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Government, &c." By taking evidence on the merits without dealing with this question of jurisdiction raised in the 7th issue the plaintiffs were likely to be misled as to what section 59 of the Code requires. We refrain from deciding whether the requisite appeals had been presented and whether an appeal presented after the period of limitation, therefore, is outside of the words "allowed by the law." The facts must first be found.

The Court for these reasons, and considering that, in such matters of procedure as section 138 deals with, it should rather lean to an interpretation which advances justice than to a contrary interpretation, reverses the decree of the Assistant Judge and remands the suit to his Court for disposal according to law: costs to abide the result.

Suit remanded.

APPELLATE CIVIL.

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

1896.
April 8.

TATIA (ORIGINAL PLAINTIFF), APPELLANT, *v.* BABAJI (ORIGINAL DEFENDANT), RESPONDENT.*

Vendor and purchaser—Executed deed of sale set aside for want of consideration—Contract Act (IX of 1872), Sec. 25.

On the 18th November, 1892, A executed to B a deed of sale of certain land. The deed was duly registered and it recited that the consideration money, Rs. 90, had been duly paid. B got into possession of the land. A subsequently brought a suit to set aside the deed of sale, and to recover possession, alleging that he had been induced to execute the deed when incapacitated from illness, and that the consideration money had not been paid. Both the lower Courts found that the consideration money had not been paid. The lower appellate Court dismissed the suit, holding that A's remedy was to sue for the consideration money if it was unpaid, and that he had a lien on the land for the amount, but that he could not set aside the deed.

Held, that the deed should be set aside and the plaintiff should recover possession.

Per FULTON, J.:—The sale was void for want of consideration. Section 25 of the Contract Act (IX of 1872) applied to the transaction.

Trimalrav Raghavendra v. *The Municipal Commissioners of Hubli*(1) distinguished.

* Second Appeal, No. 611 of 1895.

(1) I. L. R., 3 Bom., 172.

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Per FARRAN, C. J. :—The judgment itself appears to me to disclose a state of facts which shows that there was no sale at all, and that the plaintiff was tricked into executing and registering the conveyance. I am not, however, as at present advised, prepared to assent to the train of thought which puts conveyance of lands in the mofussil perfected by possession and registration, where the consideration expressed in the conveyance to have been paid has not been paid in fact, in the same category as contracts void for want of consideration.

SECOND appeal from the decision of Ráo Bahádur Narhar Gadadhar Phadke, First Class Subordinate Judge of Sholápur with appellate powers, reversing the decree of Khán Sáheb Rattonji Mancherji, Subordinate Judge of Bársi.

Suit to set aside a deed of sale and to recover possession of land.

The plaintiff alleged that he being very ill, the defendant undertook to cure him on condition of obtaining a portion of his land ; that on the 18th November, 1892, the defendant by holding out false hopes of curing him induced him to execute a deed of sale of the land in question for the consideration of Rs. 90 ; that the consideration money was not paid by the defendant ; and that he had been induced to execute the deed by the defendant's fraud and deceit.

The plaint further stated that the defendant had got possession by a summary suit in the Mámlatdár's Court.

The plaintiff now prayed that the deed of sale should be set aside and for possession.

The defendant pleaded that the deed of sale was duly registered and that the plaintiff had admitted payment of consideration before the Registrar ; and that the plaintiff showed no ground for setting aside the deed.

The Subordinate Judge found that the deed was void for want of consideration, and allowed the plaintiff's claim.

On appeal the Judge, though he found there was no consideration for the deed, reversed the decree and dismissed the suit, relying on *Trimalrav Raghavendra* v. *The Municipal Commissioners of Hubli*[1].

The plaintiff preferred a second appeal.

(1) I. L. R., 3 Bom., 172.

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Balkrishna N. Bhajekar for the appellant (plaintiff) :—At the time the deed was executed the defendant was in possession of the land as tenant. It was not under the deed that he got possession. The decision relied on by the Judge is distinguishable. In that case the contract itself was not illegal, while in the present case the plaintiff was induced to execute the sale-deed by deceit and fraud. Section 25 of the Contract Act (IX of 1872) is applicable, as well as sections 11 and 12, because at the time of the sale the plaintiff was incapacitated by illness.

Section 54 of the Transfer of Property Act (IV of 1882) defines a sale. Some consideration, if not the whole of it, must pass to validate a sale. Both the lower Courts have found that no consideration was paid to us—*Umedmal Motiram* v. *Davu bin Dhondiba*[1].

Mahadev B. Chaubal for the respondent (defendant) :—The Judge held that the consideration was not paid. He did not hold that the sale deed was void for want of consideration. If the consideration was not paid, the plaintiff has a lien for the unpaid purchase-money. He can sue for the price—*Trimalrav Raghavendra* v. *The Municipal Commissioners of Hubli*[2]. But he cannot get back the ownership, which was transferred to us by the sale-deed. The Transfer of Property Act is not applicable, because the sale-deed was passed before that Act came into force in this Presidency.

FULTON, J. :—In this case the plaintiff, who on the 18th November, 1892, had executed a deed of sale of certain land in favour of the defendant, sued to have the deed set aside, and possession of the land, which had passed to the defendant, restored to him, on the ground that the sale-deed was void for want of consideration and that he was induced to pass it by the defendant's fraud and deceit. The defendant alleged that the consideration of Rs. 90 had been paid as stated in the deed, and that certain other statements in the plaint were untrue.

The recital in the deed about the payment of the consideration was as follows :—"I (the plaintiff) received the abovementioned sum of Rs. 90 twelve days ago. In respect thereof there is no

(1) I. L. R., 2 Bom., 547. (2) I. L. R., 3 Bom., 172.

document or kháta. I have received payment of the money. There has remained no dispute as to payment of the money." The Subordinate Judge on the evidence held that no valuable consideration passed for the sale, which was, therefore, void, and ought to be set aside, and he accordingly decreed possession to the plaintiff with costs of the suit.

The First Class Subordinate Judge with Appellate Powers agreed with the lower Court in holding that the consideration money had not been paid, but rejected the plaintiff's claim on grounds stated as follows:—

"A vendor of immoveable property who has given possession to the purchaser is not entitled to rescind the contract of sale and recover possession because the purchase-money is not paid. His remedy is to sue for the sum due, and he has a lien on the property for the amount—*Trimalrav Raghavendra* v. *The Municipal Commissioners of Hubli*[1]. There is no contention in the present case that the land was not held by the defendant as its purchaser after the sale-deed in continuation of the previous lease tenure as admitted by him in No. 8. The sale-deed cannot be cancelled, as there is no fraud or deceit proved to subsist in its execution by the plaintiff."

The plaintiff is, therefore, left in the unfortunate position of getting neither his money nor his land. He may seek to recover the money in another suit, but, if the defendant still continues to allege payment, it is very doubtful whether the fact of non-payment will be treated as a *res judicata*, for it may probably be argued that, as the appellate Court considered that the transfer of ownership was effected by the mere execution of the deed and delivery of possession, the finding that the price had not been paid was immaterial to the result, the suit being dismissed not in consequence of that finding, but in spite of it.

Now, of course, if we considered that the lower Court had rightly applied the law to the facts found, we should be obliged to uphold its decision, but I am glad to think that according to the view which I take of the law we shall not be compelled to concur in such an unsatisfactory result. To the learned First

(1) I. L. R., 3 Bom., 172.

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Class Subordinate Judge's statement of the law I entirely assent, but not to its application in the present case. The fallacy of his argument appears to lie in the use of the word "vendor." If the transaction was a "sale," and the plaintiff was a "vendor," undoubtedly he could not now recover possession of the land; but if there was no consideration, either paid or promised, then, I think, there was no sale, and the remarks above quoted have no bearing on the case. The decision—*Trimalrav Raghavendra* v. *The Municipal Commissioners of Hubli*[1]—relied on by the First Class Subordinate Judge is wholly inapplicable. The validity of the contract there was unquestionable. The consideration for the sale consisted in the promise to pay the price by instalments, and, on this promise being broken, the remedy lay not in a rescission of the contract but in a suit to recover the money due under it. The case of *Umedmal* v. *Davu*[2] is more analogous to the present case. There the deed of sale, it is true, recited that the purchase-money had been paid; but the conduct of the parties showed that the real intention was that the money was to be paid subsequently; for thirteen days after execution the purchaser, finding that he could not raise it, returned the deed to the vendor. Therefore, in that case it could not be argued that there was no consideration. There was an understood promise to pay, and on this consideration the contract was valid, and by the execution of the deed embodying it the vendor's title was conveyed to the vendee and could not be restored to him except by a subsequent agreement. The evidence, however, offered to prove such agreement was inadmissible by reason of the terms of the Registration Act, and the vendee's title could not be disproved. That case simply emphasized the principle that a contract of sale is completed when the terms are agreed on and the deed is executed, but cannot be treated as an authority for the proposition that a mere conveyance not containing the terms of a valid agreement is sufficient in itself to transfer the property. In that particular case the contract was valid, but I do not think that the learned Judges who decided it intended to affirm that in all cases where a deed of sale was signed, and possession was delivered, the property *ipso facto*

(1) I. L. R., 3 Bom., 172.

(2) I. L. R., 2 Bom., 547.

passed. In most cases, no doubt, where the execution of a deed is the final act of a valid contract of sale, it is correct to say that the property is transferred by the deed, but the matter seems to me to hinge on the validity of the contract. Nor I think can it be argued that in all cases in which the price is incorrectly recited to have been paid, we ought to infer that the real agreement was that it was to be paid. In many cases no doubt such an inference would properly be drawn having regard to the well-known laxity of recitals on this point, but the inference to be drawn in many (or perhaps in most) cases cannot be extended to all. It is a mere presumption of fact. Each case must be decided on its own merits.

In the present case, having regard to the great care taken by the parties to the deed to exclude the possibility of any claim for future payment, and the fact that neither party has alleged a promise or intention to pay in future, it would not, I think, be possible consistently with section 114 of the Evidence Act to presume that payment was promised. To me it seems very unlikely that any future payment was promised or intended. If on the meagre facts before us I were compelled to form a theory as to the reason which induced the plaintiff, who is found not to have received the Rs. 90, to sign the deed, I think I should be inclined to accept his own version of the story, which, though not proved, may nevertheless be true. But it is not necessary to speculate on this point, for the lower Court has expressly found that there was no consideration for the sale. Such being the case, I think section 25 of the Contract Act applies to this transaction as to any other contract. It is true that this deed was executed before the Transfer of Property Act came into force, and that, therefore, it is not affected by section 4 of that Act, which declares that the chapters and sections relating to contracts shall be taken as part of the Indian Contract Act; but even apart from this section there is, I think, no reason for excluding from the general provisions of the Contract Act contracts of sale of land. The wording of these provisions certainly does not suggest any such exclusion. In *Rajan Harji* v. *Ardeshir*[1] it seems to have been assumed by Sir M. Westropp and Mr. Justice F. D. Melvill that

(1) I. L. R., 4 Bom., 70.

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a sale of land was subject to the provisions of sections 23 and 24 of the Contract Act, though the finding that there was no fraudulent or unlawful object rendered any decision on the point unnecessary. In *Manna Lal* v. *Bank of Bengal*(1) the Allahabad High Court held a mortgage effected by a duly registered deed to be void for want of consideration under section 25 of the Contract Act. This case is on all fours with the present case, excepting that here the transaction purported to be a sale and there a mortgage. See also *Ganga Bakhsh* v. *Jagat Bahadur Singh*(2) in which the applicability of section 16 of the Contract Act to a gift of land appears to have been admitted.

Of course it may be said that as the plaintiff chose to sign a sale deed without any consideration, either paid or promised, there is in justice no more reason for setting it aside than there would be for annulling a deed of gift. The plaintiff, if he chose, was at liberty to give away his land. But the answer to this argument appears to be that if the defendant had come into Court with a deed of gift it would almost certainly, under the circumstances set forth in the judgments, have been avoided as obtained by means of undue influence. Considering the illness of the plaintiff and the fact that he was unable to manage his property and remembering that no intelligible motive has been assigned for the alienation of this land, the Court would doubtless have come to the conclusion that there had been unfair dealing. It is quite as strong a case as *Clark* v. *Malpas*(3) in which a completed sale was set aside on the ground that the inadequacy of the consideration and the helpless condition of the vendor, who was illiterate, ill, and without independent advice, proved a transaction which was "equitably void." Numerous other cases might be referred to in which transactions have been avoided where the consideration was so grossly inadequate as to indicate fraud; but I have thought it enough to refer to *Clark* v. *Malpas* to show how hopeless it would have been to attempt to uphold this transaction as a gift based on no consideration at all.

This point, however, need not be further discussed. The transaction, as it stands, purports to be a sale and nothing else. But

(1) I. L. R., 1 All., 309. (2) L. R., 22 I. A., 153.

(3) 4 D. F. and J., 401.

as a sale it is void for want of consideration. There being no contract, there could, I think, be no transfer of property by sale.

I would, therefore, reverse the decree of the First Class Subordinate Judge and restore that of the Subordinate Judge, with costs on defendant throughout.

FARRAN, C. J.:—I am not prepared to dissent from the conclusion which my learned colleague has come to in this particular case. The findings of the Subordinate Judge, A. P., that "the defendant has been in possession of the land in dispute from times previous to the sale to him and it is evident that he is aware of the real valuableness of the same. He, therefore, seems to have the same conveyed to himself by the plaintiff at a more or less price which he managed not to pay to the latter," and that there was no fraud or deceit proved to subsist in the execution of the conveyance by the plaintiff, are to my mind self-contradictory, especially bearing in mind that the plaintiff was at the time of the execution incapacitated by illness from managing his business. The judgment itself appears to me to disclose a state of facts which shows that there was no sale at all and that the plaintiff was tricked into executing and registering the conveyance. I am not, however, as at present advised, prepared to assent to the train of thought which puts conveyances of lands in the Mofussil perfected by possession or registration, where the consideration expressed in the conveyance to have been paid has not in fact been paid, in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem to me to have been sufficiently borne in mind throughout the judgment. I refrain, however, from saying more upon this subject until the problem is presented to the Court in a more intelligible form. The Transfer of Property Act, section 54, will for the most part in future regulate conveyances which come before the Court under such circumstances.

Decree of the Joint Subordinate Judge, A. P., reversed and that of Subordinate Judge restored. Cost of appeals on respondent.

Decree reversed.