judgment-debtor is entitled to take credit for the price of property *not* belonging to him. With this view we do not agree. We find ourselves in complete accord with that expressed in *Prasanna Kumar* v. *Ibrahim Mirza* (1) and the authorities there cited and we are of opinion that the suit by the auction purchaser lies. The summary remedy prescribed in Order XXI does not exclude a suit of this nature where there has been a complete failure of consideration and this more especially where there has been an adjudication, though not a final adjudication, in favour of the title of the judgment-debtor.

The appeal is therefore dismissed with costs.

A. R.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Lumsden.

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May 9.

ISHAR SINGH AND OTHERS (PLAINTIFFS) Appellants

versus

SURAT SINGH AND ANOTHER (DEFENDANTS) Respondents.

Civil Appeal No. 2340 of 1920.

Custom—Adoption—by written deed—whether it can be treated as a gift—where Court finds that there has been no adoption in fact.

One G. S. executed a deed of adoption in favour of defendant S. S. The plaintiffs, collaterals of G. S., brought the present suit to have it declared that the deed should not affect their rights of succession to G. S's. estate. The District Judge held, concurring with the trial Court, that S. S. was never actually adopted, but treating the deed of adoption as a deed of gift gave a declaration in favour of S. S's. right to succeed to the estate of G. S. The deed contained merely a declaration of adoption, and made no reference to any property belonging to G. S.

Held, that when a deed contains a testamentary disposition in favour of a person believed to be the adopted son, it is a question for consideration whether on the failure of adoption the gift also fails. This is the law with respect to cases where there is an express gift or bequest in favour of an alleged adopted son.

(1) (1917) 36 Cal. L. J. 205.

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Fanindra Deb v. *Rajeswar Das* (1), and *Lali* v. *Murlidhar* (2), followed.

Held also, that as the deed of adoption in this case made no mention of any gift it could not be treated as a deed of gift.

Sant Singh v. *Sadha* (3), distinguished.

Second appeal from the decree of A. H. Brasher, Esquire, District Judge, Amritsar, dated the 3rd July 1920, modifying that of Rai Sahib Lala *Ganga Ram* Wadhwa, *Senior Subordinate Judge, Amritsar, dated the 31st March 1920, and granting plaintiffs a decree.*

RAM CHAND MANCHANDA and BADRI DAS, for Appellants.

SHEO NARAIN, for Respondents.

The judgment of the Court was delivered by—

SIR SHADI LAL C. J.—On the 2nd September 1913, Ganda Singh, a *Jat* of the village Khutrai Khurd, in the District of Amritsar, executed a deed of adoption in favour of the defendant Surat Singh. The plaintiffs, who are Ganda Singh's collaterals, have brought the present action for a declaration that the deed of adoption is a fictitious document and shall not affect their rights to succeed to the estate of Ganda Singh. Now, the District Judge concurring with the trial Court holds that Surat Singh was never actually adopted by Ganda Singh, and that the alleged adoption was a mere paper transaction. The learned Judge has, however, treated the deed of adoption as a deed of gift and has granted a declaratory decree in favour of Surat Singh's right to succeed to the estate of Ganda Singh, since the property held by the latter has not been proved to be ancestral, *qua* the plaintiffs.

Now, it has been repeatedly held, *vide, inter alia, Fanindra Deb* v. *Rajeswar Das* (1), and *Lali* v. *Murlidhar* (2), that, where a deed contains a testamentary disposition in favour of a person believed to be the adopted son, it is a question for consideration whether on the failure of adoption the gift also fails. The Court has to decide in each case, after considering the language of the document and the surrounding circumstances, whether the adoption was the reason or motive for making the

(1) (1884) I. L. R. 11 Cal. 463. (P. C.) (2) (1906) I. L. R. 28 All. 488 (P. C.)
(3) 63 P. R. 1912.

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gift or bequest, or whether the mention of the donee or legatee as an adopted son was merely descriptive of the person to take under the gift or bequest and he was to take the property even though his adoption may not be valid. This is the law with respect to cases where there is an express gift or bequest in favour of an alleged adopted son. The instrument before us, however, does not mention any gift *inter vivos* to Surat Singh or any testamentary disposition in his favour. It contains, merely a declaration of adoption, which declaration has been found to be incorrect, and does not even remotely refer to any property held by Ganda Singh. We fail to understand how such a deed can be treated as a deed of gift.

The learned District Judge has relied upon a judgment of the Punjab Chief Court in *Sant Singh and others* v. *Sadha and others* (1) where the adoption was found to have taken place, but according to the custom governing the parties it was held to be invalid. The property affected by the adoption was, however, non-ancestral, and the learned Judges consequently held that as the adoptor was entitled to transfer his non-ancestral property to the adopted son without the consent of his collaterals, the adoption, though invalid by custom, should be viewed as a gift to the adopted son to take effect after his death. It is unnecessary to decide whether the rule laid down in that judgment can be regarded as a correct exposition of the law on the subject because the present case is distinguishable from that case. As pointed out above, even the *factum* of adoption has not been proved in the case before us, and there is, therefore, nothing in the deed which could by any stretch of reasoning be treated as a gift or a testamentary disposition in favour of Surat Singh.

The result is that we accept the appeal and reversing the decree of the District Judge restore that of the Court of first instance. The plaintiffs shall recover from Surat Singh the costs incurred by them in this Court as well as in the District Court.

C. H. O.

Appeal accepted.

(1) 63 P. R. 1912.