poses of the family. To the same effect is the decision of the Calcutta High Court in *Sheo Pershad Singh* v. *Sahib Lal*[1], in which the head-note runs thus: "the sale having been under a decree in respect of a joint debt of the family, the whole interest of the family in the properties in dispute passed at the sale, although L and S only out of the members of the family were sued." We, therefore, frame these issues—

(1) Whether the debt for which the decree was passed was contracted by Devji as the manager of the family and for a family purpose?

(2) Whether the interests of the plaintiffs Nos. 2 and 3 were attached and sold in execution of the decrees? and

(3) If so, whether it is open to the defendant in the present suit to contend that he is still possessed of their interests?

(This last issue, we may remark, is framed at the request of the pleader for the respondent in relation to point 3 in Appeal No. 109 of 1897.)

We ask the Judge to certify his findings on the above issues within two months.

[1] (1892) 20 Cal, 453.

APPELLATE CIVIL.

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

KOTRABASSAPPAYA (ORIGINAL DEFENDANT), APPELLANT, *v.* CHENVIRAPPAYA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1898. *August* 11.

Specific Relief Act (I of 1877), Sec. 39—Limitation Act (XV of 1877), Sch. II, Art. 91—Suit to cancel a void or voidable instrument—Reasonable apprehension of serious injury—Limitation.

Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it cancelled. The test is "reasonable apprehension of serious injury." Whether that exists or not, depends upon the circumstances of each case. It cannot be laid down, as a rule of law, that in no case can a man, who has parted with the property in respect of which a void or voidable instrument exists, sue to have such instrument cancelled.

* Second Appeal, No. 172 of 1898.

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Iyyappa v. *Ramalakshmamma*(1) referred to.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, reversing the decree of E. S. Kulkarni, Subordinate Judge of Ránebennur.

Suit under section 39 of the Specific Relief Act (I of 1877) to have a document declared cancelled.

The plaintiff was the swámi of a math. He had become old and blind, and had no *mari* (disciple) to succeed him. On the 13th August, 1892, he executed a *jimmapatra* to the defendant appointing him manager of the properties of the math, and making them over to him as such manager, upon certain terms as to service and upon condition that he should give his son, if he should have one, to the plaintiff as his *mari* (disciple), or if he had not, that he should select a *mari* for the plaintiff. It further provided that, in case the defendant failed to act according to its terms, he should have no right over the property.

The following extract from the judgment of the District Judge gives a summary of the contents of the *jimmapatra* :—

"As the decree to be passed in this case depends almost entirely on the construction placed on Exhibit 125, I will summarize it in English.

"It is described as a *jimmapatra* passed on the 13th August, 1892, by Chenvirappa, Guru, to Kotrabasappa bin Baslingappa, and after giving a list of the property recites that the said property is made over to Kotrabasappa for the performance of the worship and ceremonies of the math, the terms of agreement being as follows. Paragraph 1 stipulates that if Kotrabasappa should have a male child within a year or two, that child was to be made the guru's *mari* or disciple; failing to have a child, Kotrabasappa was to find a *mari* somewhere else to succeed plaintiff No. 1 in the math.

"Paragraph 2 requires defendant to feed and clothe the *mari*, and paragraph 3 to feed and clothe succeeding *maris* chosen by this one. Paragraph 4 authorizes defendant to deal with the tenants of the land, and paragraph 5 to pay the assessment, and so enjoy the property from generation to generation. Paragraph 6 states that the math and lands are to be kept in repair.

"Paragraph 7 states that the khâta was to be entered in the name of the *mari*, and never in that of defendant or his successors.

"Paragraph 8 states that, in case of defendant's failing to live in the math and keep the property in repair, he has to have no right to the property.

"Paragraph 9 provides that defendant should feed and clothe plaintiff.

(1) (1890) 13 Mad., 549.

"Paragraph 10 states that neither plaintiff No. 1, nor his successors, nor defendant or his successors, should have any power to alienate the property.

"Paragraph 11 requires defendant to act as required above, to manage the property from generation to generation, and render service to the guru and future gurus in matters of worship. If defendant failed to act as required above, he was to have no power or right over the property, but plaintiff No. 1 and succeeding gurus were to have it.

"It thus appears that the guru, who was at the time seriously ill, contemplated obtaining a successor to himself through defendant. Defendant was to serve the succeeding *maris*, and was to manage the land for their benefit, but was to have no right in it himself or his successors. Plaintiff No. 1 expected the arrangement to be permanent and last for generations, but, if defendant failed to do what was required of him, he was to have no right over the property."

On the 18th June, 1894, the plaintiff Chenvirappa sold the same properties to one Rudrapayya for Rs. 2,000. The deed of sale recited the above *jimmapatra*, but stated that the defendant had failed to act according to its terms.

On the 13th August, 1895, the plaintiff Chenvirappa filed this suit under section 39 of the Specific Relief Act (I of 1877), praying for a declaration that the *jimmapatra* was void, and that it might be delivered up to be cancelled. He alleged that the defendant had failed to act according to its terms; and that he (the plaintiff) had, therefore, cancelled and set it aside and had sold the property to Rudrappaya; that he was apprehensive that, if the *jimmapatra* was allowed to remain in the defendant's possession, injury might be caused to him (the plaintiff) and to the math, and he, therefore, brought this suit.

The defendant pleaded (*inter alia*) that the plaintiff had no right to sue; that he was in possession of the property as owner, and he denied that he had violated the terms of the *jimmapatra*.

On the 13th July, 1896, on his own application Rudrappayya was joined as co-plaintiff in the suit.

The Subordinate Judge held that the plaintiff had no right to bring the suit, and he, therefore, dismissed it.

On appeal by the plaintiff the District Judge reversed the decree, and passed a decree for the plaintiff, directing that the *jimmapatra* should be delivered up and cancelled.

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The defendant preferred a second appeal.

Scott and *Shamrao Vithal*, for the appellant (defendant):—Under the *jimmapatra* the plaintiff gave us possession. Subsequently he sold the property to the second plaintiff, and yet he brought the suit in his own name only. We contend that the plaintiff had then no interest in the property and was not entitled to sue *Iyyappa* v. *Ramalakshmamma*[1]. Further, there is no cause of action disclosed in the plaint. The plaintiff says that possession was not given to us. If so, then no cause of action has accrued to him. But, as a matter of fact, possession was given to us as found by both the lower Courts, and we submit that there are no circumstances in the case which would entitle the plaintiff to set aside the document. A deed can only be set aside under the circumstances mentioned in section 39 of the Specific Relief Act. We say that we are the owner, because the property is conveyed to us from generation to generation.

The next point is as to limitation. The suit as originally brought was not properly constituted. We submit that the subsequent addition of the second plaintiff did not cure the defect. Plaintiff No. 2 had the right to bring the suit, and when he was put on the record, four years had elapsed since the *jimmapatra* was executed. The suit is, therefore, clearly time-barred—*Hasan Ali* v. *Nazo*[2]; *Janki Kunwar* v. *Ajit Singh*[3]. Further, the suit cannot be maintained, because the plaint does not contain a prayer for consequential relief.

Macpherson and *Narayan G. Chandavarkar* appeared for the respondents (plaintiffs):—Under the *jimmapatra* the defendant was not to be the owner, but merely a manager. The first plaintiff is still the swámi of the math and is, therefore, interested in the property. At the most, the *jimmapatra* was an absolute conveyance subject to defeasance on defendant's failure to carry out the conditions mentioned therein. As to the joinder of the second plaintiff, we say that he is not barred by limitation. He has three years from the time at which the facts of the case became known to him. He was put on the record within three years of his pur-

(1) (1890) 13 Mad., 549. (2) (1839) 11 All., 456.
(3) (1887) 15 Cal., 58.

chase. Both the lower Courts have found that the defendant was put in possession. This is a finding of fact and it is binding in second appeal.

FARRAN, C. J. :—The original plaintiff in the suit, out of which this second appeal arises, sued to have it declared that a *jimmapatra* which he had passed in favour of the defendant on the 13th August, 1892, had been cancelled. The plaint was filed on the 13th August, 1895. The suit in the lower Courts has been treated as a suit to cancel or set aside an instrument not otherwise provided for, and as falling within the scope of article 91 of the second schedule to the Limitation Act, and such is doubtless its true nature. The period, within which it must be brought, is, therefore, three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him.

The original plaintiff was the swámi of a math. He had become old and blind and had no *mari* to succeed him. The *jimmapatra* which he executed in favour of the defendant need not be referred to in detail. In effect it appointed the defendant manager from generation to generation of the properties of the math upon certain conditions as to service, and provided that the defendant should give his son, if one should be born to him within a year or two, to the original plaintiff as his '*mari*', or in default of such a son should select a '*mari*' for the said plaintiff. It also provided that, in the event of the defendant failing to act according to its terms, the defendant should have no right over the property.

Subsequently on the 18th June, 1894, the original plaintiff by a sale deed of that date (Exhibit 124) reciting the above *jimmapatra*, and further reciting that the defendant had failed to act according to its terms, sold the properties of the math to the second plaintiff for the sum of Rs. 2,000. The second plaintiff was by amendment added as a plaintiff on the record on the 13th day of July, 1896. If the original plaintiff is not entitled to maintain the suit, the claim of the added plaintiff to sue would appear to have been time-barred at the time when he was added as a plaintiff to the suit.

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The first question which we have to consider, therefore, is whether the original plaintiff, under the circumstances of the case, was entitled to bring the suit. The law upon this subject is contained in section 39 of the Specific Relief Act, which enacts that "any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable." The District Judge considered that the original "plaintiff naturally thought it most dangerous to leave such a document (as the *jimmapatra*) in the hands of a man who was actually in possession of the lands as manager," and held that he was entitled to sue. We do not dissent from his view. It appears to us that, if the document is not cancelled, the added plaintiff, the purchaser, may sue the original plaintiff for a return of his purchase-money, if he cannot get possession of the lands by reason of the defendant holding them under the *jimmapatra*, and that thus the original plaintiff may have had reasonable apprehension of permanent injury. He was also in danger of the defendant suing him in respect of the lands of which the defendant had not obtained possession, for it does not appear that the defendant has obtained possession of all the lands; and there is, lastly, the suggested risk that the added plaintiff may not act fully up to the terms of his purchase and that the original plaintiff may be in a position to resume the lands. As to the judgment in *Iyyappa* v. *Ramalakshmamma*[1], which has been relied on for the appellant, we are not prepared to follow it if it was intended to lay it down, as a rule of law, that in no case can a man, who has parted with the property, in respect of which a void and voidable instrument exists, sue to have such instrument cancelled. The decision in the Madras case may be correct with reference to the facts before the Court, but we think that we ought not to depart from the wording of the section which we have quoted, or to add to it a condition which is not to be found in the section itself. The test is "reasonable apprehension of serious injury." Whether that exists or not, must depend upon the circumstances of the particular case with which the Court has to deal. In this view the question of limitation does not

(1) (1890) 13 Mad., 549.

arise. The suit was brought by the original plaintiff within three years of the date of the *jimmapatra*. Mr. Scott also contends that as the plaint averred that the defendant had not got possession of the lands, the defendant could not have broken the conditions of the *jimmapatra*, and that the suit must, therefore, be dismissed, even though the Courts have found that such averment has not been supported. We cannot allow this peculiarly technical argument to prevail. The plaint also averred that the defendant after the execution of the document began to act improperly, and not in accordance with its conditions. This averment the written statement traversed. We think that an issue should have been framed by the Court of first instance on this averment and traverse, which raised in fact the main issue between the parties.

Strangely enough, though the Court of first instance found that the defendant had obtained possession, in part at least, of the lands, the appellate Court did not raise an issue as to whether the original plaintiff was entitled to cancel the *jimmapatra* by reason of the defendant having broken its conditions, but that Court dealt with the appeal as if that issue had been before it. Its judgment on this point is as follows :—

"Defendant seems to have mistaken his position altogether, and almost as soon as the document was registered he discontinued attendance at the math and the personal service of plaintiff No. 1. Differences arose almost immediately, and finally plaintiff No. 1 sold the property and math by Exhibit 126 to plaintiff No. 2. How great was defendant's misapprehension is shown even by the pleadings in the case. * * * Defendant does not in his written statement attempt to make out that he did his duty and was entitled to remain in possession and retain his title-deed. He merely raised technical pleas and pleaded that under the terms of the deed he was in possession as owner. No further justification is needed for this suit."

There has been no ground of appeal to this Court directed particularly against that finding, but the grounds of appeal generally involve it. The District Judge has misread the pleadings and has based his finding upon the assumption that the defendant did not aver that he had acted up to the agreement. If he had raised a formal issue, the parties would have argued it, and he possibly would not have fallen into this error. We must send down the issue :—"Was the original plaintiff entitled

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to cancel the *jimmapatra* by reason of the defendant's non-observance of its conditions or for any reason?"

The District Judge to be at liberty, if he considers it necessary, to record frosh evidence. Findings to be certified within two months.

Issue sent down.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *August* 16.

RAMCHANDRA (ORIGINAL PLAINTIFF), APPLICANT, *v.* GANESH (ORIGINAL DEFENDANT), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), *Sec.* 25—"*Court of Small Causes*"—*Meaning of the expression—A Court invested with Small Cause Court powers not a Small Cause Court within the section—Appeal.*

The expression "a Court of Small Causes" in the last clause of section 25 of the Code of Civil Procedure (Act XIV of 1882) means a Court properly and strictly so called, and does not include a Court invested with the jurisdiction of a Court of Small Causes.

Mangal Sen v. *Rup Chand*(1) dissented from.

APPLICATION under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiffs filed a suit to recover Rs. 49-15-11 as their share, for the years 1890-91, of the profits of a khoti village from the defendant, who was the managing khot.

The suit was originally filed in the Court of the First Class Subordinate Judge at Ratnágiri, who was invested with the jurisdiction of a Judge of a Court of Small Causes under section 28 of the Bombay Civil Courts Act (XIV of 1869).

The suit was afterwards transferred to the Court of the Assistant Judge by the District Judge under section 25 of the Civil Procedure Code (Act XIV of 1882).

The Assistant Judge passed a decree for the plaintiff.

On appeal the District Judge reversed the decree and rejected the plaintiff's claim.

*Application, No. 72 of 1898.

(1) (1891) 13 All., 321.