share in the village of Uple which was situated within the local limits of the Rajápur Court. It was, however, filed in the Ratnágiri Court, and the District Judge considered that the latter Court had jurisdiction, because the relief sought could be entirely obtained by the personal obedience of the defendants, and that, therefore, the suit came within the proviso to section 16 of the Civil Procedure Code (Act XIV of 1882). He seems, however, to have quite overlooked the fact that this proviso also requires that the defendant, through whose personal obedience the relief sought could be obtained, should reside within the jurisdiction of the Court in which the suit was filed. In the present case the Subordinate Judge of Ratnágiri says that all the defendants do not reside within the local limits of the jurisdiction of his Court; the proviso, therefore, will not apply even if we assume that the District Judge was right in his opinion that the relief sought could be obtained through their personal obedience. We must reverse the order of the District Judge.

The Subordinate Judge ought not to have dismissed the suit, but returned the plaint to be presented to the proper Court under section 57 of the Code. For this reason we reverse his order of dismissal also, and direct him to return the plaint with the proper endorsement. The plaintiff must bear the costs of the defendants throughout.

Orders reversed.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

PARSHOTAM MANJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANESH VINAYAK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1899. *April* 6.

Execution—Sale in execution subject to mortgage—Suit to set aside sale and for re-sale of property free from mortgage—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Sec. 287.

The plaintiff, having sold property in execution of a decree subject to a certain mortgage lien which had been duly investigated and allowed, brought this suit to have the sale set aside and praying for a re-sale of the property free from the mortgage lien.

* Second Appeal, No. 632 of 1898.

1899.

PARSHOTAM v. GANESH.

Held, that he was not entitled to the relief sought. His proper remedy was to have brought a suit for a declaration that the alleged mortgage was null and void, and to have stayed the sale till the determination of that suit.

SECOND appeal from M. B. Tyabji, District Judge of Thána.

The plaintiff as assignee of a decree attached certain property in execution and applied to have it sold. The first defendant thereupon intervened and claimed to have a mortgage lien upon it. On inquiry his claim was allowed and was ordered to be entered in the proclamation of sale. The property was sold subject to this encumbrance and was bought by the second defendant.

The plaintiff brought this suit praying that the sale should be set aside and that the property should be re-sold free from the first defendant's mortgage. The lower Courts dismissed the suit. The plaintiff appealed to the High Court.

Manekshah J. Taleyarkhan for the appellant (plaintiff).

Narayan V. Gokhale for the respondents (defendants).

PARSONS, C. J. (ACTING):—We think that the lower Courts have correctly held that this suit will not lie. The facts are these. The plaintiff as the assignee of the decree-holder attached certain property and asked for its sale. The defendant No. 1 came forward in response to notices issued in accordance with the rules framed under section 287 of the Civil Procedure Code, and claimed a mortgage lien over the property. His claim was enquired into and was found proved, and was ordered to be entered in the proclamation of sale, and, though the plaintiff took the matter up to this Court, he failed to get the order set aside. The encumbrance accordingly remained notified in the proclamation of sale, and the property was sold and purchased by the defendant No. 2.

The plaintiff has brought this suit to have the sale set aside and a re-sale ordered of the property freed from the alleged encumbrance. We think that he is not entitled to this relief. We know of no authority which allows of a decree-holder selling property twice over on his own application where there has been no irregularity in publishing or conducting it, and no default committed on the part of the purchaser. His proper remedy in the first instance was to have brought a suit for a declaration that the alleged mortgage was null and void, and to have stayed

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PARSHOTAM v. GANESH.

the sale till the determination of that suit. Instead of that he caused the sale to be held under the proclamation which contained the encumbrance, and that sale has been confirmed by the Court. No fraud is alleged on the part of the defendant No. 2, on the contrary his action has been held by the lower Courts to have been throughout *bonâ fide*. He cannot, therefore, now be deprived of what he has bought. Possibly, if the mortgage is non-existent, the plaintiff might have a remedy against the defendant No. 1 in the form of an action for slander of title, but that is quite different to what he asks for in the present suit. We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899.
April 10.

BALVANTRAO (ORIGINAL PLAINTIFF), APPLICANT, *v.* F. L. SPROTT (ORIGINAL DEFENDANT), OPPONENT.*

Qualified ue 31 Bom.

Mámlatdár's Court—Jurisdiction of Mámlatdár over officers of Government sued in their official capacity—Act XIV of 1869, *Sec.* 32—*Act X of* 1876, *Sec.* 15—*Bombay Irrigation Act* (*Bom. VII of* 1879), *Sec.* 48—*Leakage water—Rights of riparian proprietors—Water-course.*

A Mámlatdár has jurisdiction, under Bombay Act III of 1876, to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity.

The Irrigation Department has no power, under Bombay Act VII of 1879, to dam a stream or a water-course on the ground that it derives its supply of water by leakage from an irrigation canal. Section 48 of the Act only gives the Department the special right of charging a water-rate on land which derives benefit from the leakage.

Water which has leaked from a canal into the land of another person does not belong to the Irrigation Department, so as to give the latter the right to follow it up and claim it as their own.

If the leakage flow was such that it itself had become, in the eye of the law, a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses.

A Mámlatdár has no power to inquire into matters not covered by the issues laid down by the Act itself.

* Application, No. 237 of 1898.