

Suit No. 376 of 1869.

1869  
Oct. 15.

Tukaram Vithoji....       ...       ...       ... *Plaintiff.*  
 Khandoji Malharji.       ...       ...       ... *Defendant.*

*Mortgage bond—Collateral security—Registration—Evidence—  
 Act XX of 1866, Secs. 17 and 49.*

*Held, by* Couch, C. J., following the decisions of the Calcutta and Madras High Courts, but doubting,\* that an unregistered bond, whereby immoveable property was pledged by way of collateral security, was admissible in evidence where effect was sought to be given to it for the purpose of obtaining a decree for the money due under it.

This suit was brought to recover the sum of Rs. 2,000, and interest thereon at the rate of 12 per cent. per annum from the 30th of August 1866, due from the defendant to the plaintiff, on a bond in the Marathi language, bearing date the 30th of August 1866.

The plaint was subsequently amended by the insertion of the common money counts.

The bond as translated, was as follows :—

“Mortgage bond (Shri) the 5th of Shravan Vad, Shake 1788 (30th August 1866), on that day this bond is written. To the creditor, namely, Rajashri Tukaram bin Vithoji Patil Kased, residing at Bombay, (from) the debtor Khanduji bin Malharji Patil and Gangaram bin Khunduji Patil, residing at Bombay. We give this mortgage bond in writing to you as follows:—We have borrowed from you principal (the sum of) Company Rupees 2,000. As to the interest thereon we shall go on paying the same at the rate of Rs. one per cent. per mensom. As security for your said money we have mortgaged to you by way of first mortgage our own *mirasi* two houses, which have been purchased by us. The particulars thereof are as follows:—The two houses, bearing Government Nos. 80 (and) 81, have been mortgaged to you. The documents (*i.e.*) deeds of sale of those houses have been deposited with you—(here were inserted the particulars of the deeds;—in all two deeds have been deposited with you. On the day we pay your principal money and interest we shall redeem from you the above two documents and houses. We have received the above money in ready cash in full. Out of (the same), money has been paid to Sadhu

\* NOTE—It has been since held in the case of *Sangappa v. Basappa*, decided on the 18th January 1870, by Couch, C. J., and Melvill, J. (to be reported) that where a mortgage bond contained an express promise to pay the money secured by it, such bond, though not registered, could be put in evidence in a suit for the recovery of the money.—Ed.

Gurlay. His bonds which we have redeemed are with you, and one certificate of the house and two deeds of sale and four documents of Sathu Gurlay; in all seven documents are with you. Therefore we shall pay your principal money and interest and redeem our documents. There is now no dispute whatever on the part of us both with regard to the payment of the money.

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We shall pay the principal mency, together with the interest, and redeem our houses and documents. We have duly given in writing this mortgage bond in our sound sense and understanding, and of our free will and pleasure. We shall go on paying you the interest for the above mentioned money (and) interest. We shall pay jointly and severally. We shall not plead the absence of one another. We shall pay the money in this country, or any other country wherever you may demand it. We shall not raise any dispute whatever. We both persons have received the money in ready cash in full. There is now no dispute regarding the payment. We have duly given this mortgage bond in our sound sense and understanding.

(Signed)

I. The signature of Khanduji bin Mulharji Patil, residing at Bombay; his own handwriting; Rs. 2,000, two thousand.

Signatures of attesting witnesses follow here.

I. ( Blank. )

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The defendant put in a written statement, in which he alleged that the mortgage bond had not been registered, and that therefore, under Sec. 49 of Act XX. of 1866, it could not be enforced.

He further alleged that the transaction was an incomplete one, and that the Rs. 2,000 had never in fact been advanced.

The suit came on for hearing before Couch C. J., on the 11th October 1869.

*Scoble and Latham* for the plaintiff.

*Marriott and Macpherson* for the defendant.

On the case being opened, a preliminary issue was raised whether the bond sued upon could be received in evidence.

*Macpherson* for the defendant:—The bond in question, in the words of Sec. 17 of Act XX. of 1866, “creates an interest in immoveable property.” It must therefore under that section be registered, and within four months for its execution under Sec. 22, or within the enlarged time given by Sec. 24 on payment of the penalty. This has not been done. Sec. 49

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points out the effect of such omission : "No instrument required by Sec. 17 to be registered *shall be received in evidence in any civil proceeding in any Court \* \* \**, or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act." It is submitted that the effect of this section is to prevent an unregistered document of this kind from being used in evidence for any purpose whatever.

*Latham* for the plaintiff:—There are no words of conveyance in this bond ; it therefore does not create any interest in land. It is a mere memorandum accompanying an equitable mortgage. (Couch, C. J. :—For many years instruments in this form have been enforced by the courts as instruments creating an interest in land.

Although for the purpose of enforcing rights against the land mentioned in it, the bond is useless, it may be received in evidence and acted upon so far as it is a money bond when the land is pledged as a collateral security merely ; this is now established: *Woodoy Chand Jana v. Nitye Mundal (a)* ; *Gopal Pershad v. Mussamat Nuzzeranee (b)*, *Vellaya Padyachy v. Moorthy Padyachy (c)*. He also cited *Shankar Bapa v. Vishnu Narayan (d)*.

*Macpherson* in reply.

The Chief Justice said that, as he was then advised, he thought the document did create an interest in immoveable property, and that such documents had before been acted upon as creating such an interest, but that he would look into the point, and also consider the cases that had been cited and directed the case to stand over till the next day the Court sat upon the original side.

15th October—Couch, C. J., said that he had looked into the cases, and though he did not altogether concur in them, yet that he would follow them, and admit the bond in evidence, leaving it to the defendant, if he wished, to raise the question in the Court of Appeal.

(a) 9 Cal. W. Rep. Civ. R. 111.

(b) 10 Ibid 252.

(c) 4 Mad. H. C. Rep. 174.

(d) 4 Bom. H. C. Rep. A. Cl J. 79.

Two further issues were then framed:

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I. Whether the defendant received any consideration for the bond.

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II. Whether the defendant was indebted to the plaintiffs as in the plaint alleged.

From the evidence adduced for the plaintiff it appeared that there had been dealings between the plaintiff and the defendant, but that the debt arising from them was barred by the law of limitation at the date of the bond, and that at that time no money was advanced by the plaintiff.

Couch, C. J.:—If the bond is admissible in evidence the plaintiff is entitled to recover upon both issues—on the bond, and on the money counts; for the bond, if admissible, operates as an acknowledgment, so as to take the original debt out of the law of limitation. There is no ground for the contention that the bond does not create an interest in land. As creating a mortgage it is a form in constant use. Looking at the terms of Sec. 49, I should have great difficulty in allowing the bond to be put in evidence were it not for the cases at Calcutta and Madras. The words of the section are very strong. These cases, I may remark, were not argued by counsel, but they may be upheld on the ground that there are two instruments containing in the same paper; one, the contract to pay the money, and the other the mortgage. I give judgment for the plaintiff for Rs. 2,000, and interest at 12 per cent. per annum from the 30th August 1866 to this day. Costs and interest on judgment.

Attorneys for the plaintiffs—*C. E. and F. Stanger Leathes.*

Attorneys for the defendant—*Thacker and Chalk.*