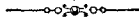


1868.
 VYASRAV
 BALAJI
 v.
 SURHAJI
 NARA'YAN
et al.

present action, by providing that the Civil Courts shall not take cognisance of any suit, brought on a cause of action, which shall have been heard and determined by a court of competent jurisdiction in a former suit between the same parties. That the cause of action on which the present suit was brought was heard and determined in the former action is unquestionable, and it is sufficiently evident from the circumstance that the Principal Şadr Amín considered his decree in the previous suit to furnish sufficient ground for the decree now appealed against, and the language of the section referred to is too absolute to permit of any exception being made on the grounds which have been pleaded, that the Principal Şadr Amín admitted in the first suit the right of the respondents to the full share claimed, and that they then failed to obtain a decree for it only through a mistake as to the stamp, which they would have corrected had it been pointed out to them by the Court.

The decrees of the courts below are reversed, and the respondents must bear all costs throughout.

WARDEN, J., concurred.



1867.
 Dec. 2.

Special Appeal No. 505 of 1867.

AHILOJI valad KHANDOJI *Appellant.*
 DONGAR HARICHAND GUJAR *Respondent.*

Mortgage Deed—Secondary Evidence—Acknowledgment of Title—Act XIV. of 1859, Sec. 1., cl. 15.

Where the defendant denied a mortgage to his father set up by the plaintiff, the latter was held at liberty to give secondary evidence of its execution and contents.

Held that an acknowledgment of title, under cl. 15, Sec. 1. of Act XIV. of 1859, need not be made to the mortgagor, or his representatives.

THIS was a Special Appeal from the decision of A. C. Watt, Acting Assistant Judge of Puñá, in Appeal Suit No. 360 of 1865, confirming the decree of the Munsif of Júnar.

The plaintiff sued to redeem certain mortgaged properties alleged to have been mortgaged by his grandfather to the defendant's father, the last of which mortgages he stated was made in A.D. 1835.

1857.
 AHILLOJI
 KHANDOJI
 v.
 DONGAR
 H. GUJAR.

The defendant admitted two mortgages, dated respectively A. D. 1785 and A. D. 1792, but denied the mortgage of 1835, and so pleaded that the suit was barred by the Law of Limitation.

The Munsif held that the suit was barred.

In appeal, the Acting Assistant Judge, being of a similar opinion, confirmed the Munsif's decree.

Bhairavanáth Mangesh for the special appellant.

Dhirajlál Mathurádás for the special respondent.

The following points were raised and argued in the special appeal:—

- (1) That the appellant's claim was not barred by the Law of Limitation ;
- (2) That the respondent's father having acknowledged in writing the title of the mortgagor and his right of redemption, in exhibit No. 42 (a deposition made by him before a Máhalkari), the Assistant Judge should have counted the period of limitation from the date of that acknowledgment, according to cl. 15, Sec. 1. of Act XIV. of 1859 ;
- (3) That, the respondent having denied the mortgage of 1835, the Assistant Judge erred in holding that the appellant was not competent to adduce secondary evidence of its existence and contents ;
- (4) That the respondent was estopped from denying or disputing the mortgage of 1835 by his own admission contained in the deposition No. 42 ; and
- (5) That the Assistant Judge should have determined whether No. 42 was genuine.

The authorities cited in the argument were *Dur Gopal Singh v. Kasheeram Panday*, 3 Calc. W. Rep., Civ. R. 3, and *Batchelor v. Middleton*, 6 Hare 75.

1867.
 AHILJI
 KHANDOJI
 v.
 DONGAR
 H. GUJAR.

COUGH, C. J. :—The plaintiff sues to redeem several mortgages alleged to have been made by his grandfather to the defendant's father. He stated that the latest was made in the year 1835, and was of such a nature that it operated as an acknowledgment of the previous mortgages.

The defendant admitted two mortgages only, which were beyond the period of limitation, and in effect denied the mortgage of 1835.

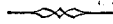
The Assistant Judge says "what the appellant's (plaintiff's) pleader wants to show is, that exhibits Nos. 12 and 13 (the two mortgages admitted by the defendants) are extended, as it were, as regards their limitation, by No. 44, which is dated A.D. 1835, and which, if true, would establish the plaintiff's claim. Whether it is true or not need scarcely occupy much time in considering. In the first place it is a copy, and the absence of the original is not accounted for; and even had the original been present, it would have been required to have been proved by the writer of it and a witness. A copy, I hold, under such circumstances, that is, when a claim to immoveable property is founded on the original, could never be receivable." But he seems to have overlooked that an unsatisfied mortgage-deed would not ordinarily be in the possession of the mortgagor. It is the defendant, the mortgagee, in whose custody it would be expected to be found, and, under the circumstances, he was in error in holding that secondary evidence was not receivable.

It is further contended by the special appellant that the mortgagee having, in his deposition before the Māhālkari, exhibit No. 42, acknowledged the mortgagor's title and his right of redemption, the period of limitation should be counted from the date of this acknowledgment, under cl. 15, Sec. 1. of Act XIV. of 1859. Considering that the word "given" is used in this clause, there might be a question whether the acknowledgment required is not an acknowledgment to the mortgagor. But without express words of the Legislature to that effect I do not feel bound to put that strict construction upon the clause. I think the words

“given in writing” are equivalent to “made in writing,” and that any acknowledgment whatever, if in writing and signed by the mortgagee, is sufficient. I am fortified in this opinion by the ruling of the Calcutta High Court, in S. A. No. 118 of 1865, reported in 3 Calc. W. Rep. Civ. R. 3, 4, and the judgment of the Vice-Chancellor in *Batchelor v. Middleton (ubi supra)*. The decree of the Assistant Judge must, therefore, be reversed, and the case remanded for re-trial with reference to the foregoing observations.

GIBBS, J., concurred.

Decree reversed and suit remanded.



Special Appeal No. 332 of 1868.

1868.
Sept. 17.

BA'I GANGA', daughter of Lálá Kúvarji... *Appellant.*
DULLABH PARA'G *Respondent.*

*Ejectment—Admission of Tenancy—Presumption of Perpetual Lease—
Tenant from year to year—Reg. V. of 1827, Sec. 1.*

Although a person is admitted to have been in possession as a tenant for more than thirty years, yet the presumption of law is that he is only a tenant from year to year, and such tenant may be ousted by the proprietor, unless here is evidence or strong counter-presumption of his right to hold on a perpetual lease.

Reg. V. of 1827, Sec. 1, does not apply to such cases.

THIS was a Special Appeal from the decision of George Ayerst, Acting Assistant Judge of the District of Súrat, in Appeal Suit No. 282 of 1867, confirming the decree of the Munsif of Balsád.

The plaintiff brought a suit to eject the defendant from a piece of land.

The defendant stated that he had been in possession for more than thirty years, and that there being no lease or agreement to show the nature of the original tenancy, he could not be ousted so long as he paid rent.

The Munsif gave a decree for the defendant, which was confirmed on appeal.

1867.
ARILOJI
KHANDOJI
v.
DONGAR
H. GUJAR.