

a transaction, even so sacred as an adoption amongst Hindus, was held to be avoided by fraud.

Instances are not wanting in the reports of Indian cases in which the doctrine of English Courts of Equity as to notice has been applied in the Mofussil. Amongst them may be mentioned *Gopal v. Krishnappa* (1), where a mortgage of the 1st August 1864, unregistered and without possession, was (even in the Dekkan, where the rule of Hindu law is that a mortgage of land must, to have validity against third persons, be accompanied by possession) held valid against a subsequent purchaser, under a registered deed of 1867, with possession, who had notice of the mortgage. That he had such notice through an order of Court, which may have been irregular, was deemed not to affect the equitable value of the notice. The mortgage might have been registered under Bombay Reg. IX of 1827 and Act XIX of 1843. The purchase deed was registered under Act XVI of 1864. In *Shib Kishen v. Sheikh Abdul* (2) an agreement for sale was enforced against a subsequent purchaser with notice. The same principle was acted on in *Ramtonoo v. Gour Chunder* (3), where an inquiry was directed as to whether a purchaser had notice of a previous agreement for sale. In *Gowree Kant v. Girdhar* (4), with reference to s. 68 of Act XVI of 1864, the Court said that a registered deed could not prevail against a prior unregistered deed, whereof the grantee of the registered deed had notice. *Jivandas v. Framji* (5) arose within the original jurisdiction of the High Court, not in the Mofussil.

The Specific Relief Act (I of 1877) having come into force since the present litigation commenced, is not applicable to this case. It is, therefore, unnecessary now to consider s. 4, cl. c; s. 24, cl. d; s. 27, cl. b, and the illustrations of it.

The petition of review is dismissed.

4 B. 155.

[155] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Officiating Chief Justice, and  
Mr. Justice M. Melvill.

HARKISANDAS NARANDAS, DECEASED; HIS HEIR, HIS WIDOW

BAI JAMNA (Original Plaintiff), Appellant v. BAI ICHHA

(Original Defendant), Respondent.\* [17th November, 1879.]

*Certificate of sale—Right of action—Registration Act (No. VIII of 1871), s. 49.*

The plaintiff sued to recover possession of a house purchased by him at a Court sale for Rs. 350. The plaint was filed on the 31st March 1873. No certificate of sale was filed with it; but plaintiff subsequently produced one, dated the 8th July 1873, and the Court admitted it in evidence. Defendant submitted that the suit should be dismissed, as no certificate was produced by the plaintiff with the plaint. The first Court made a decree in the plaintiff's favour. The Court of appeal reversed that decree, and dismissed the suit, holding that the certificate ought not to have been received in evidence by the lower Court.

\* Second Appeal, No. 311 of 1879.

(1) 7 B. H. C. R. A. C. J. 60 and see *Suraj Bansi v. Sheo Prashad*, 6 I.A. 88.

(2) 13 W. R. 604.

(3) 3 W. R. 64.

(4) 4 B.L.R.A. C. 8=12 W.R. 456.

(5) 7 B.H.C.R. O.C.J. 45.

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The High Court on second appeal confirmed the decision of the lower appellate Court, on the ground that the plaintiff had no right of action, as he had no registered certificate of sale at the date of the institution of the suit.

[R., 17 B. 375 (382); D., 6 B. 139 (142); 10 B. 444 (448).]

THIS was a second appeal from the decision of G. Druitt, Assistant Judge at Surat, in appeal No. 38 of 1877, reversing the decree of Makundrai Manirai, Subordinate Judge (First Class) at the same place, in original suit No. 790 of 1873.

Harkisandas Narandas, deceased, purchased the house in dispute at a Court sale for Rs. 350. His widow, Bai Jamna, brought this suit in the Court of the Subordinate Judge (First Class) at Surat to recover possession of the house from Bai Ichha. The plaint was filed on the 31st March 1873; but no certificate of sale was filed with it. She subsequently produced a registered certificate, dated the 8th July 1873. The defendant in his written statement contended, among other objections, that the suit should be dismissed, because the plaintiff produced no certificate of sale with the plaint. The Subordinate Judge on the 21st December 1876 made a decree in the plaintiff's favour. In appeal, the Assistant Judge reversed that decision, and dismissed the plaintiff's claim. The plaintiff appealed to the High Court.

[156] *Nagindas Tulsidas*, for the appellant.—The certificate of sale was properly admitted by the Court of first instance. It was competent to that Court, under s. 39 of the Civil Procedure Code (Act VIII of 1859), to admit a document subsequently which was not filed with the plaint. The respondent did not object to the admission of the certificate in evidence at the first hearing, though he contended in his written statement that the suit should be dismissed, as the plaint was not accompanied with a certificate. Moreover, it was not the certificate of sale which gave plaintiff his right of action. His right is based upon the sale by the Court which was confirmed on payment of the money by the plaintiff. His omission to produce the certificate with the plaint, is a mere technical objection, and ought not to be permitted to prevail against his right. That omission was cured by the Court's permission subsequently given to file it. The plaintiff has been successful in both the lower Courts on the merits. The learned pleader also referred to ss. 128 and 129 of Act VIII of 1859.

*Manekshah Jehangirshah*, for the respondent.—A certificate of sale is an instrument which is subject to the provisions of the Registration Act; and an unregistered certificate, where its registration is compulsory, is not only inadmissible in evidence, but invalid: *Padu Malhari and another v. Rakhmai* (1). The certificate is the plaintiff's title-deed. He had no right or title before it came into existence. In the present case the date of the certificate filed in Court is later than that of the plaint. [SARGENT, A.C.J.—It appears that the plaintiff had previously obtained certificate about or before the 15th March 1872.] That certificate was unregistered, and, therefore, useless, because, under s. 49 of the Registration Act (VIII of 1871), which governs this case, it did not affect any immoveable property comprised therein, and was inadmissible as evidence of any transaction affecting such property. Where such certificate is unregistered, no other evidence is admissible to prove the sale: *Padu Malhari and another v. Rakhmai* (1). The learned pleader also referred

(1) 10 B.H.C.R. 435.

to *Lalbhai Lakhmidas v. Naval Mir Kamaludin Husenkhan* (1) and *Basapa v. Marya* (2).

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PER CURIAM.

[157] At the date when the plaintiff brought this suit he had no registered certificate of sale, and, therefore, no right of action. The suit should, therefore, have been dismissed. The plaintiff subsequently obtained a certificate, and registered it. This certificate may, perhaps, enable him to bring another action, but we think that the Assistant Judge has rightly held that it could not be admitted in evidence in the present suit, which was brought before the certificate came into existence. On this ground the decree is confirmed with costs.

*Decree affirmed.*

4 B. 157=4 Ind. Jur. 637.

APPELLATE CIVIL.

*Before Mr. Justice Kemball and Mr. Justice F. D. Melvill.*

BABAJI PARSHRAM (*Original Defendant*), Appellant v.

KASHIBAI (*Original Plaintiff*), Respondent.\*

[18th November, 1879.]

*Hindu Law—Partition—Effect of an unexecuted decree for partition—Agreement to divide.*

Where there is no indication of an intention to presently appropriate and enjoy in a manner inconsistent with the ordinary estate of enjoyment of an undivided family, an agreement to divide without more is not of itself sufficient to effect a partition. Nor is a direction to divide in a decree—which in principle is not distinguishable from a material agreement to divide—more than an inchoate partition insufficient to change the character of the property, which continues a joint estate until there has been an actual partition by metes and bounds, or a division of title so as to give to each member thenceforth a definite and certain share which he may claim the right to receive and enjoy in severalty.

[F., 37 B. 307 (312)=14 Bom. L.R. 1198=17 Ind. Cas. 955; D., 24 B. 182 (185); 12 C. 96 103.]

THIS was a second appeal from the decision of A. C. Watt, Judge of Ratnagiri, confirming the decree of Rao Saheb A. K. Kothare, Subordinate Judge of Rajapur.

*Shantaram Narayan*, for the appellant.

*Yashvant V. Athale*, for the respondent.

JUDGMENT.

The facts of the case and arguments as well as the authorities are fully set forth in the following judgment of the Court delivered by

KEMBALL, J.—The facts connected with this case are somewhat peculiar; before coming, therefore, to the main question between the parties here, it may be well to set them forth.

[158] In the year 1866 the present defendant brought a suit against his uncle Ramchandra Ananta, the father of the present plaintiff Kashibai, and a person who was stated to be a mortgagee, to obtain, as

\* Second Appeal, No. 262 of 1879.

(1) 12 B.H.C.R. 247.

(2) 3 B. 433.