

tion for the plaintiff's suit; and, as this fact has not been disputed before us, we confirm the Assistant Judge's decree with costs on the special appellant.

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[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 113 of 1875.*

MA'HA'DA'JI, SON AND HEIR OF VITHAL VISHWANATH DESAI (ORIGINAL DEFENDANT No. 1, SPECIAL APPELLANT) v. VYANKAJI GOVIND (ORIGINAL PLAINTIFF, SPECIAL RESPONDENT).

March 16.

*Registration—Memorandum—Receipt—Section 17 (Clauses 2 and 3) and Section 49 of Act XX. of 1866 and Act VIII. of 1871—Evidence—Practice—Special Appeal—Point not taken in either of the Lower Courts.*

A document purporting to have been passed by a mortgagee to his mortgagor and reciting the demand of the former for repayment of his mortgage money before the due date of the mortgage, and the compliance with that demand by the latter by means of a fresh loan upon a second mortgage of the same property; and reciting also the fact of the delivery of possession of the property by the original to the second mortgagee; and purporting, in conclusion, to contain a declaration by the original mortgagee that nothing remained due to him in respect of his mortgage, is a document which, under Clauses 2 and 3 of Section 17 of Act XX. of 1866 as well as under Clauses 2 and 3 of Section 17 of Act VIII. of 1871, requires registration, and, if unregistered, is by Section 49 of the same two Acts inadmissible as evidence of any transaction affecting any property comprised therein.

The fact of the extinction of the original mortgagee's lien may, however, be proved by other documentary or proper oral evidence.

A point not taken in either of the Lower Courts was disallowed as being too late when taken for the first time at the hearing of the special appeal.

THIS was a special appeal from the decision of A. D. Pollen, Acting Assistant Judge of Ratnágiri, in appeal No. 161 of 1874, reversing the decree of the 1st class Subordinate Judge's Court at Ratnágiri.

The plaintiff sued as the purchaser, under a deed (Exhibit 3) dated the 13th September 1871, of the interest of one Kazi Muhammad, who was the mortgagee, under a mortgage, dated 24th April 1868 (Exhibit 4), of a *thikan*, the property of the first defendant Vithal Vishvanáth Desai. The mortgage was for six years from the date of the mortgage deed, and to secure Rs. 350. The plaintiff, alleging that the defendants had dispossessed his vendor before the sale to himself, sought to be established in

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the position of transferee of that mortgage, and to be placed as such in possession of the *thikan*.

The first defendant, the mortgagor, alleged that previously to the asserted sale, by Kazi Muhammad, of his rights as mortgagee to the plaintiff, the former had, on the 24th of February 1870, been paid off in full, and the *thikan*, in order to enable the first defendant (the mortgagor) to raise the sum of Rs. 350 necessary for that purpose, had been re-mortgaged by him to the second defendant, Bálkrishna Dáji Pandit. In order to prove this defence the first defendant produced in evidence an unregistered document (Exhibit No. 17), stamped as a common money receipt and not as a re-conveyance, and dated the 24th of February 1870, purporting to be signed by Kazi Muhammad, the first mortgagee. This document stated the demand of Kazi Muhammad for re-payment of his mortgage debt, made within two years after the execution of the mortgage to him, and therefore four years before he was entitled to make it; the compliance of the first defendant with that demand, and his consequent re-mortgage to the second defendant in order to raise the money for this purpose; and the payment by the second defendant on account of the first defendant of the sum due on the mortgage to Kazi Muhammad. The document further stated that the second defendant demanded possession of the original mortgage bond executed to Kazi Muhammad; that the latter, by direction of the first defendant, handed such bond to the second defendant, and made over to him possession of the mortgaged *thikan*; and, finally, that nothing remained due to Kazi Muhammad on the original mortgage bond. This document (Exhibit 17) was admitted in evidence by the Subordinate Judge, who found it to have been signed by Kazi Muhammad, and accordingly made a decree against the plaintiff. He appealed. The Assistant Judge then held that Exhibit 17, not being registered, was inadmissible in evidence, and after stating that there was not any other evidence that Kazi Muhammad's mortgage lien had been extinguished, made a decree for the plaintiff with costs. Against that decree this special appeal was filed by the first defendant. The memorandum of appeal raised three principal questions, viz., 1st, whether the document Exhibit 17 was admissible in evidence; 2nd, whether there was evidence other

than that furnished by Exhibit 17 sufficient to support the appellant's contention; and, 3rd, whether the plaintiff's vendor having admittedly parted with the possession of the mortgaged property before the sale to the plaintiff, the latter, under the Hindu Law, took anything.

The special appeal was argued before WESTROPP, C. J., and WEST, J.

*Pándurang Bálíhadra* for the first defendant, the special appellant:—The plaintiff admits in his plaint that his purchase was subsequent to his vendor's dispossession by the first defendant, the original mortgagor and owner of the property. If so, he gets nothing by the Hindu Law, and his suit must fail.

*Ganasham Nilkanth*, for the plaintiff, respondent:—This objection was not taken in either of the Lower Courts, and is too late now when taken here for the first time<sup>(1)</sup>.

*Pándurang*:—Exhibit 17 is a receipt, and need not be registered for the purpose of showing the simple fact of the re-payment of the mortgage debt to the original mortgagee: *Woodoy Chand v. Nitye Mundul*<sup>(2)</sup>, *Venkatarama v. Chinnathambu*<sup>(3)</sup>, *Shib Prasad v. Anna Purna*<sup>(4)</sup>, *Sham Narain v. Khemajeet*<sup>(5)</sup>. Oral or other evidence of the fact of the extinction of the lien of the original mortgagee independent of that furnished by Exhibit 17, is admissible, and should have been considered by the Assistant Judge.

*Ganasham contra.*

WESTROPP, C. J., after reviewing the facts recorded above, continued as follows:—The object of the first defendant (appellant) in giving the instrument Exhibit 17 in evidence is to show that Kazi Muhammad's mortgage lien on the land has been extinguished, and was so previously to the alleged transfer or assignment of that lien to the plaintiff; and if the document be genuine and

(1) This is the rule generally followed on the Appellate Side of the High Court: see *Ramabai v. Appa*, 12 Bom. H. C. Rep. 13. On the Original Side, where the appellant won on a point not taken by him in the Court below, he was ordered to pay the respondent's costs of appeal: *Haridas v. Gamble*, 12 Bom. H. C. Rep. 23.

(2) 9 Calc. W. R. 111 Civ. Rul.

(3) 7 Mad. H. C. Rep. 1.

(4) 3 Beng. L. R. 451 A. J.

(5) Calc. W. R. 11 F. B.

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admissible in evidence, it would, no doubt, be efficacious for that purpose, and a complete defence to this suit, which is maintainable only on the hypothesis that the mortgage to Kazi Muhammad is a still existing and unsatisfied security.

We deem it unnecessary to enter upon the question of the sufficiency of the stamp, inasmuch as we think, whether we look to Act XX. of 1866 or Act VIII. of 1871, that the non-registration of Exhibit 17 renders it inadmissible for the purpose for which it is sought to be given in evidence in this suit.

Act XX. of 1866, Section 17, requires that the following instruments be registered:—

“ Clause 1. Instruments of gift of immoveable property.

“ Clause 2. Instruments (other than an instrument of gift) which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property.

“ Clause 3. Instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title, or interest ; and

“ Clause 4. Leases of immoveable property for any term exceeding one year.”

We are clearly of opinion that Exhibit 17 falls within Clauses 2 and 3 of this seventeenth section,—within Clause 2 because it purports to extinguish the right, title, and interest of Kazi Muhammad in the land—and within Clause 3 because it acknowledges the receipt of Rs. 350 as consideration on account of the extinction of his right, title, and interest in the land. Section 49 enacted that “ no instrument required by Section 17 to be registered shall be received in evidence in any civil proceeding in any Court, or shall be acted on by any public servant as defined in the Indian Penal Code, or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act.” This clearly renders Exhibit 17 inadmissible in evidence for such a purpose, as it has been offered in evidence in this suit.

The first three clauses in Section 17 of the more recent Registration Act (VIII. of 1871) are substantially the same as the first three clauses in Act XX. of 1866, Section 17. The 49th Section of Act VIII. of 1871 enacts that "no document required by Section 17 to be registered shall affect any immovable property comprised therein; or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." Even supposing, but not actually deciding, that, according to *Guduri v. Rapaka*<sup>(1)</sup>, the law applicable to the admissibility in evidence of Exhibit 17 is the more recent Act (VIII. of 1871); yet inasmuch as that exhibit is offered in evidence for the purpose of showing a transaction whereby it is contended that the mortgage lien of Kazi Muhammad became extinguished, and thus affecting the land, we are of opinion that Exhibit 17, being one which under Clauses 2 and 3 of Section 17 ought to have been registered, but was not, is not admissible on behalf of the defendants in evidence.

Several cases have been cited to us on behalf of the first defendant in favour of the admissibility of Exhibit 17; but none of them appeared to us to meet the exigency of the position.

*Venkatarama v. Chinnathambu*<sup>(2)</sup> was a suit by a mortgagor to recover from a mortgagee a sum paid (on redemption) to the latter in excess of what was really due to him. The claim merely affected the mortgagee personally, and the unregistered indorsement on the mortgage bond of the amount paid was not offered in evidence as a transaction affecting the land, but as proof of the amount paid. Neither party denied that the mortgage lien had been extinguished.

*Guduri v. Rapaka*<sup>(3)</sup>, already mentioned, was a suit against the mortgagors personally for the money, the plaintiffs having waived all claims against the land.

The absence (in the report) of the documents, upon which the case quoted from 20 Calc. W. R. 334,\* Civ. Rul. (*Sheikh Gugunfur Ali v. Mahomed Yaseen*) was decided, prevents us from being able

(1) 7 Mad. H. C. Rep. 348.

(2) 7 Mad. H. C. Rep. 1.

(3) 7 Mad. H. C. Rep. 348.

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to understand that case fully. This difficulty is increased by the omission of the learned Judge, as reported, to notice the bearing of Clause 3 of Section 17 of Act XX. of 1866 upon the receipt which was there admitted in evidence. The learned Judge is, in the concluding portion of his judgment, reported as having said that the receipt did not fall within Clause 2 of that section; but he was silent as to Clause 3.

In *Máhád bin Dánápa v. Dári*<sup>(1)</sup> my brother Kemball and I refused to permit an unregistered *yádi* to be given in evidence by a defendant in defence of her possession. The *yádi* stated that a sum of Rs. 483 had been paid to the plaintiff on account of the sale by him to her of the land. In fact, it was a receipt for money, but stated in what respect the money had been paid, namely, as part of the consideration for the sale of the land.

We agree accordingly with the Assistant Judge in holding the receipt Exhibit 17 to be inadmissible in evidence. Any other decision would, in our opinion, defeat the manifest intention of the Legislature.

But the appellant's pleader pointed out that there is some oral evidence of the payment, although the Assistant Judge has said that "the receipt is the only evidence that Kazi's mortgage lien was extinguished." The important circumstance, too, that Kazi Muhammad, before he conveyed his alleged rights as mortgagee to the plaintiff, had given up, or been put out of, possession, requires to be carefully considered and investigated. That he is and was out of possession, cannot be denied, and the burden lies upon the plaintiff, who claims under him, to explain that fact. If Kazi Muhammad voluntarily surrendered his interest as mortgagee to the first defendant, the mortgagor, or to the second defendant as his nominee, there would have been nothing left in Kazi Muhammad to pass by his subsequent conveyance to the plaintiff. The fact that Kazi Muhammad was out of possession at the date of that conveyance, lends probability to the case put forward by the first defendant, unless that fact be satisfactorily explained by evidence on behalf of the plaintiff.

The appellant (first defendant) by his *durkhast* No. 52 asked for permission to examine other witnesses, and we think that,

(1) *Supra*, p. 196 and note (1) *ibidem*.

relying, as he probably did, on his Exhibit 17 to prove his case, he may have neglected to summon as many witnesses as he otherwise would have done to show that Kazi Muhammad's mortgage had been paid off and his lien extinguished. We are of opinion that he ought to have an opportunity of proving his case by oral testimony if he can, and may summon such witnesses as he may be advised to call for that purpose, and may give such other (if any) evidence as may be available, such as books, accounts, &c., and as may be legally admissible.

There should be a distinct finding of the re-trying Court on the allegation that the plaintiff's case is fraudulent and collusive.

The seventh point in the memorandum of special appeal (*i.e.*, as to the plaintiff's vendor having been out of possession at the time of the sale to the plaintiff) not having been made in either of the Courts below, is too late.

We reverse the decree of the Assistant Judge, and remand this cause for re-trial by the District Court on the merits in accordance with the foregoing observations. Costs of both appeals and of the suit are to be within the discretion of the re-trying Court.

*Decree reversed and cause remanded.*

## [ APPELLATE CIVIL JURISDICTION. ]

*Special Appeal No. 18 of 1875.*

PARBHUDA'S RA'YAJI AND ANOTHER (ORIGINAL PLAINTIFFS, APPELLANTS)  
v. MOTIRAM KALYA'NDA'S (ORIGINAL DEFENDANT, SPECIAL RESPONDENT).

March 27.

*Pensions Act XXIII. of 1871—“ Toda-Grás ”—Decree before the date of the Act.*

“ *Toda-Grás* ” *haks* are within the scope of the Pensions Act XXIII. of 1871 ; and a suit in respect of them cannot be instituted without the certificate required by Section 6 of the Act.

Where a mortgagee of such *haks* had, before the date on which the Act came into operation, obtained a decree for the recovery of his mortgage debt from the mortgaged *haks* and from the mortgagor personally, and a fresh suit was necessary to enforce execution of that decree against those *haks*,

*Held* that the Act did not apply to such fresh suit.

*Seemle* that the word “ right ” in Section 3 of Act XXIII. of 1871 is equivalent to the word *hak* in its restricted sense of “ allowance ” or “ fee ”

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