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The order on this summons will be that the sale mentioned in the summons be set aside, and that the Sheriff do repay to the applicant Jaitha Devji the sum of Rs. 2,300 mentioned in the said summons, less any deductions which the Sheriff may be entitled to retain for poundage expenses or otherwise, and that the plaintiff do pay to the applicant his costs of and incident to this summons, together with the amount of the deductions, if any, which the Sheriff may have made in respect of poundage expenses, or otherwise. As to the costs suggested to have been incurred by the applicant concerning the said sale, and also asked for by the summons, he has given no evidence what they were, and they are not of a nature, so far as appears, that they might be referred for taxation: so as to this part of the summons I make no order. Nor do I make any order as to interest, for the reasons that the power of giving interest in such a case exists under the Code only where a sale of immoveable property is set aside, and also that by the summons no interest is asked for.

Order accordingly.

[ORIGINAL CIVIL.]

Before Mr. Justice Green.

RA'JU BA'LU (PLAINTIFF) *v.* KRISHNA'R'AV RA'MCHANDRA' AND ANOTHER (DEFENDANTS).*

July 30.

Registration—Act III. of 1877—Evidence—Covenant—Patent ambiguity—Title—Estoppel—Cause of action—Damages—Consideration—Limitation.

S. L., by a deed of gift of 16th February 1847, granted and assured to S., his daughter, certain immoveable property. By a subsequent unregistered deed of gift of 15th July 1865, S. L. purported, in consideration of natural love and affection, to grant and convey the same property, the value of which exceeded Rs. 100, to B. R., the husband of S., his heirs, executors, administrators, and assigns. The last-mentioned deed contained covenants, on the part of S. L., his heirs, executors, and administrators, with B. R., his heirs, executors, administrators, and assigns, for title to "the hereditaments and premises hereinbefore expressed to be hereby granted and assured unto and to the use of the said B. R., his heirs, executors, administrators, and assigns." S. died in the lifetime of B. R., who, in 1867, mortgaged the premises comprised in the deed of 15th July 1865, and died in 1868. In 1870 the mortgagee sold the premises by auction, under the power of sale contained in the

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mortgage-deed ; the plaintiff became the purchaser, and the mortgagee, on 24th March 1871, executed to him a conveyance of the premises, which were then in the possession of the surviving members of the family of B. R. and S. The plaintiff having failed in a suit in ejectment against the parties in possession, who relied on the prior gift to S., sued the representatives of S. L. for damages for breach of the covenants for title contained in the unregistered deed of 15th July 1865.

Held, 1*st*, that the provisions of Act III. of 1877 apply to all documents tendered in evidence on or after 1st April 1877.

2*nd*, that though, as in *Tukárám* v. *Khandoji* (6 Bom. H. C. Rep. 134 O. C. J.) and *Sangáppá* v. *Basáppá* (7 Bom. H. C. Rep. 1 A. C. J.), an unregistered document requiring registration may be admitted in evidence for certain purposes, yet it cannot be looked at so far as it affects the immoveable property comprised therein, nor so far as it is evidence of any transaction affecting such property, and that, excluding the part of the document of 15th July 1865 which purported to be the conveyance to B. R., the covenant for title sued on in the present suit was itself ambiguous and uncertain ; and there being nothing to connect the premises to which the covenant related with the premises conveyed to the plaintiff, no breach of the covenant sued upon had been proved.

3*rd*, that a covenant for title, running with the land, would seem to be in itself a transaction affecting the land, and that the instrument containing it, if coming within clauses (*a*) to (*d*) of s. 17 of Act III. of 1877, must be registered, unless it comes within the exceptive clauses (*e*) to (*l*) of the same section.

4*th*, that a document containing covenants for title, though, no doubt, embodying " a transaction affecting immoveable property," is admissible in a suit for damages for breach of such covenants, provided the document conform to the requirements of the exceptive clauses of s. 17 of Act III. of 1877; but where, as in the present case, the evidence of the covenant is contained in a document *itself* purporting to assign an interest in immoveable property—the covenant being ambiguous and uncertain without reference to such assignment—the document is not excepted from the necessity of registration.

5*th*, that the Court being precluded by the operation of the Registration Act (III. of 1877) from looking at the deed of 15th July 1865 so far as it was a conveyance, the defendants were not estopped from contending that nothing having passed under it to B. R., nothing had passed to the plaintiff under the subsequent deeds, and that, consequently, the plaintiff was not entitled to maintain this suit.

6*th*, that, though under the English law damages may be recovered for breach of covenants for title contained in a voluntary settlement of such a character as to be ineffectual without the assistance of a Court of equity, and which assistance a Court of equity would refuse to a volunteer, yet this, depending on the principle of English law that a document sealed and delivered imports consideration, which principle does not hold as between Hindus, it was open to the defendants in the present case to show that the plaintiff was suing on a contract for which there was no consideration other than natural love and affection, which cannot be made the ground of a suit for damages.

7th, that the breach of the grantor's covenant, so far as related to his present right to convey, took place on the day the conveyance to the covenantee was executed, viz., 15th July 1865, and, consequently, a suit in respect of such breach was barred; but the covenant for quiet possession, admitting of a continuing breach, was not barred so long as the breach continued, and that of the covenant for further assurance there had been no breach at all, as such covenant would be broken only by refusal on the part of the covenantor or his representatives to execute a further assurance when required so to do by the covenantee or his representatives.

SAKHA'RA'M LAKSHMANJI, by a deed of gift dated 16th February 1847, granted and assured to his daughter, Shámábái, certain immoveable property situated in Lohár Chál Street in Bombay. By a subsequent deed of gift of 15th July 1865, purporting to have been executed in consideration of natural love and affection, he affected to grant and convey the same property, the value of which greatly exceeded Rs. 100, to Bhagvantráv Rámchandra, the husband of Shámábái, his heirs, executors, administrators, and assigns. This deed, which was never registered, contained covenants for title by Sakhárám Lakshmanji, for himself, his heirs, executors, and administrators, to Bhagvantráv Rámchandra, his heirs, executors, administrators, and assigns. The premises, however, to which these covenants related, were not described in the covenants otherwise than by reference to the conveyance contained in the previous part of the deed.

Sakhárám Lakshmanji died in 1865. Shámábái died in 1855, and before her husband Bhagvantraáv, who died in 1868, after having, in 1867 and 1868, executed deeds of mortgage and further charge of the premises in Lohár Chál Street comprised in the two deeds of the 16th February 1847 and the 15th July 1865 to one Shrikrishná Náráyen. Default having been made in payment of the mortgage-moneys and interest, Shrikrishná Náráyen, under the powers of sale contained in the deeds of mortgage and further charge, sold the mortgage premises by auction in 1870, and the plaintiff became the purchaser at such auction. By conveyance of 24th March 1871 Shrikrishná Náráyen conveyed to the plaintiff the mortgaged premises, which were then in the possession of the representatives of Bhagvantráv Rámchandra and his wife Shámábái. Against these persons the plaintiff, in 1872, filed a suit in ejectment to recover possession of the premises so purchased by

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him. The defendants in that suit relied on the prior gift to Shámábái. The deed of gift of 16th February 1847 had been lost; but, secondary evidence of the gift having been admitted, the title of the defendants was upheld, and the suit dismissed. The plaintiff then filed against the representatives of Sakhárám Lakshmanji the present suit to recover damages sustained by reason of the breach of the covenants for title contained in the deed of 15th July 1865.

Gill and *Kirkpatrick* for the plaintiff.

Marriott, Advocate-General (Acting), *Latham*, and *B. Tyabji* for the defendants.

The facts of the case and the arguments are fully stated in the following judgment delivered by

Green, J.:—The plaintiff, in the character of assignee of certain immoveable property in Lohár Chál Street in Bombay, claims as against the defendants, the surviving heirs of one Sakhárám Lakshmanji, who died on or about 27th October 1865, to recover damages for the breach of certain covenants for title contained in a certain instrument, purporting to be an indenture and under seal, dated 15th July 1865, and expressed to be made between the said Sakhárám Lakshmanji, of the one part, and one Bhagvantráv Rámchandra, of the other part. The plaint alleges that, by this indenture of 15th July 1865, the said Sakhárám Lakshmanji granted and conveyed to the said Bhagvantráv, his heirs, executors, administrators, and assigns, the said premises in Lohár Chál Street. The plaint also alleges that at the time of the execution, by Sakhárám Lakshmanji, of the indenture of 15th July 1865, the said premises were, and had been by a deed of gift bearing date 16th February 1847, and executed by the said Sakhárám Lakshmanji, granted and assured by the said Sakhárám Lakshmanji to Shámábái, the wife of the said Bhagvantráv Rámchandra, and daughter of the said Sakhárám Lakshmanji, absolutely, and that a copy of the said deed of gift was thereto annexed and marked E.

By the allegations of the plaint and the documents put in evidence it further appears that by two indentures of mortgage, dated, respectively, 6th August 1867 and 1st September 1868, and

expressed to be made between the said Bhagvantráv Rámchandra of the one part, and one Shrikrishná Náráyen of the other part, in consideration, respectively, of the sums of Rs. 25,000 and Rs. 10,000, expressed to be advanced by the said Shrikrishná Náráyen to the said Bhagvantráv Rámchandra, the latter purported to convey and charge the said premises in Lohár Chál Street to or in favour of the former, to secure repayment of the said advances with interest as therein mentioned.

The said Bhagvantráv Rámchandra, as the plaint alleges, died on 26th October 1868.

The said mortgaged premises were, on 28th October 1870, by virtue of the power of sale contained in the said mortgages, put up to sale by public auction by the mortgagee Shrikrishná Náráyen, and at such sale the plaintiff was declared the purchaser thereof at the price of Rs. 25,000, and by an indenture of conveyance dated 24th March 1871, and expressed to be made between the said Shrikrishna Náráyen, of the one part, and the plaintiff, of the other part, and to be in consideration of such sum of Rs. 25,000, paid as therein mentioned, the said mortgaged premises were expressed to be conveyed to the plaintiff. Neither Shrikrishná Náráyen nor the plaintiff ever had possession of the premises, and the plaint alleges that, at the time of the execution of the conveyance of 24th March 1871, one Báláji Bhagvantráv (who was the survivor of the two sons of Bhagvantráv Rámchandra by his wife Shámábái, the daughter of Sakhárám Lakshmanji), one Sonábái, one Shámráv Bábáji, and one Rámráv Bábáji (respectively the widow and sons of one Bábáji Bhagvantráv, who was the other son of Bhagvantráv Rámchandra by Shámábái, but who had died since his father's death,) were in possession of the said premises. Shámábái herself had, it appears, died in the lifetime of her husband Bhagvantráv Rámchandra, and before 26th October 1868.

In the year 1872 the present plaintiff instituted in this Court suit No. 157 of 1872 against the said Báláji Bhagvantráv and Sonábai, against one Sundrábái (widow of one Sakhárám Mádhavji), and against the said Shámráv Bábáji and Rámrav Bábáji, for the recovery of possession of the said premises, the

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said plaintiff claiming to be entitled to the same under the conveyance of 24th March 1871. In this suit the defendants Shámráv and Rámráv appeared by counsel, the defendant Báláji Bhágvantráv in person, and the defendants Sonábái and Sundrábái did not appear at all. Sonábái, it may be mentioned, was the mother of the defendants Shámráv and Rámráv, and Sundrábái was their aunt, being a daughter of Bhagvantráv Rámchandra. By the decree of the Court in suit No. 157 of 1872, dated 2nd August 1873, judgment was passed for the defendants in that suit, and the costs of the defendants Shámráv and Rámráv, amounting to Rs. 2,234-0-1, were ordered to be paid by the plaintiff therein.

The plaintiff Ráju Bálu then appealed against the decree of the 2nd August 1873; but by the decree of the Appellate Court, of 1st April 1875, the decree appealed from was affirmed with costs.

The plaint in the present suit also alleges that suit No. 157 of 1872 was dismissed on the ground that the defendants therein were entitled to the said premises under the aforesaid gift of 16th February 1847, and that by reason of the said gift no estate or interest in the said premises passed, under the said indenture of 15th July 1865, to the said Bhagvantráv Rámchandra, his heirs, or assigns.

The covenant contained in the indenture of 15th July 1865, on which this suit is founded, is as follows :—" And the said Sakhárám Lakshmanji doth hereby for himself, his heirs, executors, and administrators, covenant with the said Bhagvantráv Rámchandra, his heirs, executors, administrators, and assigns, that, notwithstanding any act, deed, matter, or thing by him the said Sakhárám Lakshmanji, or any of his ancestors or testators, done, omitted, or knowingly suffered, he the said Sakhárám Lakshmanji now hath power to grant, convey, and dispose of the hereditaments and premises hereinbefore expressed to be hereby granted and assured unto and to the use of the said Bhagvantráv Rámchandra, his heirs, executors, administrators, and assigns, and that the same premises shall from time to time and at all times hereafter remain and be to the use of the said Bhagvantráv Rámchandra, his heirs, executors, administrators, and assigns, and be jointly (*sic*) entered into and upon and held and enjoyed, and the rents and profits received

and taken by him and them accordingly without any interruption or disturbance by the said Sakhárám Lakshmanji or any person claiming through, under or in trust for him or any of his ancestors or testators, and that free and discharged or otherwise by him the said Sakhárám Lakshmanji, his heirs, executors and administrators sufficiently indemnified against all estates, incumbrances, claim and demand created, occasioned or made by the said Sakhárám Lakshmanji, his ancestors and testators or any person claiming through, under or in trust for him, them or any of them, and further that he, the said Sakhárám Lakshmanji and every person having or claiming any estate or interest in the said hereditaments and premises hereby granted and assured or expressed or intended so to be through, under or in trust for him or any of his ancestors or testators, will at all times hereafter at the cost of the said Bhagvantráv Rámchandra, his heirs, executors, administrators or assigns, make, execute and do every such assurance and thing for the further or more perfectly conveying, assigning and assuring all or any of the said hereditaments and premises hereinbefore expressed to be hereby granted, conveyed, assigned and assured unto and to the use of the said Bhagvantráv Rámchandra, his heirs, executors, administrators or assigns, as by him or them or his or their counsel in the law shall be reasonably desired, advised or required."

The plaint prays by way of damages for the alleged breach of the covenant for title set out as aforesaid to recover from the defendants herein, as heirs of Sakhárám Lakshmanji, the sum of Rs. 25,000, the consideration money of the conveyance to the plaintiff of 24th March 1871, with interest at 13½ *per cent. per annum*, and the sum of Rs. 10,550, the alleged amount of costs incurred by the plaintiff in prosecuting suit No. 157 of 1872.

The written statement of the defendants in the present suit, amongst other grounds of defence not necessary to be specified, alleges in para. 7 that the said Bhagvantráv Rámchandra and Shrikrishná Náráyen, as well as the plaintiff himself, had full and complete notice that the said Sakhárám Lakshmanji had, previously to the said alleged indenture of 15th July 1865, made a valid and effectual gift (*i.e.*, by the instrument of 16th February

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1847) of the said property to his daughter Shámábai and her heirs, and that, therefore, the said Sakhárám Lakshmanji had not, at the date of the said indenture, any right to make a gift of the same to the said Bhagvantráv Rámchandra.

The issues settled were as follows :—

(1). Whether any and what estate passed to Bhagvantráv Rámchandra under the deed of 15th July 1865.

(2). Whether Sakhárám Lakshmanji covenanted with Bhagvantráv Rámchandra as in the plaint alleged.

(3). Whether there was any and what consideration for the said deed or the covenant therein contained.

(4). Whether the plaintiff is a purchaser for valuable consideration, without notice, of the property comprised in the said indenture.

(5). Whether the plaintiff is entitled, as assignee of Bhagvantráv Rámchandra, to maintain this suit.

(6). Whether the plaintiff is entitled to recover from the defendants the costs of suit No. 157 of 1872.

(7). Whether the plaintiff is entitled to recover any and what damages from the defendants in respect of the matters alleged in the plaint.

And (8) whether the suit is barred by the Limitation Act.

The first question which arose at the hearing was as to the admissibility in evidence, having regard to the provisions of the Indian Registration Act, 1877, (Act III. of 1877) of the document of 15th July 1865. This Act, though it came into force only on 1st April 1877, does not contain any provision, as is frequently the case with Acts of a similar nature, exempting from its operation documents executed previously to the date of its coming into force. On the contrary, it requires by section 17 the registration of all documents of the classes described in clauses (*a*), (*b*), (*c*), and (*d*) of that section, (subject to a proviso as to leases, not necessary to be mentioned, and subject to the exceptions mentioned in clauses (*e*) to (*l*) of the same section, both inclusive,) executed on or after the date on which the Act itself should come into force, or on which

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the previous Registration Acts, viz., Act XVI. of 1864, Act XX. of 1866, or Act VIII. of 1871, had come into force.

Though section 18 of Act III. of 1877, as compared with section 18 of Act VIII. of 1871, extends the class of documents which *may* be registered—in fact *all* documents either *must* or *may* be registered under the present Act—yet the exceptions from the necessity of registration are, under section 17 of Act III. of 1877, in some respects larger than were those under section 17 of Act VIII. of 1871. To this extent the greater strictness of the requirements of Act VIII. of 1871 and the earlier Registration Acts has been mitigated, and the Act was framed as it is, very probably with a view to admit to the benefit of such mitigations documents though executed before the day on which the Act came into force. The practical result is, that the provisions of Act III. of 1877 apply to all documents tendered in evidence on or after 1st April 1877.

The sections, then, of the Act applicable to the question arising in the present case are sections 49 and 17. By the former it is provided that "no document required by section 17 to be registered, shall affect any immoveable 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." Now, section 17 requires the registration of, *inter alia*, "(*a*) instruments of gift of immoveable property; (*b*) other non-testamentary instruments 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 Rs. 100 or upwards, to or in immoveable property; (*c*) non-testamentary 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." The mitigations introduced by the present Act, as compared with Act VIII. of 1871, consist in this, that the operation of clauses (*b*) and (*c*) is by the subsequent clauses (*e*) to (*l*) excluded from a wider class of documents than were excluded by clauses (*a*) to (*c*) in section 17 of Act VIII. of 1871 from the operation of

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clauses (2) and (3) of section 17 of that Act, which clauses (2) and (3) were in substance the same as (*b*) and (*c*) of section 17 of the present Act.

One of the mitigations of the present Act is, that clauses (*b*) and (*c*) of section 17 of that Act do not apply to (see clause (*h*) of the same section) "any document not itself creating, declaring, assigning, limiting, or extinguishing any right, title, or interest of the value of Rs. 100 and upwards to and in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title, or interest." The exception of documents of the class described in clause (*h*) of section 17 of Act III. of 1877 from the requirement of being registered in order to be admissible in evidence, having regard to section 49 of Act III. of 1877, is not to be found in Act VIII. of 1871, and is a relaxation or mitigation of the law as thereby established.

The indenture of 15th July 1865 on being tendered in evidence on the plaintiff's part was objected to on the part of the defendants as not having been registered. There can be no doubt that the instrument, taking it as a whole, is one which under section 17 of Act III. of 1877 is required to be registered. It purports to be a gift and grant of the premises in Lohár Chál Street by Sakhárám Lakshmanji to Bhagvantráv Rámchandra, his heirs, executors, administrators, and assigns, the consideration expressed being "the love and affection which the said Sakhárám Lakshmanji hath for his son-in-law Bhagvantráv Rámchandra, and also for divers other good considerations him thereunto surviving (*sic*)." Then follows the covenant for title already set out. No valuable consideration being expressed, and none such having been proved, the instrument is included in the operation of section 17 of the Act as being an instrument of gift of immoveable property; or if there can be any room for doubt, notwithstanding what is expressed on the face of the deed itself, as to its gratuitous or donative character, it is an instrument creating or assigning a right, title, or interest to or in immoveable property which independent evidence shows to have been of the value of upwards of Rs. 100. If so, its admission in evidence for the purpose of proving any conveyance

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to a predecessor in title of the plaintiff, is forbidden by section 49 of the Act, as the document on production is an instrument purporting to affect the immoveable property comprised therein. The admissibility of the document in evidence was, however, pressed on the ground that it was tendered and sought to be used only as containing a covenant for the breach of which damages were claimed, and the cases of *Tukárám Vithoji* v. *Khandoji Malhárji*[1] and *Sangáppá Ningáppá* v. *Basáppá Páráppá*,[2] decisions of this Court, were relied on. In those cases a bond for the payment of money was admitted in evidence in a suit for payment of the money, though not registered, and though the document also contained a mortgage of immoveable property to secure such re-payment. Those decisions were with reference to section 49 of Act XX. of 1866, the words of exclusion in which are much more express and unqualified than those of section 49 of Act VIII. of 1871, or of section 49 of the present Act. I considered at the time that the document in question, though unregistered, was admissible, and admitted it as evidence of a covenant for the breach of which damages are sought, though the document was to be treated as non-existent, or rather as not in evidence, so far as it purported to affect the immoveable property comprised therein, or to afford evidence of any transaction affecting such property.

It had been also contended that the indenture of 15th July 1865 could be treated as admissible in evidence *for all purposes*, though not registered, by reason that it was recited and confirmed by the will or codicils, or one of them, dated 12th August 1865, 14th August 1865, and 2nd October 1865, of Sakhárám Laskhmanji, and so, in fact, formed a part of the will and codicils themselves, which do not require registration. I do not find that the will and codicils of Sakhárám Lakshmanji were put in evidence on the part of the plaintiff, and cannot, therefore, judge what were the precise words in which this alleged recital and confirmation were embodied. But, taking the effect of the will and codicils to be as alleged in the plaint, I am unable to see how by his will a man *can* confirm a conveyance *as a conveyance*. He may, no doubt, so refer in his will to an ineffectual or inoperative conveyance as

(1) 6 Bom. H. C. Rep. 134 O. C. J. (2) 7 Bom. H. C. Rep. 1 A. C. J.

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to constitute a devise of itself; but, then, the property passes by devise; the conveyance so referred to does not acquire any greater force or effect *as a conveyance.* In the present case, the devise, if any there were, would be in itself as inoperative as the conveyance which it is contended it had the effect of confirming, and this for the reason that, by the plaintiff's own case, the testator had no power to devise this property, having already conveyed it by the deed of gift of 16th February 1847. I do not consider that the alleged reference to, and confirmation of, the deed of 15th July 1865 by the subsequent will of Sakhárám Lakshmanji in any degree gets over the difficulty of treating the former document as in evidence as a conveyance, owing to its want of registration.

Now, though this deed of 15th July 1865 may have been admitted in evidence for some purpose, that will not, of course, prevent the Court from considering, and, in fact, the Court is bound to consider, how far the law allows it, though in such manner admitted in evidence, to be used as evidence for other purposes. We cannot look at it so far as it affects the immoveable property comprised therein, nor so far as it is evidence of any transaction affecting such property. In fact, the only part of the document we can look at, is the description of the parties, the covenants for title, and the *testatum.* But, confining our attention to these parts only, and excluding the part which purports to be the conveyance to Bhagvantráv Rámchandra, the document is, it seems to me, as was contended by the defendants' counsel, without sense, and unintelligible. For instance, the covenant throughout has reference to some hereditaments and premises thereby granted and conveyed or expressed or intended so to be. But the document being unregistered, the Court is bound to consider that it did not affect and, of course, did not convey the immoveable property comprised therein, and is bound not to recognize any expression of intention to affect such immoveable property. Nor has the Court any means of ascertaining what these hereditaments and premises so referred to are, for to do so would be to look at the part of the deed (and so in effect treat it as evidence) containing or purporting to contain the conveyance. This being so, the covenant is patently ambiguous and uncertain as to its subject matter, and there is nothing

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to connect the hereditaments and premises, to which the covenant relates, with the hereditaments and premises conveyed to the plaintiff by the deed of 24th March 1871, or with those as to which the breach of covenant is alleged. If this be so, not only is no breach of the covenant sued upon, proved, but the covenant sued upon, is in itself ambiguous and uncertain.

Then, the absence of registration seems to involve this difficulty in the plaintiff's way, having regard to the position of the plaintiff suing as alleged assignee. The right of a subsequent assignee of land to sue on a covenant for title by a former assignor, is based on the principle that such a covenant, as it is said, runs with the land, as being something relating to, touching, or concerning the land. But if the ground of admitting an assignee to sue on such a covenant is that it relates to, touches, or concerns the land, then the question arises,—is not such a covenant in itself a transaction affecting the land, within the words of section 49 of the Act? If such a covenant is in itself a transaction affecting the land, it would seem that the instrument containing it, if coming within clauses (*a*), (*b*), (*c*), or (*d*), of section 17, must be registered before it is admissible in evidence for the purpose of proving the existence of such covenants, unless it comes within the exceptive clauses (*e*) to (*l*), and in particular within clause (*h*). If, however, the document containing the covenant for title be a document conforming to the description of the exceptive clause (*h*), though it may be a document tendered as evidence of a transaction affecting land, is, it seems to me, admissible in evidence without registration. The case of *Váláji Isáji* v. *Thomas*[1] was cited by defendants' counsel in aid of his argument, that the document ought not to be admitted in evidence for any purpose. In that case the Court upheld the decision of the Judge below, that in a suit for specific performance of an agreement to execute a deed of sale of certain immoveable property on the terms therein mentioned, the agreement was not admissible in evidence owing to want of registration, and that the suit ought to be dismissed. The case was decided with reference to clauses (2) and (3) of

(1) I. L. R. 1 Bom. 190.

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section 17 of Act VIII. of 1871, which, as I have stated, are in substance the same as clauses (*b*) and (*c*) of the present Act, and on the ground that a document acknowledging the receipt of Rs. 100, part of the consideration money, though contemplating the execution, *in futuro*, of a deed of sale, did operate of itself to create an interest in the property of the value of Rs. 100 and upwards, and, therefore, under the clauses cited, required registration. It does not seem to me that the decision would have been other than it was, having regard to the nature of the particular agreement in question there, had the present Act, with the extended exceptive clauses of section 17, been applicable to that case. But I am of opinion that there is nothing in that decision to interfere with the proposition, having regard to clause (*h*) of section 17 of the present Act, that in a suit for specific performance of an agreement for the sale of land, the agreement may be admitted in evidence if it does not itself create, declare, &c., any right, title, or interest of the value of Rs. 100 and upwards to or in immoveable property by the acknowledgment of the receipt or payment of any consideration on account of the creation, declaration, &c., of a right, title, or interest in the land. No doubt, a consideration would be necessary, though, if consisting in future payment, or otherwise so as not to be an acknowledgment of a receipt or part payment, and thus have an operation in itself as creating, declaring, &c., an interest, it would seem that an agreement for the sale of land does not necessarily require to be registered in order to be admissible in evidence in a suit for specific performance of such agreement by the means of a decree ordering that the person bound by such agreement do execute a deed or instrument operating as an actual transfer of the property. If such an agreement be admissible in a suit for specific performance, I am unable to see on what principle a document containing covenants for title, though, no doubt, embodying "a transaction affecting immoveable property," should not be admissible in evidence in a suit for damages for breach of such covenants, provided always that the document containing such covenants is conformable to the requirements of the exceptive clause (*h*) of section 17 of the Act. If, for instance, the document tendered as evidence of the covenant for title in a suit for damages for breach of such covenant be so

framed as to embody such covenant only, with, of course, a consideration in cases where necessary, and so as to conform to the requirements of clause (*h*) of section 17, I am of opinion that, to be admissible in evidence, registration would not be necessary; but where, as in the present case, the evidence of the covenant is contained in a document *itself* purporting to assign an interest in immoveable property, and when the effect of the covenant itself cannot be got at without looking at the portion of the document which contains the assignment, I think the document is not excepted by clause (*h*) of section 17 from the necessity of registration, and ought not to have been received in evidence, even for the purpose solely of proving the covenant for title. I have, it will be observed, been assuming—of which there was no evidence, though it was suggested—that the document was really executed for valuable consideration. If it was a deed of gift simply, and within clause (*a*) of section 17, there can be no doubt that it must be excluded for all purposes, as the exceptive clauses (*e*) to (*l*) are exceptions from the operation of clauses (*b*) and (*c*) only, and not from clause (*a*).

It was contended by defendants' counsel that, admitting the covenant as alleged to have been proved, no breach of it was shown, inasmuch as the plaintiff had not proved the act of Sakhárám Lakshmanji, namely, the execution of the alleged deed of gift of 16th February 1847, which constituted, or was the foundation for, the alleged breach of the covenant. The plaintiff certainly gave no evidence that such a document was ever executed. The only evidence of the alleged breach of covenant, was the decrees in suit No. 157 of 1872, at the original hearing of 2nd August 1873 and on appeal of 1st April 1875, rejecting the plaintiff's claim to have possession of the premises purported to be conveyed to him by the indenture of 24th March 1871. But in a suit for an alleged breach of a covenant for title it is not enough to prove unsuccessful proceedings to recover possession from third parties, or even an eviction by third parties, in order to prove a breach of such covenant. As against the covenantor and his representatives, such proceedings are not necessarily, though they may happen to be, binding, and the plaintiff has in general to prove, as against the covenantor and his representatives, not only that the plaintiff's

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proceedings to recover possession had been unsuccessful, or that an eviction of the plaintiff had taken place, but that such proceedings were rightfully unsuccessful, or that such eviction was rightful. In other words, he has to prove, as against the covenantor or his representatives, that the title was bad by reason of some act or fact covenanted against. Otherwise it would be very easy for any purchaser, who had repented of his bargain, to get up collusive proceedings, either as plaintiff or defendant, and then sue the covenantor to recover purchase money and interest. In the present case, however, this point, which of itself would have been fatal to the plaintiff's case, does not arise. From the notes of the hearing before Mr. Justice Bayley, in 1873, of suit No. 157 of 1872, put in evidence on the part of the defendants, we find what were the issues in that case, and that the deed of gift of 16th February 1847 was relied upon by the defendants in that suit, and that it was, in fact, the ground on which the learned Judge proceeded in refusing relief to the plaintiff there. Then, we have the allegations, in para. 7 of the written statement of the defendants in the present suit, that Sakhárám Lakshmanji had, previously to the alleged indenture of 15th July 1865, made a valid and effectual gift of the said property to his daughter Shámábái and her heirs, and that, *therefore*, the said Sakhárám Lakshmanji had not, at the date of the said indenture, any right to make a gift of the same to the said Bhagvantráv Rámchandra. So that we have incidentally supplied on the defendant's part—by the notes of the hearing of suit No. 157 of 1872, and by the allegation in para. 7 of the written statement—proof of matters which it lay on the plaintiff to prove but which were not proved on his part, viz., that the Court had decided suit No. 157 of 1872 on the ground of an infirmity of title in the plaintiff in that suit, arising from an act of the covenantor Sakhárám Lakshmanji, and so within the operation of his covenant, and that such decision was a right one.

Another point raised by the defendants was as to the plaintiff's right to sue. He sues as assignee of an assignee of Bhagvantráv Rámchandra; but how can he be an assignee of Bhagvantráv Rámchandra, inasmuch as Bhagvantráv Rámchandra himself, by reason that the Registration Act excludes all operation on the

land of the conveyance to him by the document of 15th July 1865, cannot be held by the Court to have taken anything by that document? To this it was argued, in answer, that this is always so where, by a previous assurance or other act of the covenantor for title, he has already parted with his interest to another, and so conveys nothing under the subsequent conveyance to the person to whom he gives covenants for title, and yet in such case the covenantor or his representatives would not be heard to say that the plaintiff in an action on the covenant for title under such subsequent conveyance was not an assign by reason that nothing passed by the instrument so subsequently executed by the covenantor and purporting to be a conveyance to such plaintiff or to the predecessor in estate of such plaintiff. I am of opinion, however, that this answer has been successfully met by a reference to the principle of estoppel. Where a man by one instrument effectually conveys away his interest in land, and then by a subsequent instrument purports to convey it over again, accompanying his conveyance by vendor's covenants for title, and a subsequent assignee of the land is rightfully evicted by one claiming under the prior conveyance, there, though he who is claiming as assignee under the subsequent conveyance, and who brings a suit for breach of the covenant for title, is not *really* an assignee, for the reason that by the conveyance to his predecessor nothing, in fact, passed, yet the covenantor and his representatives by reason of the execution of the subsequent conveyance, are estopped, in an action for breach of the covenant for title in such last-mentioned conveyance, from saying that nothing passed under that conveyance, or that, supposing derivative title from the covenantor proved, the plaintiff is not assignee of what the defendant is estopped from denying passed to such covenantee under such conveyance. But in that case the subsequent conveyance accompanied by the covenants for title are in evidence; here we cannot look at the deed of 15th July 1865, at any rate so far as it is a conveyance. The Legislature has enacted that, so far as this Court is concerned, there is no such conveyance, and there is nothing in evidence here which estops the defendants from showing, in accordance with the truth, that inasmuch as Bhagvantráv Rámchandra took nothing, so the plaintiff claiming under him has taken nothing, and is not, therefore,

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Bhagvantráv Ramchandra's assign of anything, and is not, therefore, in the alleged character of such assign, entitled to maintain this suit.

It was further contended that no damages could be awarded to the plaintiff, by reason that there was no valuable consideration for the indenture of 15th July 1865, and so not for the covenants therein contained, and this on the general principle that a Court exercising equitable jurisdiction will not assist one claiming under a voluntary settlement, unless, by the settlement itself or other acts, the relation of trustee and *cestui que trust* has been actually constituted according to the particular nature of the property. *Jefferys* v. *Jefferys* (1) was cited as a notable instance of the distinction observed. In that case a voluntary settlement, dated in September 1834, for the ultimate benefit of the settlor's three daughters, comprised a conveyance of freehold to certain trustees, and a covenant to surrender to the same persons certain copyholds. The settlor died without having surrendered the copyholds, and having by a will of August 1836 given part of the same freehold and copyhold estates to his wife Isabella, who after his death was admitted tenant to part of the copyholds. The voluntary settlement was carried into execution against the widow and devisee so far as concerned the freeholds; but so far as concerned the copyholds to which the widow had been admitted tenant, the plaintiffs being volunteers, and having a right lying in voluntary covenant only, their bill was dismissed. The Lord Chancellor states: "My impression is, that the principle of the Court to withhold its assistance from a volunteer, applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement." But, though this may be so, a Court of equity does not in England interfere with the right of a volunteer to maintain an action at law for damages for breach of a covenant, and of this we have two instances very apposite to the present case in *Hervey* v. *Audland* (2) and *Cox* v. *Barnard*. (3) In the first-named case a bill to have a voluntary settlement established, and the trusts of it performed, and the property delivered by the executor of the settlor to the trustee of the settlement, had been dismissed, on

(1) Cr. & Ph. 138.

(2) 14 Sim. 531.

(3) 8 Hare 310.

the ground that the settlement was voluntary, and that a Court of equity would not assist a volunteer in the way asked. But the Court gave the plaintiff leave to bring an action at law for damages on a covenant for further assurance contained in the very same settlement, the trusts of which it had refused to decree the execution of. This action, we find, was, in fact, brought, and damages recovered: see *Ward* v. *Audland.*[1] So in *Cox* v. *Barnard*[2] the Court of equity in administering the estate of a deceased settlor, enforced, as against the estate, without recourse to an action at law, a covenant for further assurance contained in a voluntary settlement executed by the deceased, though it was doubtful, and at any rate the Court was unwilling to decide that the assignment of property comprised in the voluntary settlement would have been complete and effectual had it been attempted to enforce the trusts of it directly. There can, I think, be no doubt that, according to English law, damages may be recovered for breach of covenants for title contained in a voluntary settlement, even though the settlement may not be of such a character as to be effectual without the assistance of a Court of equity, and which assistance the Court of equity will refuse to a volunteer. This, however, depends on the principle of English law, that the fact of the solemnity of sealing and delivering a document is regarded at law as importing consideration. The question then arises, does the principle last referred to, hold as between Hindus? In the face of the decision of the Privy Council in *Rájá Sáhib Prahlad Sen* v. *Baboo Budhu Sing*[3] it is impossible to hold that it does. The Court there states it to be an indisputable proposition "that it has never been held by the Courts in India that a contract made under seal, of itself, imported that there was a sufficient consideration for the agreement." This being so, the fact that the indenture of 15th July 1865 was sealed and delivered by Sakhárám Lakshmanji is immaterial to the question, and we have the ordinary case of a plaintiff suing on a contract for which there was no consideration other than natural love and affection, which, of course, cannot be made the ground of a suit for damages.

The fifth issue, viz., whether the plaintiff is a purchaser, for valuable consideration without notice, of the property comprised

(1) 16 M. & W. 862. (2) 8 Hare 310. (3) 2 Beng. L. R. 111 P.C.

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in the indenture of 15th July 1865, does not, in my opinion, need much discussion, as it is not decisive of the case, whichever way that issue may be found. On the one hand, it is clear enough that the present plaintiff, before he completed his purchase by the execution of the conveyance of 14th March 1871, and before he paid the sum of Rs. 18,750, the balance of the purchase money, had notice by the hand-bill, (exhibit A,) and otherwise, that the property sold was the subject of a then pending suit in this Court, and that it was alleged that, by a deed of gift of 16th February 1847, the said property had been given over to Shámábái for life, with remainder to her sons "till (*sic*) their lives." Then by the conditions of sale the plaintiff must, or at least might, have known that he was purchasing a shaky title, as they provide, *inter alia*, that the purchaser shall not raise any objection of the vendor's title, or make any requisitions thereon, but shall accept such title as the vendor can give, and the vendor shall not be required by the purchaser to clear any claim that may be made to the premises by any person. On the other hand, if this had been a case depending on the question of purchase for value without notice, the plaintiff, though *he* had notice when he completed his purchase, yet might have protected himself by the fact that his vendor, Shrikrishná Náráyen, was a purchaser for value without notice, and there is no evidence whatever to show that Shrikrishná, at the time of the mortgages of 6th April 1867 and 1st September 1868, had any notice of the deed of gift of 16th February 1847, or that Bhagvantráv Rámchandra was otherwise than absolutely entitled to the mortgaged premises.

Then a few observations as to the issue upon the Limitation Act. The covenant sued on, consists of three branches: 1st, that Sakhárám Lakshmanji now—*i.e.*, on 15th July 1865—hath power to grant and convey; 2nd, that the premises conveyed shall at all times thereafter—*i.e.*, from the same date—remain and be to the use of the grantee, and be enjoyed without interruption by Sakhárám Lakshmanji or any one claiming through him, and free and discharged from all estates, incumbrances, &c., created by Sakhárám Lakshmanji or any one claiming through, or in trust, &c., for him; and, 3rd, for further assurance.

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As to the first branch of the covenant, the breach took place on the day the indenture was executed, viz., 15th July 1865 (see Dart's Vendors and Purchasers, 4th ed., 715), and the suit is barred.

As to the second branch of the covenant, it would seem to be one of those covenants admitting of a continuing breach, so that under section 23 of the Limitation Act a suit would not be barred so long as the breach continues, and that, therefore, the suit, if otherwise maintainable, would not be barred by reason of the Limitation Act.

As to the third branch of the covenant, it does not appear ever to have been broken at all. Such a covenant is broken by a refusal of the persons bound by it to execute, or procure to be executed, a proper further assurance when tendered to them on the part of the persons requiring performance of the covenant, and there is no evidence in the present case of any such refusal by the defendants, or that they have ever been required to execute, or procure to be executed, a further assurance, though we may fairly assume that they would have refused had they been asked.

The findings on the issues will be as follows:—on the first in the negative, for the reason that the plaint and written statement in this suit agree in alleging in effect that, before the deed of the 15th July 1865 was executed, Sakhárám Lakshmanji, the person who by such last-mentioned deed purports to convey the premises therein mentioned to the said Bhagvantráv Rámchandra, had by an earlier deed of gift, which, however, has not been put in evidence in this suit, effectually granted and conveyed the said premises to persons other than the said Bhagvantráv Rámchandra, and from whom there is no evidence that the said Bhagvantráv Rámchandra ever acquired the same.

On the second issue the finding is in the negative, and for the defendants, on the ground that the document containing such alleged covenant is not registered, and is, therefore, inadmissible in evidence.

On the third issue the finding is, that there was no consideration for the deed and covenant therein mentioned other than natural love and affection.

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The fourth, fifth, sixth, and seventh issues are found in the negative, and for the defendants.

On the eighth issue it is not necessary to record any finding.

The decree is, that the suit be dismissed, and with costs.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melvill.

August 7.

JAMNA'DA'S AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS v. LA'LI-TARA'M AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Execution of decree—Limitation Act IX. of 1871, *Schedule II., Article* 167, *Clause* 4—*Application to "keep in force" decrees or orders.*

The Pensions Act (XXIII. of 1871) is not retrospective.

The "application" spoken of in article 167, clause 4, of schedule II. to Act IX. of 1871 is not merely such an application as is contemplated by section 212 of Act VIII. of 1859, but includes an application to keep in force a decree or order.

The language of article 167, clause 4, of schedule II. to Act IX. of 1871 is wide enough to include any application to enforce or keep in force decrees or orders, and, consequently, an application to enforce or keep in force a decree by the attachment of a portion of the property of the defendant, will keep the decree alive against the residue of his property or his person.

Jibhái Máhipáti v. *Párbhu Bápu* (I. L R. 1 Bom. 59) distinguished. *Gouree Sunkur* v. *Arman Ali* (21 Calc. W. R. 309 Civ. Rul.) mentioned.

An order for attachment of a pension in satisfaction of a decree obtained on the 10th December 1863, was made on 16th April 1869. After the passing of the Pensions Act (XXIII. of 1871), the Deputy Collector refused to continue paying the pension to the decree-holder, and returned to the Court the warrant of execution issued under the order of 16th April 1869, and an order finally disposing of the application for attachment was made on 14th June 1872. On 19th June 1872 the decree-holder presented a fresh application, praying that the attachment of the pension might be continued, and a letter be written to the Collector, directing him to continue to pay the pension to the decree-holder, as directed by the order of 16th April 1869.

Held that such last-mentioned application came within clause 4 of article 167 of schedule II. to Act IX. of 1871, and that, consequently, an application on 24th July 1874, for execution of the decree of 10th December 1863, was not barred.

Held, also, that the decree might properly be enforced against property of the defendant, mentioned in the application of 1874, other than the property mentioned in the applications of 1869 and 1872.

*Miscellaneous Appeal No. 9 of 1875.