APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

BALAJI VALAD RAOJI KOLHE (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGADHAR RAMKRISHNA KULKARNI (ORIGINAL DEFENDANT), RESPONDENT.*

1908. *January* 28.

Fraud—Allegations of—Particulars constituting fraud should be given—Issue in cases of fraud—Practice.

It is an elementary rule of law that where fraud is set up, particulars of it must be given and it must be based upon a specification of the acts relied upon as constituting fraud.

Per CHANDAVARKAR, J. :—It is a matter of supreme importance and necessity that a case of fraud should not be the subject of a mere vague allegation in the plaint or written statement; but that it shall be supported by particulars; and that if that condition is not complied with, the party relying on a case of fraud, shall not be allowed to raise that case in the form of an issue. It is generally advisable, indeed, when framing an issue on the point of fraud, to set forth in the issue itself a brief statement of the fraud alleged, or at least to refer to the passage in the pleadings where it is specified. If this be made an invariable practice, the door will be closed to vague and indiscriminate allegations.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, confirming the decree passed by V. V. Bapat, Subordinate Judge at Pimpalgaon.

Suit to redeem a mortgage.

On the 10th June 1870, the ancestor of the plaintiff conveyed to the ancestor of the defendant certain lands to hold for twenty years.

In 1871 one Ramlal obtained a money decree against the ancestor of plaintiff and in execution of that decree the right, title and interest of the plaintiff was sold to one Rajaram in the year 1877 and in the year 1878 was bought by the ancestor of the defendant.

The plaintiff brought this suit in 1904, to redeem the mortgage of 1870.

* Second Appeal No. 22 of 1907.

1908.

BALAJI v. GANGADHAR.

The Subordinate Judge held that the defendant had become the owner of the land in dispute on account of his purchase in 1878; that it was not proved that the decree and the auction sale and the defendant's purchase from the auction-purchaser were collusive and fraudulent; and that the claim was barred by the defendant's adverse possession for over twelve years.

On appeal this decree was confirmed. The learned District Judge held that if the conveyance of 1870 were a mortgage the purchase by the defendant in 1877 did not extinguish the equity of redemption, for "the proceeding was wholly collusive and probably engineered by the defendant's father through his relations and friends. Practically then he himself brought the residuary rights of the plaintiff to sale and bought them himself. This being so, this sale would be inoperative to extinguish those residuary rights if they were rights to redeem a mortgage." The learned Judge further held that the document of 1870 must be construed not as a mortgage but as a lease. It was therefore not open to the defendant to lawfully buy the fee simple of the property at a Court-sale: the sale of 1877 was inoperative and the suit was long since barred.

The plaintiff appealed to the High Court.

D. A. Khare for the appellant.

M. R. Bodas for the respondent.

CHANDAVARKAR, J.:—We are unable to agree with the two Courts below in holding that the deed on which the appellant sued is a lease and not, what it expressly purports to be, a mortgage. The description of it by the parties as a mortgage-deed is, indeed, not conclusive; but the terms of it leave no doubt that the land specified in it was intended to be security for the payment of Rs. 187 paid to the executant by the party in whose favour the deed was executed. The deed says: "When you receive the proceeds, according to what is stated above," (*i.e.*, by cultivation of the property during twenty-one years), "the said amount of rupees borrowed from you is to be (considered) as paid up." That plainly means that the land was to be regarded as security for the debt. Then it proceeds: "Nothing is then to be due from us"—that is, the amount of Rs. 187 was treated as a debt, which, if satisfied out of the proceeds of the land, was to be treated as liquidated. So also the deed says further on: "Your rupees are paid up when you get the proceeds without obstruction for twelve years." If there is obstruction, and no proceeds are realized, the executant undertakes to make up the loss. All these conditions are inconsistent with any intention to treat the sum of Rs. 187 as a mere rent paid in advance for the period of twenty-one years.

The District Judge has indeed found upon the hypothesis that the deed is a mortgage that the transactions of 1877-78 did not operate to extinguish the equity of redemption, because, he observes, "the proceeding was wholly collusive and probably engineered by the defendant's father through his relations and friends." We are, however, unable to accept this finding as one of fact conclusive in law in the absence of any reasons given by the District Judge and in the face of the Subordinate Judge's careful discussion of the evidence, in the course of which he has pointed out that the plaintiff alleged no fraud in the plaint but made a mere vague allegation of it in a *purshis*. It is an elementary rule of law that where fraud is set up, particulars of it must be given and it must be based upon a specification of the facts relied upon as constituting fraud. No such particulars being given in the plaint, the Subordinate Judge ought to have required the plaintiff to amend his plaint by specifying the fraud alleged; and, in case of failure by him to amend, the Subordinate Judge ought to have refused to enter into the question. Instead of that, the Subordinate Judge allowed an issue to be raised covering the case of fraud. Procedure of this kind is very much to be deprecated, because it encourages loose pleadings and false cases. We desire to impress upon Subordinate Judges the supreme importance and necessity of insisting that a case of fraud shall not be the subject of a mere vague allegation in the plaint or written statement, but that it shall be supported by particulars; and that if that condition is not complied with, the party relying on a case of fraud, shall not be allowed to raise that case in the

1908.

BALAJI
v.
GANGADHAR.

form of an issue. It is generally advisable, indeed, when framing an issue on the point of fraud, to set forth in the issue itself a brief statement of the fraud alleged, or at least to refer to the passage in the pleadings where it is specified. If this be made an invariable practice, the door will be closed to vague and indiscriminate allegations such as that which we find in the present case. We are constrained to make these remarks because we observe that a lax practice in this respect has grown in the mofussil Courts much to the detriment to justice and honest pleading.

In the present case, though the allegation as to fraud was vague, both parties went to trial on an issue raised on the question; and it is too late now for us to hold that the plaintiff ought not to have been allowed to rely upon that case. The Subordinate Judge found on that issue against the plaintiff on the ground that there was no evidence of fraud but it is not clear whether by that he meant that there was no evidence satisfactory to his mind or no evidence at all. The District Judge, as we have already remarked, has found on the question in favour of the plaintiff without giving any reasons or any discussion of the evidence and without apparently taking into consideration what the Subordinate Judge has pointed out, viz., the fact that the plaintiff's case as to fraud is of a vague character. The question is one into which the District Judge should enter with thoroughness. As his decision is based upon the preliminary question—whether the deed sued on is a lease or a mortgage—and as we differ from him on that question, we reverse the decree and remand the appeal for disposal according to law with reference to the foregoing observations. Costs shall abide the result.

R. R.