

*Referred Case.*1867.
Sept. 26.

SHANKAR BA'PU *Plaintiff.*
 VISHNU NA'RA'YAN and others *Defendants.*

Mortgage—Registration—Surety—Act XIV. of 1864, Sec. 13.

In a suit against a principal and two sureties, to recover the amount advanced on a bond by which certain immoveable property was mortgaged, one of the sureties appeared, and contended that he was discharged from his liability, in consequence of the plaintiff's neglect to have the bond registered :—

Held that the surety was discharged, as he could only be liable by virtue of the mortgage bond, which, being invalid for want of registration, could not be used against him.

The principal, however, might be sued as for money lent, if the loan could be proved by other evidence.

CASE referred for the decision of the High Court, under Sec. 1 of Act X. of 1867, by Janárdan Vísudevji, Judge of the Small Cause Court at Puná.

“ In this suit one Shankar bin Bápu sues one Vishnu bin Náráyan as principal, and two others as sureties, on a mortgage bond, dated the 14th of December 1865, for Rs. 230, abandoning his lien on the house which was mortgaged.

“ One of the defendants, Mahádev, only enters appearance, and pleads :—(1) That the mortgage bond has not been registered, and that, therefore, under Sec. 13 of Act XVI. of 1864, which was then in force, it cannot be enforced ; (2) that he, defendant Mahádev, being one of the sureties, is discharged from his liability, in consequence of the plaintiff's neglect to have the mortgage registered.

“ In regard to the first point taken by defendant Mahádev, the section of the Registration Act relied upon by him appears to me decisive. Under it no instrument creating, transferring, or extinguishing any right, title, or interest of the value of Rs. 100 or upwards in any immoveable property can be admitted in evidence, unless it has been duly registered. The mortgage bond in question, creating as it does an interest in immoveable property of the value of upwards

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of Rs. 100, cannot, therefore, for want of registration, be admitted in evidence to prove the contract of mortgage, and cannot, consequently, be declared upon, as is done in this suit.

“ The Registration Law, however, does not visit the omission to register with a forfeiture of the consideration for which an instrument is executed. I am, therefore, of opinion that the plaintiff can recover, on the common money count, the amount of the loan or debt for which the mortgage bond in question has been executed; and this he may be allowed to do in the present action by amending the plaint; but whether in that case he can use the mortgage bond simply to show the fact of the money having passed, or of the existence of the debt for which it was executed, is a point on which I feel doubtful.

“ Adverting to the second question raised by defendant Mahádev, I am of opinion that the mortgage bond, being incomplete, inasmuch as it has not been registered as required by the law, is not binding on any of the parties to it. Besides, defendant Mahádev is one of the sureties, and a surety is, under the English Law, discharged from his liability when he is deprived of the benefit of the security which the creditor held. In this case, the sureties have been deprived of the benefit of the security which the contemplated mortgage would have afforded for the payment of the debt, if it had been registered according to law. The omission in this respect, applying the principles of the English Law to this case, would go to discharge defendant Mahádev and the other surety from their liability.”

PER CURIAM (COUCH, C.J., and NEWTON, J.):—The mortgage cannot be used to prove the loan of the money; but if the loan can be proved by other evidence, the party, by whom the money was received, may be sued for it as for money lent.

But the defendant Mahádev appears to have been only a surety, and not himself to have received any portion of the money; and is, consequently, liable only by virtue of the mortgage bond, which, being invalid, cannot be used against him.