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It excludes the intermediate acknowledgments as resting on oral proof, by which the one of 3rd November, 1880, might have been made to bear on a debt then still not barred by limitation, and we must consequently reverse the decrees of the Courts below and reject the claim. Costs in this Court to be borne by the respondent and in the Courts below as there adjudicated.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. *August* 15.

GOVIND ATMA'RA'M, (ORIGINAL DEFENDANT), APPELLANT, *v.* SANTAI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Evidence—Burden of proof—Suit by a claimant to property under attachment.

The defendant having attached certain property as belonging to his judgment-debtor B., the plaintiff applied for the removal of the attachment, alleging that she had purchased the property from B. prior to the defendant's decree. Her application was rejected, and an order maintaining the attachment passed. The plaintiff thereupon brought the present suit to establish her right to the property in question. The Court of first instance dismissed the suit. The plaintiff appealed to the District Judge, who reversed the lower Court's decree, holding that it was incumbent on the defendant to show that the alleged transaction of sale was fictitious. On second appeal by the defendant to the High Court,

Held, that the District Judge was wrong in throwing the burden of proof on the defendant. The defendant had obtained an order maintaining his attachment, and it was incumbent on the plaintiff, who impugned that order by the present suit, to prove her case. For this purpose it was necessary for the plaintiff to prove the payment of the purchase-money, and that she had been in possession since the alleged sale.

THIS was a second appeal from a decision of W. H. Crowe, District Judge of Sátára.

The defendant had obtained a decree against one Bálkrishna, and attached his property in execution. The plaintiff, who was Bálkrishná's mistress, applied to have the attachment removed, on the ground that the property belonged to her, but her application was rejected and an order maintaining defendant's attachment passed. The plaintiff, therefore, brought this suit to establish

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her right to the property. She alleged that she had purchased it from Bálkrishna for Rs. 600, and had been in possession and enjoyment of it.

The defendant contended *(inter alia)* that the sale to the plaintiff was fictitious and had been effected for the purposes of screening the property from attachment.

The Court of first instance held that the transaction of sale was fictitious, and accordingly rejected the plaintiff's claim.

On appeal by the plaintiff, the District Judge reversed the lower Court's decree with the following remarks:—

"My finding is that the defendant has not proved the sale transaction to be collusive * * *. Both of the deeds of sale produced by the plaintiff are registered, and they are both anterior to the date of the defendant's decree, which was passed on 25th February, 1881. It is quite possible that they were executed by Bálkrishna to prevent his property from falling into the hands of his creditors. That circumstance alone does not make the transaction a collusive one. Fraud must be proved, and not presumed. It was incumbent on the defendant to show that the transaction was altogether a fictitious one,—that is to say, that the ownership still remained with Bálkrishna, and that the transfer was a nominal one only * * *."

From this decision the defendant preferred a second appeal to the High Court.

Ganesh Rámchandra Kirloskar for the appellant:—The District Judge was wrong in throwing the burden of proof on the defendant. The plaintiff having failed in successfully resisting the attachment was bound to prove her title—*Tillakchand Hindumal* v. *Jitamal Sudárám*[1]; *Rajan Harji* v. *Ardeshir Hormusji*[2]. Under the Civil Procedure Code (Act XIV of 1882) the plaintiff was bound to prove her purchase and her possession since the purchase.

SARGENT, C. J.:—The Judge says that "it was incumbent on the defendant to show that the transaction (*viz.*, the alleged sale to plaintiff) was altogether a fictitious one." This view is, however,

(1) 10 Bom. H. C. Rep., 206. (2) I. L. R., 4 Bom., at p. 74.

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opposed to the ruling in *Tillakchand Hindumal* v. *Jitamal Sudárám*(1), as explained in *Rajan Harji* v. *Ardeshir Hormusji Wadia*(2). The defendant had obtained an order maintaining his attachment, and it was incumbent on the plaintiff, who impugns that order by the present suit, to prove her case. For this purpose it would be necessary for the plaintiff to prove the payment of the purchase-money, and that she had since been in possession.

As the Judge has considered the evidence from a wrong point of view, we cannot accept his conclusion on the question whether the sale to the plaintiff was a real transaction, and must reverse the decree, and send back the case to the lower Court of appeal for a fresh decision. Costs of this appeal to be costs in the cause.

Decree reversed.

(1) 10 Bom. H. C. Rep., 206. (2) I. L. R., 4 Bom., at p. 74.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. *September* 19.

SHRIDHAR NA'RA'YAN, (ORIGINAL PLAINTIFF), APPELLANT, *v.* KRISHNA'JI VITHOJI, (ORIGINAL DEFENDANT), RESPONDENT.*

Insolvency—Civil Procedure Code (Act XIV of 1882), *Secs.* 354, 355 *and* 356—*Receiver selling a mortgaged property of insolvent—Purchaser at such sale—Right of mortgagee unaffected by such sale.*

By an order dated the 9th July, 1879, A. was declared an insolvent under section 351 of the Civil Procedure Code (XIV of 1882), and his property vested in the receiver, who was ordered to convert it into money. Nine fields, which were part of A.'s property, had been mortgaged to the plaintiff, who was duly cited to appear and prove his debt. The plaintiff, however, failed to appear, and he was consequently omitted from the schedule of A.'s creditors. The receiver sold one of the fields, which was purchased by A.'s undivided son G. At the sale the plaintiff gave notice of his claim as mortgagee. After paying off the debts of the scheduled creditors the receiver made over to A. the residue of the purchase-money and the eight unsold fields. In 1881 the plaintiff sued A. for possession of the mortgaged property, and on appeal obtained a decree. While that suit was pending, G. sold to

* Second Appeal, No. 457 of 1885.