

section begins, *viz.*, "where the Registrar refuses to order the document to be registered" is not one which attaches to a refusal to give the direction for which section 24 makes provision at his discretion.

The Court confirms the decree with costs.

Decree confirmed.

1896.

GANGAYA
v.
SAYAVA.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

WAMANRAO DAMODAR (ORIGINAL PLAINTIFF), APPELLANT, v. RUS-
TOMJI EDALJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1896.

February 17.

Specific Relief Act (I of 1877), Sec. 42—Declaratory decree—Right to sue for declaration—Mortgage—Code of Civil Procedure (Act XIV of 1882), Sec. 287.

Dinsha Edalji mortgaged certain property to plaintiff. After Dinsha's death plaintiff obtained a decree for recovery of his debt by sale of the mortgaged property. Before the property was advertised for sale, the defendants, who were Dinsha's brothers, objected under section 287 of the Code of Civil Procedure (Act XIV of 1882), alleging that Dinsha was not the sole owner of the property; that they were joint owners with him; that they had set aside the property for religious purposes, and that Dinsha had no right to mortgage it.

The Court executing the decree thereupon ordered that the applicants' (defendants') claim should be notified in the proclamation of sale. Plaintiff then filed a suit against the defendants, praying for a declaration that the property belonged to Dinsha exclusively, and that the defendants had no right or interest in it.

Held, that under section 42 of the Specific Relief Act (I of 1877), the plaintiff was entitled to the declaration prayed for.

Plaintiff having himself purchased the property after his claim for declaration had been allowed by the Subordinate Judge, it was contended that he was not entitled any longer to a declaratory decree.

Held, that the change of circumstances brought about by the plaintiff himself purchasing the property did not take away the right to sue which had already accrued to him.

Govinda v. Perumdevi(1) referred to.

SECOND appeal from the decision of T. Hamilton, District Judge of Surat.

*Second Appeal, No. 300 of 1895.

(1) I. L. R., 12 Mad., 136.

1896.

WAMANRAO

v.

RUSTOMJI.

One Dinsha Edalji mortgaged his property to the plaintiff. After Dinsha's death the plaintiff obtained a decree for the sale of the property.

The defendants, who were Dinsha Edalji's brothers, filed a claim under section 287 of the Civil Procedure Code, alleging that the property belonged jointly to them and to Dinsha; that its income was dedicated to charity; and that Dinsha had no right to mortgage it. On the 9th September, 1891, the executing Court passed an order that the claim set up by the applicants (*i. e.* the defendants) should be notified in the sale-proclamation.

Plaintiff then filed this suit to obtain a declaration that the property belonged to his judgment-debtor Dinsha exclusively, and that the defendants had no right to it.

The Subordinate Judge found that Dinsha was the sole owner of the property, and granted the declaration sought for.

After this decree the plaintiff on the 17th June, 1894, put up the property to sale and himself purchased it.

The defendants appealed to the District Judge, who set aside the order of the 9th September, 1891, reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim for a declaration.

In his judgment he said :—

“The cause of action is clearly the aforesaid order (*i. e.* of 9th September, 1891), as the suit was instituted on the 8th September, 1892, just within the period of limitation for a suit under article 13.

“The original decree was for the sale of certain mortgaged property. As there was no attachment, the proceedings taken under section 287 of the Civil Procedure Code must be held to have been *ultra vires* as described in *Himatram v. Khushal*(1), where the ruling in *Deefholts v. Peters* (2) has been followed.

“The property should have been sold without the notification of the claim of defendants. This has since been done in pursuance of the decree now under appeal. The sale was of the right, title and interest of the deceased Dinsha Edalji, and the decree-holder, the plaintiff himself, purchased the same for Rs. 1,500 on the 17th June, 1894.

“No cause of action for a declaration that defendants have no interest in the property has yet arisen to plaintiff. That may hereafter arise, as it is alleged that defendants are in actual possession.”

(1) I. L. R., 18 Bom., 98.

(2) I. L. R., 14 Cal., 631.

Against this decision the plaintiff preferred a second appeal to the High Court.

Ganpatrao Sadashiv Rao, for the appellant-plaintiff.

Govardhanram M. Tripathi for the respondents-defendants.

FARRAN, C. J.:—The decree of the District Judge setting aside the order of the 9th September, 1891, in Suit No. 73 of 1891 is, in our opinion, of extremely doubtful legality; but as there is no appeal against that part of the decree we abstain from doing more than expressing our present opinion.

As to the declaration it appears that when the plaintiff sought to sell the property mortgaged to him by Dinsha, the defendants set up a claim to it which struck at the root of his mortgage, and, if sustained, would have rendered it practically valueless. It is to meet such cases as these that the Legislature inserted section 42 in the Specific Relief Act, and the Subordinate Judge deeming the claim made by the defendants untenable rightly exercised his discretion and gave the plaintiff a declaratory decree.

We think that the District Judge wrongly reversed that decree without entering upon the merits of the case. The change of circumstances brought about by the plaintiff himself purchasing the property did not take away the right to sue which had already accrued to him—*Govinda v. Perumdevi*⁽¹⁾.

We reverse the decree and remand the appeal for disposal on the merits. Costs to be costs in the appeal.

Appeal remanded.

1896.

WAMANRAO
v.
RUSTOMJI.