

JUDGMENT.

The judgment of Court was delivered by  
 M. MELVILL, J.—We think that the intention of the latter portion of s. 2 of Act XV of 1877, was to extend for two years the benefit of the old law in cases in which a plaintiff would be prejudiced by the application to his case of the provision of the new law. In the case of notes payable on demand, the Limitation Act of 1877 prescribes a period of three years from the date of the note, while under the Act of 1871 the period commenced to run from the date of demand. The holder of a note passed in 1874 would be seriously prejudiced if the law of 1877 were suddenly applied to him, for the period of Limitation under that law might expire on the very day after the Act was [89] passed; while under the old law the period might not even have commenced to run. To meet such cases the Legislature has given to plaintiffs so situated a period of two years from the date of the passing of the Act, and, therefore, the present claim, having been brought in 1878, is not barred. This view of the law is in accordance with that taken by the Calcutta Court in *Omirotlall Dey v. A. Howel*. The order of the Court of Small Causes is reversed, and the case remanded for a decision on the merits. Costs to follow final decision.

Order accordingly.

4 B. 89.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

SAMBHUBHAI KARSANDAS (*Original Plaintiff*), Appellant v.  
 SHIVLALDAS SADASHIVDAS DESAI (*Original Defendant*),  
 Respondent.\* [5th January, 1879.]

*Registration—Regulation IX of 1827—Acts XIX of 1843, XVI of 1864, XX of 1866—Priority of registered over unregistered instruments—Purchaser at Court's sale—Burden of proof—Adverse possession—Limitation.*

On the 13th January 1876 plaintiff became purchaser at a Court's sale of the right, title, and interest of G and N in a shop, and, having been obstructed by defendant in obtaining possession of it, sued to recover it from him. The plaint was filed on the 27th January 1877. Defendant answered that he purchased it from G under a deed of sale dated 5th January 1865, and that he had been in possession since that day. The deed of sale was not admitted in evidence for want of registration, but it was found that defendant had been in possession as owner since 5th January 1865.

*Held*, that as the defendant admitted that he had derived his title from G (of whose interest in the shop the plaintiff was assignee) the burden of proof lay upon the defendant and that he had failed to prove his purchase, inasmuch as his unregistered deed of sale could not be received in evidence, and oral evidence was inadmissible in place of the deed.

*Held* also, that although the defendant could not prove a title by purchase, it was open to him to establish his title without the aid of the deed of sale; that his possession of the premises for more than twelve years prior to the institution of the suit was adverse both to G and N, and that the claim of the plaintiff who was assignee of their interest, was consequently barred.

*Balaram Nemchand v. Appa* (1) explained.

*Somu Gurrukul v. Rangammal and others* (2) referred to and concurred in.

\* Second Appeal No. 251 of 1879.

(1) 9 B.H.C.R. 121.

(2) 7 M.H.C.R. 13.

1879  
 SEP. 4,  
 APPEL-  
 LATE  
 CIVIL,  
 4 B. 89  
 4 Ind. Jur.  
 576.

1879  
JAN. 5.APPEL-  
LATE  
CIVIL.

B. 89.

[Appr., 4 B. 126 (148) (F.B.); R., 11 A. 438; 6 B. 168 (180) (F.B.); 9 B. 137 (140); 12 B. 569; 16 B. 722 (725); 27 B. 452; D., 18 B. 332 (337).]

[90] THIS was a second appeal from the decision of W. H. Crowe, Acting District Judge of Khandesh, in appeal No. 4 of 1878 reversing the decree of Dinkar Dhondev Datar, Subordinate Judge (Second Class) at Nandurbar, in original suit No. 112 of 1877.

The plaintiff filed this suit on the 27th January 1877 in the Court of the Second Class Subordinate Judge at Nandurbar, and sought to recover possession of a shop as purchaser at a Court's sale. He alleged that he had purchased the shop on the 18th January 1876, in execution of a decree against two brothers, Narotam and Girdharlal, but that he had been obstructed by the defendant Shivilaldas in taking possession of it.

The defendant answered that he purchased the shop in dispute from Girdharlal on the 5th January 1865 for Rs. 399, and that he had since been in possession of it, and that the plaintiff's claim was barred by limitation.

The Subordinate Judge held that the defendant failed to prove his title, because his deed of sale was inadmissible in evidence, not having been registered, and that no oral evidence could be received to prove the same. He accordingly, on the 15th December 1877, made a decree in favour of the plaintiff.

In appeal the District Judge reversed that decree, and dismissed the plaintiff's claim on the 27th February 1879. The following passage from his judgment contains his reasons:—

“Plaintiff sues as purchaser of the right, title and interest of Narotam and Girdharlal at a Court sale on the 18th January 1876. The defendant relies on a sale to him by Girdharlal, accompanied by possession in 1865 A.D. The *onus* lies on defendant. The Subordinate Judge, relying on the case of *Sheikh Ibrahim v. Parvata* (1), has not admitted defendant's deed of sale, owing to want of registration, and has refused oral evidence of the sale. The later case of *Balaram Nemchand v. Appa* (2) has been overlooked by the Subordinate Judge. This appears to me to apply to this case. It is proved by the evidence that defendant [91] has been in possession of the shop for several years prior to plaintiff's purchase. His title, therefore, was completed by possession, and no interest remained to Girdharlal. Consequently, plaintiff purchased nothing at the Court sale. The above ruling was made on the old regulation law (Reg. IX of 1827); but their Lordships added that the same ruling would, in their opinion, be proper if the case were governed by Act XVI of 1864, which is the law applicable to this case. I must, therefore, reverse the decree of the Lower Court and reject the plaintiff's claim with costs.”

On the 8th June 1879 the plaintiff Shambhubhai preferred a second appeal to the High Court.

*Nanabhai Haridas* (Government Pleader), for the appellant.—The District Judge was wrong in holding the defendant's purchase proved, when the deed of sale, the only evidence of the transaction, was unregistered, and, therefore, inadmissible in evidence. Defendant's possession does not strengthen his claim, because it was under an invalid title. The lower Court ought to have determined how long the defendant had been in possession of the shop in dispute before the sale of it to the plaintiff. The case of *Balaram Nemchand v. Appa* (2) does not apply, because the decision refers to instruments of which the registration was optional.

(1) 8 B.H.C.R. A. C. J. 163.

(2) 9 B.H.C.R. 121.

In the present case registration is compulsory. The case is completely governed by *Sheik Ibrahim v. Parvata* (1).

*Manekshah Jehangirshah*, for the respondent. — The defendant has been exercising acts of ownership over the property with Girdharlal's consent or acquiescence. His title, therefore, is good without a deed to support it. In *Shaik Parabdi Shahani v. Shaik Mahomed Hossein* (2) the High Court of Calcutta held that a certain *ikrarnama* was inadmissible in evidence because not registered, but that the Court might look at other independent evidence, such as the acts and conduct of the parties, to throw a light upon their intention. In *Selam Sheikh v. Baidonath Ghatak* (3) that Court ruled that a registered deed cannot, under s. 49 of Act XX of 1866, prevail against an unregistered deed [92] under which possession had been delivered to the alienee. In *Narsing Porkaet v. Mussamat Beewah* (4) it has been decided that where possession of immovable property has been given under an unregistered lease, a subsequent grantee of a registered lease cannot maintain a suit to evict the lessee in possession, on the ground of the priority of his deed, under s. 48 of the same Act. The rule laid down in *Balaram Nemchand v. Appa* (5) fully supports the defendant's claim.

1879  
JAN. 5.  
—  
APPEL.  
LATE  
CIVIL.  
—  
4 B. 89.

#### JUDGMENT.

The following are the judgments of the Court:—

M. MELVILL, J.—The plaintiff in this case is the purchaser, at a Court sale, of the interest of Girdharlal and another in a shop, and he seeks to eject the defendant, who has been for some years in possession, in virtue, as he alleges, of a purchase from Girdharlal in 1865. The deed of sale produced by the defendant was inadmissible in evidence, because it was not registered; and on this ground the Subordinate Judge, following the decision of this Bench in *Sheik Ibrahim v. Parvata* (1), refused to receive either the document itself or oral evidence in support of the defendant's title, and allowed the plaintiff's claim.

The decree of the Subordinate Judge has been reversed by the District Judge who held, on the authority of *Balaram Nemchand v. Appa Dulla* (5) that the defendant's title was completed by possession, and that, therefore, the plaintiff purchased nothing at the Court sale.

I think that the decision referred to (to which I was a party) has been carried by the District Judge further than we intended, certainly further than I intended. What we decided in that case was that the priority given by Regulation IX of 1827 and Act XIX of 1843 to registered over unregistered instruments did not operate to defeat the title of a person who had obtained possession under an unregistered conveyance previously to the execution of registered conveyance to another person. It is true that we added, somewhat unnecessarily, that the same ruling would, in our opinion, be proper if the case were governed by Act XVI of 1864, or Act XX of 1866; but in this remark we were only [93] referring to the provisions of those Acts which relate to the precedence given to certain registered over certain unregistered documents; and all that we meant to say was that, if we were construing those provisions (which have reference only to instruments of which the registration is not compulsory), we should hold that the title of a person in possession under an unregistered conveyance was not liable to be defeated by a subsequent registered conveyance of

(1) 8 B.H.C.R. A.C.J. 163. (2) 1 B.L.R. A.C. 37. (3) 3 B.L.R. A.C.J. 312.  
(4) 5 B.L.R. App. 86. (5) 9 B.H.C.R. 121.

1879  
 JAN. 5.  
 ———  
 APPEL-  
 LATE  
 CIVIL.  
 ———  
 4 B. 89.

the same property. The question, whether a purchaser can defend his possession when registration of his conveyance is by law obligatory, and when he has omitted to register it, is a question which was not raised in that case, and could not have been raised, for the simple reason that the Regulation and Act, with which we were dealing, do not render the registration of any documents compulsory.

I adhere to the decision in *Sheik Ibrahim v. Parvata*, and am of opinion that the Subordinate Judge was right in holding that, as the plaintiff is the assignee of Girdharlal's interest in the shop, and as the defendant admitted that he derived his title from Girdharlal, the burden of proving his purchase lay upon the defendant and that the defendant has failed to prove that purchase, because his deed of sale cannot be received in evidence, and oral evidence is inadmissible in the place of the deed. I concur in the view expressed by the Madras High Court on this point in *Somu Gurruakal v. Rangammal and others* (1).

Though the defendant cannot establish a title by purchase, he may still prove a title founded on adverse possession for twelve years. On this point he is entitled to a finding by the District Court.

The burden of proof is upon the defendant, and he must establish his title without the aid of his deed of sale. If he prove actual possession for twelve years, the burden of proving that such possession was not as owner, should, I think, be shifted to the plaintiff; and in the absence of such proof the defendant would be entitled to a decree. But, if (as the Subordinate Judge has found) Girdharlal continued in actual possession until a period within twelve years from the date of the suit, it will be for the [94] defendant to prove his allegation that Girdharlal was his *gumasta* and that, therefore, Girdharlal's possession was really his (the defendant's) possession.

KEMBALL, J.—I think the Subordinate Judge was perfectly right in refusing to receive the evidence tendered by the defendant in proof of the sale set up by him, and I also think that the decision quoted and relied on by the District Judge in overruling the Subordinate Judge on the above point, had no application to the circumstances of the present case. But the first point to which, in my opinion, the District Judge should address himself is the question of limitation. The plea was raised, and apparently disposed of, in the Court of first instance, and was again urged in appeal to the District Court; and it is for the plaintiff to show that either he or his vendor was in possession within twelve years of the institution of this suit. If the plaintiff succeeds in satisfying the District Court that his suit was not time-barred, it will still be for the Judge to determine, upon the evidence recorded, whether the acquisition of possession by the defendant, "for several years prior to plaintiff's purchase," as already found by the District Judge, taken conjointly with other evidence adduced by him, is sufficient to prove defendant's acquisition of title. The plaintiff can only succeed by the strength of his own title; and I agree in thinking that, if the defendant has proved such undisturbed possession as is *prima facie* sufficient, in the Court's opinion, to induce the presumption that it related to rightful title, the *onus* is on the plaintiff to show that the possession relied upon is not, in fact, so referable, and that, if he fails therein, the defendant is entitled to succeed in the suit.

M. MELVILL, J.—I admit, that the defendant, who has admittedly been in possession for several years, may succeed if he prove conduct on

(1) 7 M. H. C. R. 13.

the part of Girdharlal which is only consistent with a recognition, by Girdharlal, of defendant's title as owner.

*Final order of the Court.*—The District Judge is required to find on the following issues:—

1. Has the defendant proved adverse possession for twelve years before the date of plaintiff's suit? 2. If not, has the defendant proved such conduct on the part of Girdharlal as is [96] only consistent with a recognition, by Girdharlal, of defendant's title as owner? 3. If so, is plaintiff still entitled to succeed, and to what extent, as assignee of Narotam's interest?

The finding must be on the evidence already on record, exclusive of defendant's unregistered deed of sale. The third issue has been added, because the plaintiff has purchased the interest both of Narotam and Girdharlal, and defendant claims to derive title from Girdharlal only. The question of Narotam's interest does not appear to have been considered by the Court below.

On remand, the District Judge recorded the following findings:—

“ My finding on the first issue is in the negative.

“ Cause of action accrued on the 23rd September 1876, and the defendant's possession does not date further back than 5th January 1865.

“ My finding on the second issue is in the affirmative.

“ It has already been found in the evidence that defendant has been in possession for several years. Girdharlal has admitted that he sold the shop to defendant, and that the defendant has been in possession as owner, and that when he (Girdharlal) was in possession for a time it was only as defendant's *gumasta*. The evidence of the witnesses sufficiently proves that Girdharlal's conduct has been consistent with the present admission.

“ My finding on the third issue is that plaintiff has purchased Narotam's interest in the shop, and there is nothing in the evidence to show that Girdharlal transferred or was competent to transfer Narotam's interest. Narotam and Girdharlal are brothers, and the presumption is that they are undivided in interest. The plaintiff is, therefore, entitled to Narotam's interest in the shop, but should bring a suit for partition.”

On the return of the case with the above findings it was heard again on the 5th January 1880 by M. Melvill and Pinhey, JJ.

*Nanabai Haridas*, (Government Pleader), for the appellant.

*Manekshah Jehangirshah*, for the respondent, objected to the finding of the District Judge on the first issue, that the cause of action arose on the 23rd September 1876, and contended that the [96] suit was barred by limitation, because the defendant had been in possession and exercising acts of ownership since the 5th January 1865, a period of more than twelve years from the date of the suit, which was not filed till the 27th January 1877.

#### ORDER.

The Court confirmed the decree of the lower Court with the following order:—

M. MELVILL, J.—The first issue sent down by this Court would have been more correctly worded if it had required the lower Court to find whether the defendant had been in adverse possession for twelve years before the date, not of the plaintiff's purchase, but of the filing of the plaint. The District Judge's finding, however, is sufficient to enable this Court to dispose of the issue in its proper form. The District Judge has found that the defendant has been in possession since the 5th January

1879  
JAN. 5.  
—  
APPEL-  
LATE  
CIVIL.  
—  
4 B. 89.

1879  
JAN. 5.  
—  
APPEL-  
LATE  
CIVIL.  
—  
4 B. 89.

1865, and that such possession has been as owner, Girdharlal having occupied the shop as the defendant's *gumasta*. The present suit was instituted on the 27th January 1877, or more than twelve years after the defendant's adverse possession commenced. That possession was adverse to Narotam as much as to Girdharlal; and the plaintiff, who is the assignee of Narotam's and Girdharlal's interest, is affected by the bar created by the defendant's long adverse possession. For these reasons we find the present suit to be barred by limitation, and on this ground we confirm the decree of the District Court, with all costs on the plaintiff throughout.

*Decree confirmed.*

4 B. 96=4 Ind. Jur. 577.

APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice F. D. Melvill.*

RAGHO GOVIND PARANJEE (*Original Plaintiff*), *Appellant v.*  
DIPCHAND (*Original Defendant*), *Respondent*.\* [26th August, 1879.]

*Bond payable by instalments—Penalty—Waiver of default—Acts IX of 1871 and XV of 1877, sch. II, art. 75—Act VIII of 1859, s. 194—Act X of 1877, s. 210—Jurisdiction.*

Where a bond is payable by instalments, and expressly stipulates for the payment of the whole debt on failure of the payment of any instalment, the [97] law of limitation runs on the whole amount of the bond against the obligee from the day on which the obligor first makes default in the payment of any instalment, unless the obligee waives the default, and afterwards from the day on which any fresh default is made in respect of which there is no waiver.

The obligee may waive the default under Acts IX of 1871 and XV of 1877, sch. II, art. 75, but the Courts have no authority to compel him to waive it.

Neither Act VIII of 1859, s. 194, nor Act X of 1877, s. 210, confers any authority on the Courts to relieve a contracting party from such an express stipulation in a bond payable by instalments, as to the consequence of default in punctual payment of the instalments.

A debt being presently due, an agreement to pay it by instalments, with a stipulation that, on default, the creditor may demand immediate payment of the whole balance due with interest, is not to be relieved against in equity. Such a stipulation is not in the nature of a penalty, inasmuch as its object is only to secure payment in a particular manner.

The defendant executed to the plaintiff a bond payable by instalments and expressly stipulating for the payment of the whole amount on failure to pay any instalment on the day fixed. He paid the first instalment, but, made default in paying the second, which fell due on the 3rd August 1878. On the 20th August plaintiff sued to recover the whole balance due on the bond. Defendant admitted the bond, but pleaded tender of the amount of the second instalment soon after the due date, and prayed for payment by instalments without any interest. The first Court passed a decree in the plaintiff's favour for the amount claimed with costs, but ordered defendant to pay Rs. 100 and the costs at once, and the balance by yearly instalments of Rs. 100 each, with interest at 6 per cent. till payment. The District Judge, in appeal, affirmed the decree, with a slight variation as to interest, which he directed the defendant to pay on over due instalments only.

*Held*, by the High Court on second appeal that neither of the lower Courts had jurisdiction, without the consent of the parties, to substitute for the contract made by them, terms which the Court preferred.

\* Second Appeal No. 256 of 1879.