

1869 355 of the Code. This section applies not merely to a case where the lower Court has refused to take evidence, but also where there is a substantial cause for taking further evidence, and here there was a substantial cause, not only to justify but to require the admission of additional evidence by the Assistant Judge. We, therefore, reverse the decree of the Appellate Court and remand the case to be dealt with in accordance with this judgment.

Appa Kashinath
v.
Vithoba Tukaram

NEWTON, J.—Concurred.

Case Remanded.

Special Appeal No. 82 of 1869.

April 19. Vithal Mahadev *et al.*... .. Appellants.
Daud valad Muhammad Husen *et al.*... .. Respondents.

Ancient Documents—Proof—Thirty years' rule.

With regard to the proof of ancient documents the proper rule is, that if they are more than thirty years old they need not be proved provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use and are free from suspicion of dishonesty.

Application of this rule considered.

Hari Dhangar v. Biru Dasru (5 Bom. H. C. Rep. A. C. J. 135) commented upon, and error in note thereto pointed out.

The rule, that if the owner of different estates mortgage them to one person separately for distinct debts or successively to secure the same debt the mortgagee may insist that one security shall not be redeemed alone, applied to a Muhammadan mortgage.

In mortgage transactions in which the mortgage contracts have been entered into before Act XXVIII. of 1855 came into operation and to which Reg. V. of 1827 secs. 11 and 12 applies, and in which an account of principal and interest on the one side and of rents and profits on the other side is not directed, the arrears of interest must be limited to six years.

This was a Special Appeal from the decision of R. F. Mactier, Judge of the District of Sattara, in Appeal Suit No. 428 of 1867, amending the decree of the Principal Sadr Amin of Sattara.

The case was heard this day before COUCH, C. J., and
NEWTON, J.

1869

Vithal Mahadev
et al.

v.

Daud Muham.
mad Husen
et al.

Shantaram Narayan for the Appellants.

Vishvanath Narayan Mandlik for the Respondents.

The facts of the case appear sufficiently from the following judgment delivered by.

COUCH, C. J.—In this case the three plaintiffs, one of them being the son of one brother and the others grandsons of another brother, sued to redeem a mortgage upon certain property which they alleged was in the possession of the defendants. The plaintiffs stated that they did not know the amount of the mortgage, and prayed that the defendants might be required to render an account and to give up the land on payment of the amount that might be found due. It is clear, though there is no finding on the point, that the defendants had been in possession for such a length of time that the plaintiffs would have been barred if they had not sued as mortgagors. The defendants set up two mortgages (Exhibits Nos. 6 and 7). No. 6 purported to have been executed by the father of the first plaintiff, and No. 7 had been executed by the first plaintiff himself. No. 7 was admitted by the plaintiffs, but No. 6 was disputed and the plaintiffs contended that it was not executed at all; or that, if it was executed, it did not apply to the land in dispute.

The munsif decreed that the land should be redeemed on payment of the amount due under No. 7. On appeal, by the defendants, the Judge laid down the point,—“what is the amount of the defendant's mortgage claim on No. 6, and is it proved?” and he found that No. 6 was proved. The grounds of his finding were, that it was much more than thirty years old; that, having been produced by the representatives of the mortgagee, it came from proper custody, and that he saw no reason to believe that it was either concocted or satisfied. This finding is objected to and in support of the objection the case of *Hari Dhangar v. Biru Dasru (a)* is cited.

1869

Vithal Mahadev
 et al
 v.
 Daud Muham-
 mad Husen
 et al

In that case the Assistant Judge, having held that a document which came from proper custody and which was more than thirty years old proved itself, the Division Court held that the decree was erroneous, and the decision in Special Appeal, No. 966 of 1864, was referred to as laying down the rule as to the proof of ancient documents. The rule laid down in Special Appeal No. 966 of 864 was, that documents more than thirty years old need not be proved, provided that they have been so acted upon, or brought from such a place, as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty. That I consider to be the proper rule on the subject; but I cannot concur in the application of it by the Division Court in the case quoted. In Special Appeal No. 966 of 1864, the District Judge, although the document was more than thirty years old, thought from the circumstances of the case that there was suspicion attaching to it, and he therefore found that it was not proved. In Special Appeal it was urged that, as the document was thirty years old and came from proper custody, the Judge was bound to find proved and to give effect to it. We, however, held that he was not bound to do so if he thought it was not free from suspicion. Another case, Special Appeal No. 229 of 1868, is referred to in a note to the reported case, in which there were three documents more than thirty years old, but the Judge required the same proof of them as if they had been modern documents, and we held that he was wrong in doing so. The note referred to which represents me as having followed the ruling in the case of *Hari Dhangar v. Biru Dasru* (*supra*) is not correct. In both the cases in which I sat I applied the rule, but not in the manner in which it was applied in the case of *Hari Dhangar v. Biru Dasru*. In the first case, I held that the Judge was not bound to give effect to the document, merely because it was more than thirty years old and came from what might be considered proper custody. In the other, I held that the Judge ought to have had regard to the rule of law as to the proof of ancient documents, and not to have required them to be proved in the

ordinary way, whereas in the case of *Hari Dhangar v. Biru Dasru* (*supra*) it does not appear that the Judge entertained any suspicion of the genuineness of the document.

1869

Vithal Mahadev
et al.
v.
Daud Muham-
mad Husen
et al.

* In the case now before us the Judge finds the document No. 6 to be more than thirty years old and to have come from proper custody; and, as there is no expression of distrust respecting it, it should be considered to be proved.

The Judge holds that it ought not to have effect in favour of the appellants, the mortgagees, because it is not shown that it applied to the forty bighas of land in dispute. We, however, consider that he was not justified in requiring further proof on this point, since the second mortgage, No. 7, contains words which show that there had been a previous mortgage; viz., "our land is with you for liquidation of debt." And, as there is no evidence of any other previous mortgage than that shown by Exhibit No. 6, the Judge might fairly have held it to be the one referred to. This is a question of fact, and it might be that on this we could not interfere with his decision but in point of law he was wrong in his finding. No. 7, as I have just observed, showed that there was a previous mortgage debt and, according to the doctrine of Equity, "if the owner of different estates mortgage them to one person, separately for distinct debts, or successively, to secure the same debt, or the same debt with further advances, the mortgagee may insist that one security shall not be redeemed alone; upon the principle that redemption being an equitable right, the person who redeems must on his part do equity towards the mortgagee, and redeem him entirely—not taken one of his securities, and leaving him exposed to the risk of deficiency as to the other." (b).

Here the mortgagors seek to redeem No. 7, and it is found that there is another mortgage between the same parties, though possibly not of the same land; the Court will not therefore assist the plaintiffs who seek to redeem, unless they are ready to do equity by paying off all the mortgages.

(b) Fisher on Mortgage, 2nd Ed. Vol. II. P. 678.

1869

Vithal Mahadev
et al
 v.
 Daud Muham-
 mad Husen.
et al.

It is true that the bond, No. 6, was not executed by more than one of the members of the family, but the plaintiffs, though Muhammadans, have sued jointly as if they were members of a Hindu family and appear to have followed the Hindu custom, and treated the property as joint family property. The second and third plaintiffs cannot now be allowed to say that the maker of the bond, No. 6, was not competent to bind them. He was in all probability acting as the manager of the family.

As regards interest, the lower Court has ruled that no more than six years' interest should be allowed in this case. Against this, Mr. Shantaram has cited the decision of the present Bench in *Bahirji v. Balkrishna* (Special Appeal No. 638 of 1866, decided on the 30th July 1867), where it was held that the proper way to take an account between mortgagor and mortgagee was to give credit for the rents and profits and to charge the interest from the date of mortgage. But where the profits are by agreement to be received in lieu of a portion of the interest, no account can be taken of the profits, and the remaining portion of the interest must only be allowed for six years. The Exhibit, No. 6, provided that for a part of the debt no interest should be charged, but that the profits should be enjoyed in lieu of interest. Where the Court does not order an account to be taken of the interest on the one side and of the rents and profits on the other, we have held that in cases to which Reg. V. of 1827, secs. 11 and 12 applies—that is, cases where the contracts were made before Act XXVIII. of 1855 came into operation—the arrears of interest must be limited to six years. The effect is that where an account is not ordered, the parties are put into the same position as if the suit was simply one to recover the principal money and interest. We must, therefore, modify the decree according to the views above expressed, by adding to the sum allowed the principal sum due under the bond, No. 6, and six years' interest on the amount which bore interest according to the terms of the bond, and we must also decree that the plaintiffs do redeem the mortgaged property, on payment of the aggregate sum, within six

months from the date of this decree, or that, in default, they be foreclosed of all right or equity of redemption in or to the said property.

1869

Vithal Mahadev
et al.
v.
Daud Muham-
mad Husen
et al.

Newton, J.—Concurred.

Decree modified.

Referred Case.

Balaji Mahadev. ... *Plaintiff.*
Krishnaji bin Chinnaji et al. ... *Defendants.*

April 20.

Stamp—Single document containing two contracts.

Where a document contained two distinct contracts requiring separate stamps, but the whole was impressed with one insufficient stamp it was held, that, this stamp might be taken into account in making up the aggregate of the stamps required.

Case stated for the opinion of the High Court by Janardan Vasudevji, Judge of the Court of Small Causes at Puna under sec. 22 of Act XI. of 1865:—

“The two suits have been instituted by the same plaintiff against two different individuals and against their surety, who is the same in both cases, on a promissory note which runs as follows:—

“We, Sambhu bin Mahadji Khengra and Krishna bin Chinnaji Khengra, Thalkari of Mouje Rihe, Tarf Pavan Maval, execute this note unto Balaji Mahadev Ketkar, to wit, that we purchased from you, on the 5th Vaishakh Vadya, the following quantities of grass at Rs. 20 per 1,000 bundles out of the stock which you had bought at Mouje Rihe, namely:—

“I, Sambhu bin Mahadji Khengra, (bought) 500 bundles of grass, the price of which is.....Rs.	10	0	0	
“I, Krishnaji bin Chinnaji Khengra, (bought) 400 bundles of grass, the price of which is.....	Ra.	8	0	0
<hr/>				
“Total Rs.....	18	0	0	

In words, eighteen. Interest on this is to run at one per cent. per mensem from the date on which the grass was purchased. We promise to pay the principal with interest in the month of Margashirsh of the cur-