

PER CURIAM :—The District Judge speaks of a certificate of sale which has not been registered; but the Court cannot find that the appellant ever received any certificate of sale. A certificate of sale ought to have been granted to him, for what he purchased was not a mere paper on which the decree was written, but the interest in immoveable property which was recoverable under that decree, and such interest must be regarded as immovable property within the meaning of Section 259 of the Code of Civil Procedure. The Subordinate Judge who directed the sale should have given to the appellant a certificate of sale in accordance with that Section, and he should be directed to do so now. The appellant can get such certificate registered, and apply again for execution of the decree. The present order of the District Judge is confirmed.

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DRA
P. JOSHI,
GANESH
RA'MCHAN-
DRA
P. GANESH.

Order confirmed accordingly.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 396 of 1871.

Jan. 10.

VALLABH BHULÁ' *Appellant.*
RA'MA', heir of LAKHA' JIVAN, deceased ... *Respondent.*

Suit heard and determined—Civ. Proc. Code Sec. 2—Misdescription of document—admissions.

In 1864 the original plaintiff, Lakhá Jivan, as heir of Fakirá, brought a suit against Jánki, the guardian of Fakirá, Jivan Jivráj, Jivan Bhulá, and Vallabh Bhulá, to recover a piece of land. The suit was rejected, as it was proved that (though the plaintiff was the heir of Fakirá) Fakira's guardian had mortgaged the land for necessary purposes to Vallabh Bhulá. The plaintiff then sued Vallabh Bhulá for redemption of the mortgaged premises.

Held that the second suit was not barred under Sec. 2 of the Code of Civil Procedure.

Held also that the fact of the document under which Vallabh Bhulá held the land being described in the Court's judgment in the earlier suit as an instrument of sale was not conclusive in the second suit as to the real nature of the instrument.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of the District of Súrat.

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The plaintiff, Lakhá Jivan, in 1864, brought a suit in the Oolpád Munsif's Court against Bái Jánki, guardian of one Fakira, Jivan Jivráj, Jivan Bhulá, and Vallabh Bhulá to recover a piece of land situated in the village of Chapara Bathá in the Súrat Collectorate. Jánki stated that she, on behalf of her ward, Fakirá, mortgaged it to Vallabh Bhulá on the 20th March 1861. Vallabh Bhulá answered that in this mortgage it had been stipulated, that if the mortgage money was not paid to him within two years from the date of the mortgage, he was to be considered the absolute owner of the property, and that, that time having expired, he had become such an owner. The other defendants were merely tenants of Vallabh Bhulá. The Munsif found that the mortgage had been made by Jánki for necessary purposes, and, therefore, although the plaintiff was the heir of Fakira, his claim to recover as his heir should be rejected. The Munsif's decree was confirmed both in regular and special appeals. The plaintiff, therefore, brought the present suit to redeem this land, alleging that he was entitled to do so under the ruling of the High Court in *Ramji v. Chinto* (a).

The Court of first instance decided that this suit had already been heard and decided by a Court of competent jurisdiction, and was consequently barred by Section 2 of the Code of Civil Procedure.

The Lower Appellate Court held that this was not *res judicata* and reversed the original decree.

The special appeal was heard by MELVILL and KEMBALL, JJ.

Dhirajlal Mathwádás, Government Pleader, for the special appellant.

Nagandás Tulsidas, for the respondent.

MELVILL J. :—We think that the view taken by the District Judge is correct.

This action is certainly not barred by Section 2 of the Code. The former suit was an action of ejection, the present is a suit to redeem. The causes of action are totally

(a) 1 Bom. H. C. Rep. 199.

different. In England they would not even be cognizable by the same Court.

Nor, as a question of evidence, do we think that the judgment in the former suit is conclusive evidence against the plaintiff that the alienation to the defendant has the effect of a sale, and not of a continuing mortgage. The only question before the Courts in that suit was, whether the widow had made the alienation for necessary purposes. It was immaterial for the purposes of that suit whether the alienation was a mortgage or a sale. Neither the issues framed by the Munsif nor by the Judge put the point in issue. No doubt the Courts described the alienation as a sale:—for at that time the decision of the High Court in *Ramji v. Chinto (b)*, had not been published and the general opinion was that a condition of sale in a mortgage deed operated as a foreclosure. But there was certainly no intention of deciding that point, and we think we should be unwarrantably straining the doctrine of estoppel if we were to hold that the casual use of the word sale to describe a mortgage with a condition of sale, was a conclusive judgment that the equity of redemption is barred.

We regard in the same light the argument that the plaintiff is concluded by his own admissions in the former suit. Those admissions amounted to nothing more than this, that, in appealing from the decision of a Court which had spoken of the alienation as a sale, he urged that a Hindu widow had no power to sell, and that the sale was consequently void. Even if this amount to an admission that there had been not only a conditional sale, but an absolute sale, we still think that such an admission does not bind the plaintiff in the present suit. In *Ramshet v. Pandharinath (c)* a division bench of this Court considered “that the Lower Courts were in error in holding that the plaintiff had forfeited the equity of redemption, because he had in another suit, in which the subject of the mortgage was not

(b) 1 Bom. H. C. Rep. 199.

(c) Special Appeal No. 223 of 1869, decided on the 18th November 1869.

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at issue, made an admission that the mortgaged property had been sold to the mortgagee, their decisions being based solely upon this admission, and not on any proof of there having been any *bonâ fide* sale of the property by any special agreement between the parties. The admission of the plaintiff was merely in accordance with the interpretation given to the law of mortgage at that time by the Courts in this Presidency, viz., that if property was not redeemed within the period fixed for foreclosure, the mortgagee acquired a proprietary title to it." It may be said that ignorance of the law excuses no man, and that the plaintiff cannot avoid the effect of his admission by the plea of mistake. But, granting this, we should still say that it is not every admission made in a judicial proceeding which is binding on a party in a subsequent suit. The rule of law on this point is stated, and we think correctly, by the Judges of the Madras High Court in *Civa Rau Nanaji v. Jevana Rau et al* (d):— "Mere statements for the purposes of a particular judicial proceeding can only be conclusive evidence in another proceeding, as to such material facts embodied therein as must have been found affirmatively, to warrant the judgment of the Court upon the issues joined." For the reasons which we have already stated, with reference to the former suit between the present parties, it was not necessary to warrant the judgment of the Courts, that it should have been found affirmatively, that the alienation to the defendant operated as an absolute sale.

We confirm the decision of the District Judge with costs on special appellant.

Decree confirmed with costs.

(d) 2 Mad. H. C. Rep. 31.