace expired in July, 1878. In November, 1878, the conditional vendee sued for possession of the property by virtue of the conditional sale having become absolute. He obtained a decree, in execution of which he obtained, on the 30th April, 1879, formal pos-

\* Second Appeal, No. 304 of 1881, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 8th March, 1881, affirming a decree of Maulvi Muin-ud-din, Munsif of Deoria, dated the 24th September, 1880.

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