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vious occupant, on the ground that in the absence of evidence of an actual forfeiture the Court was bound to hold such forfeiture unproved. But it is to be noted that the Judges in that case did not express any opinion as to the presumption to be drawn from a sale taking place subsequent to the liability to forfeiture. They said that the existence of forfeiture "could not properly be assumed as a fact from the mere legal consequence of failure to pay arrears of assessment." But they did not say that forfeiture could not be presumed to have taken place when the Collector proceeded to sell the occupancy, his right to do so being founded on the liability of the occupancy to forfeiture and sale. Of course if in any case there is direct evidence that the Collector omitted or refused to declare a forfeiture, and yet proceeded to sell, the validity of the sale and of the consequences, which would follow from a valid sale, may well be questioned. But I have confined myself to the present case, and for the reasons given am of opinion that we cannot hold the sale invalid simply because there is no written declaration of forfeiture. I have not touched upon the several important questions raised by the Subordinate Judge. These no doubt will be duly considered by the District Judge when he rehears the appeal.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Strachey.

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December 11.

VISHNU GANESH JOSHI AND ANOTHER (ORIGINAL PLAINTIFFS), APPLICANTS, *v.* YESHAVANTRA'O AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

Small Cause Court—Jurisdiction—Provincial Small Cause Courts Act (IX of 1887*), Sec.* 25, *Sch. II, Arts.* 4 *and* 13*—Hereditary allowance—Immoveable property—Registration Act (III of* 1877*), Secs.* 3 *and* 17*—General Clauses Act (Bom. Act III of* 1886*)—Civil Procedure Code (Act XIV of* 1882*), Sec.* 252.

Plaintiffs sued in the Court of Small Causes at Poona to recover Rs. 400 for arrears alleged to be payable to them under an agreement by the defendant's father to pay Rs. 150 per annum, of which Rs. 50 were for maintenance of plaintiffs' mother and the residue was to be applied towards defraying the expenses of a temple. The terms

* Application No. 191 of 1895 under the extraordinary jurisdiction.

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of the agreement showed that it was intended that the payment for the expenses of the temple should be continued in perpetuity. The Judge dismissed the suit, holding that being for a hereditary allowance, it was a claim for immoveable property, and came under clauses (4) and (13) of Schedule II of the Provincial Small Cause Courts Act (IX of 1887). He also held that the claim came within the meaning of sections 3 and 17 of the Registration Act (III of 1877) and that the document creating it required registration, and not being registered, was inadmissible in evidence. On application by the plaintiffs to the High Court under section 25 of the Provincial Small Cause Courts Act (IX of 1887),

Held, reversing the decree, that the suit was not for possession of immoveable property or recovery of an interest in such property within the meaning of article 4, nor did it come within the purview of article 13 of Schedule II of the Act. The Small Cause Court had, therefore, jurisdiction to entertain the suit.

Held, further, that the document did not require registration, as it was not an instrument purporting or operating to create or declare an interest in immoveable property within the meaning of section 17, or create an hereditary allowance in the sense in which that expression is used in section 3 of the Registration Act (III of 1877).

APPLICATION under the extraordinary jurisdiction of the High Court under section 25 of the Provincial Small Cause Courts Act (IX of 1887) against the decision of Khán Bahádur M. N Nánávati, Judge of the Court of Small Causes at Poona.

The plaintiffs sued in the Small Causes Court of Poona to recover rupees four hundred from the defendants under an agreement dated the 18th June, 1882, which was passed by the defendants' father to the plaintiffs and their brother. The following is the translation of the agreement :—

"To RAJESHRI HARI, NÁRÁYAN, VISHNU GANESH JOSHI;

"From SHRIMÁNT SÁMBHAJIRÁO YESHAVANTRÁO PAVÁR, of Malthán, &c., &c.

"Your father the late Ganpatráo Káka Joshi was of great use in various ways to me during my infancy, and also after I attained majority in my private concerns and business, and also as a pleader and in other things. He also assisted my mother during my minority in business and in the shape of money, and was of use to her. For these reasons when Ganpatrao Káka was alive, it had been agreed to give a perpetual allowance (*nemnuk*) towards the expenses of the idol in the temple of Shri Vishnu Panchávatan built by him. But owing to the death of your father and my having gone to Dhár, it (the agreement) was not carried out. I have now come here from Dhár and having thought of carrying out to completion my former intention, the allowance (*nemnuk*) as specified below is given :—

"Rs. 100 0 0 To be given to you from year to year in perpetuity from generation to generation in the shape of a charitable endowment for the expenses of the idol in the temple of Shri Vishnu Panchávatan built by your father Ganpatráo Káka Joshi at Poona, peth Sadáshiv, Kálúvávar.

"Rs. 50 0 0 To be given every year to your mother Ganga Bhágirathi Sarasvatibái during her life-time for her expenses in the shape of a pension.

"Thus in all Rs. 150 during your mother's life-time and Rs. 100 thereafter every year from the current year * * and thereafter from year to year will be paid to you at Poona in perpetuity from generation to generation. You should have *vahivát* as aforesaid. There will be no obstruction in the way of paying the same to you, either from me or my heirs in any way."

The defendants pleaded that this agreement being unregistered was inadmissible in evidence; that it was without consideration and was passed under mistake and misrepresentation. They contended that they were not bound by it, alleging that the deceased left no property of his own. They also contended that the Court had no jurisdiction to entertain the suit.

The Judge dismissed the suit. He held that he had no jurisdiction, the claim being for an hereditary allowance, which was immoveable property. He was also of opinion that the agreement sued on being unregistered was not admissible in evidence and was not binding on the defendants.

The plaintiffs applied under the extraordinary jurisdiction of the High Court, and obtained a rule *nisi* calling on the defendants to show cause why the decision should not be set aside.

Mahádeo B. Chaubal appeared for the applicants (plaintiffs) in support of the rule:—The Judge was wrong in holding that the allowance is immoveable property. It is not charged on any immoveable property, nor is it to come out of the income of any such property. Under the agreement the donor has merely created a personal liability which bound him during his life-time and his assets in the hands of his heirs after his death. Section 3 of the Registration Act (III of 1877) defines immoveable property, and the definition clearly shows that a hereditary allowance is a benefit arising out of land. The definition of immoveable property given in clause (16), section 3, of the General Clauses Act is also similar. The allowance, then, not being immoveable property, the Judge was wrong in holding that he had no jurisdiction to try the suit; and that the agreement required registration under section 17 of the Registration Act. We submit that the agreement is admissible, and the Judge should decide the case on the

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merits. The defendants will be liable only if they have got assets of their father in their hands.

Gangárám B. Rele appeared for the opponents (defendants) to show cause:—Under article 13, Schedule II, of the Provincial Small Cause Courts Act (IX of 1887) the Judge had no jurisdiction to try the suit. Assuming that the allowance in dispute is moveable property, still as it is hereditary and given for the benefit of a temple, it is taken out of the jurisdiction of the Small Cause Court by the above article. But we contend that the allowance is immoveable property according to the definition given in the Registration Act. The expression *hereditary allowances* in the definition is to be taken by itself, and not read with the words "*any other benefit to arise out of land.*" All hereditary allowances do not arise out of land. Some are charged on land and some are personal. The allowance being immoveable property, the agreement regarding it required registration, and the Judge was right in holding that under article (13), Schedule II, of the Provincial Small Cause Courts Act he had no jurisdiction to entertain the suit.

FARRAN, C. J.:—This is an application under section 25 of the Provincial Small Cause Courts Act to set aside the decree of the Poona Small Cause Court Judge dismissing the suit. The plaintiffs' claim was to recover Rs. 400 for arrears alleged to be payable to the plaintiffs under an agreement by the defendants' father to pay Rs. 150 per annum to the plaintiffs' father, of which Rs. 50 were for the maintenance of the plaintiffs' mother and the residue was to be applied towards defraying the expenses of a temple. The terms of the agreement appear to show that it was intended that the payment for the expenses of the temple should be continued in perpetuity. Such a suit is not, in our opinion, a suit for the possession of immoveable property or for the recovery of an interest in such property within the meaning of article (4) of Schedule II to the Act, nor does it come within the purview of article (13). It is clearly not a suit for immoveable property or an interest in it as defined in the Bombay General Clauses Act (III of 1886) or within the ordinary meaning of the term, nor is the annual payment which the plaintiffs seek to enforce, an allowance called *málikána* or a fee called *hakk*. It is simply an

annual sum which the father of the defendants bound himself by agreement to pay. It does not, in our opinion, alter its character that the defendants' father purported to promise to pay or have it paid in perpetuity. The Small Cause Court had, therefore, jurisdiction to entertain the suit.

The document further we consider is not an instrument purporting or operating to create or declare an interest in immoveable property within the meaning of section 17 of the Registration Act. It cannot, we think, be said to create a "hereditary allowance" in the sense in which that expression is used in section 3 of the Act. It is not an allowance by Government or secured in such a way as can constitute it an hereditary allowance. If enforceable at all after the death of the contractor, it can only be enforced against his general estate in the hands of his legal representative, so long as that estate remains undistributed. It is a mere personal obligation which the contractor has undertaken, not secured in any way whatever.

The suit lastly will not (as held by the Judge of the Small Cause Court) lie against the heirs of the grantor directly. The plaintiffs' claim is only, as we said, enforceable, if enforceable at all, against the general estate of the deceased under section 252 of the Civil Procedure Code (Act XIV of 1882).

We set aside the order dismissing the suit upon the above preliminary grounds, and direct that it be heard upon the merits. Costs to be costs in the case.

Order set aside.