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GOVIND VENKÁJI v. SADÁSHIV BHARMA SHET.

The plaintiff preferred a second appeal.

Báláji Ábáji Bhágvat for the appellant.

P. M. Mehta (with *B. N. Bhájekar*) for the respondents.

SARGENT, C. J.:—Both the Courts below have found that the land in question belongs to the plaintiff; but subject, as the Court of appeal has found, to a right of access to the temple. Such being the findings as to the property in the land, the Courts could not compel the plaintiff to part with his legal rights and accept compensation against his will, however reasonable it might appear to be.

We must, therefore, reverse the decree of the Court below, except as to the order as to costs, and order the defendants to remove the verandahs complained of by the plaintiff. Defendants to pay plaintiff his costs of this appeal.

Decree reversed.

N.B.—After the High Court's judgment was delivered, the plaintiff presented a petition of review praying for a direction in the decree for delivery of possession. The Court, thereupon, on the 20th April, 1893, amended the decree by adding "and to restore possession of the land to plaintiff" after the words "remove the verandahs complained of by the plaintiff."

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

1892. *October* 19.

IRANGOWDA (ORIGINAL DEFENDANT), APPELLANT, *v.* SESHA'PA (ORIGINAL PLAINTIFF), RESPONDENT.*

Practice—Procedure—Suit by decree-holder to declare a house subject to attachment in execution as being the property of the judgment-debtor—Decree for plaintiff on ground that judgment-debtor, though not the owner of the house, had an attachable interest in it as permanent tenant—Court cannot make out a new case for plaintiff.

The plaintiff's case being that a certain house was the absolute property of his judgment-debtor, and that, therefore, he (the plaintiff) was entitled to attach it in execution of his decree, the Subordinate Judge found that the judgment-debtor was not the owner of the house, and rejected the plaintiff's claim. The Appellate Court held that (though the judgment-debtor was not the owner) he had an attachable interest in the house as permanent tenant, and allowed the plaintiff's claim. On appeal to the High Court by the defendant,

* Second Appeal, No. 744 of 1891.

Held, that the order of the Appellate Court made out an entirely new case for the plaintiff which he had not made himself at any period of the trial, and that the decree of the lower Appellate Court should be reversed,

SECOND appeal from the decision of Ráo Bahádur Káshináth Bálkrishna Maráthe, First Class Subordinate Judge, with appellate powers, of Dhárwár.

Suit to set aside an order removing attachment.

The plaintiff alleged that he had obtained a decree against one Sanganbasápá and in execution thereof attached the house in dispute as the property of Sanganbasápá. The defendant, thereupon, presented an application for the removal of the attachment on the ground that the house belonged to him and not to Sanganbasápá and got an order for the removal of the attachment. The plaintiff then brought the present suit to set aside that order and for a declaration that the house was liable to be attached and sold as the property of Sanganbasápá in execution of the plaintiff's decree against him.

The defendant alleged that the house was his ancestral property and Sanganbasápá his tenant; it was, therefore, not liable to be attached and sold for Sanganbasápá's debt.

The Subordinate Judge found that the house was not the property of Sanganbasápá, and that, therefore, it was not liable to be sold in execution of the plaintiff's decree.

On appeal by the plaintiff that Sanganbasápá was the owner as admittedly he was in possession, the Subordinate Judge with appellate powers found that the house belonged to the defendant, who had reserved to himself a right to rent only, that Sanganbasápá was permanent tenant, and that permanent tenancy was "such a title as the plaintiff must be permitted to attach and sell." He, therefore, reversed the decree of the Subordinate Judge making the declaration sought for by the plaintiff.

The defendant preferred a second appeal.

Náráyan Ganesh Chandávarkar for the appellant (defendant):—The plaintiff did not allege in his plaint that his judgment-debtor had a right to live in the house as a permanent tenant, and that that right should be sold in execution of the decree. His case was that his judgment-debtor was absolute owner of the

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property, and that the right of absolute ownership should be sold. The first Court rightly rejected the claim. The lower Appellate Court was wrong in making out for the plaintiff a case which was never alleged by him and with respect to which no issue was asked for in the first Court. The lower Court could not dispose of the case on a ground not raised in the plaint, in the issues or the pleadings.

Vishnu Krishna Bhátavdekar for the plaintiff.

SARGENT, C. J.:—The plaintiff's case as made by his plaint was that he was entitled to attach the house as the absolute property of Sanganbasápá. The first issue was framed by the Subordinate Judge on that assumption, and the fourth ground of objection in plaintiff's own appeal to the Court below was that the first Court was wrong in not holding that Sanganbasápá was the owner of the house. The case has, therefore, been tried exclusively on the basis of determining whether Sanganbasápá was the owner of the house. However, the lower Court of appeal has found that, although defendant is the owner, Sanganbasápá had an attachable interest in it as a permanent tenant; but this is to make an entirely new case for the plaintiff, which he never made himself at any period of the trial.

We must, therefore, reverse the decree of the Court below and restore that of the first Court, with costs on plaintiff here and in the Court below.

Decree reversed.

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