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[458] I am, therefore, of opinion that the plaintiff is entitled to recover from the defendant, as undisclosed principal, the sum of Rs. 824-8-0 the price of the 26,626 cocoanuts, which were the subject of the third contract, and also that the plaintiff is entitled, as against the defendant to the amount realised by the sale of the 30,160 cocoanuts, the subject-matter of the first two contracts, which sum is now in the Bank of Bombay awaiting the result of this suit.

It was also argued for the plaintiff that the plaintiff was entitled to recover the price of the 26,626 cocoanuts from the defendant, on the ground that the plaintiff had retained the transshipment permit of these goods; that by such retention he retained the property and control over the goods, and that he was induced to part with the transshipment permit to Moti Ganesh on the latter's express promise to pay for the goods. This was denied by Moti Ganesh.

As I have decided, upon the main question, that the plaintiff is entitled to recover, I do not consider this point in detail, but I am of opinion that a transshipment-permit (which is issued under s. 128 of the Indian Sea Customs Act of 1878) does not, like a bill of lading, represent the goods mentioned in it, or give any lien on, or control over, them; and that, considering the character of transshipment-permits and their uses and the previous course of dealing between the plaintiff and the firm of Sunderji Kessowji as found in the case, I have come to the conclusion that the plaintiff did not retain the transshipment-permits, or deliver them to Moti Ganesh upon such promise, as alleged.

*Judgment for plaintiff.*

Attorney for plaintiff.—Mr. H. W. Payne.

Attorneys for defendant.—Messrs. Tyabji and Sayani.

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[459] APPELLATE CIVIL.

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

PARMAYA (Original Defendant No. 1), Appellant v. SONDE  
SHRINIVASAPA (Original Plaintiff), Respondent.\*  
[16th February, 1880.]

*Registration Acts, XIX of 1843, XX of 1866, VIII of 1871—Registration—Mortgage without possession—Subsequent purchase with possession.*

Deeds of sale dated, respectively, the 22nd October, 1868, and 7th February, 1874, and registered, the former under Act XX of 1866 and the latter under Act VIII of 1871, are not thereby entitled to priority over an unregistered mortgage deed, dated the 13th June, 1864, the registration of which was optional under Act XIX of 1843, where the consideration for the rival deeds exceeds Rs. 100.

*Quære.*—Whether in Kanara, a mortgage without possession can be sustained against a subsequent purchase from the mortgagor with possession.

[R., 13 B. 220 (232); 15 B. 183; 20 B. 408 (417) (F.B.)]

THIS was a second appeal from the decision of A. L. Spens, Judge of the District Court of Kanara, in appeal No. 157 of 1877, reversing the decree of V. V. Wagle, Subordinate Judge (Second Class) at Sirsi.

\* Second Appeal, No. 450 of 1879.

The plaintiff brought this suit against Parmaya and another, to establish his right to recover Rs. 724-10 0 from certain lands mentioned in the plaint. He alleges that the lands in dispute had been mortgaged to one Annapa by Shankarapa and Timapa (both deceased) by a deed dated the 13th June, 1864; that Annapa brought a suit in 1866 on his mortgage, against the mortgagors' legal representative, Narsama, and on the 4th July, 1870, obtained a decree for Rs. 613 and costs against the mortgaged property; that he (Annapa) attached the property in execution of his decree, but the attachment was removed on the application of the defendants under s. 246 of the Civil Procedure Code (Act VIII of 1859), the Court referring Annapa to a regular suit to establish his right: that Annapa subsequently assigned his decree to the plaintiff, who, thereupon, brought the present suit, and claimed to recover the money from the mortgaged lands.

Parmaya (defendant No. 1) answered that the mortgage-deed (Ex. No. 46), relied upon by the plaintiff, was a forgery, and that the decree had been fraudulently obtained; that the property had been sold by Narsama to Parambhat by a deed dated the [460] 22nd October, 1868, and that Parambhat sold it to defendant under a deed dated the 7th February, 1874.

Defendant No. 2 answered that he had no interest in the property in dispute, and that he had been unnecessarily made a party.

The mortgage-deed (Ex. No. 46) and the two deeds of purchase (Exs. 17 and 18), relied upon by defendant No. 1, were each for a consideration exceeding Rs. 100. The mortgage-deed, however, which was executed while Act XIX of 1843 was in force, was not registered. The two deeds (Exs. 17 and 18) were registered, the former under Act XX of 1866, and the latter under Act VIII of 1871.

The Subordinate Judge held that the mortgage-deed (Ex. No. 46) was not genuine. He, accordingly, dismissed the plaintiff's claim.

In appeal, which was preferred by the plaintiff it was contended on behalf of defendant No. 1 (Parmaya) that the plaintiff's mortgage (Ex. No. 46) not having been registered, could not prevail against the defendant's registered deeds (Ex. 17 and 18). The District Judge held that the mortgage-deed was genuine, and that it did not require registration, as decided in *Khandu Dulabdas v. Tarachand Amarchand* (1). He, accordingly, reversed the decree of the first Court, and allowed the plaintiff's claim.

On the 8th December, 1897, Parmaya filed a second appeal in the High Court. Defendant No. 2 did not join in it.

*Ghanasham Nilkanth Nādkarni*, for the appellant.—The plaintiff's mortgage (No. 46) is not registered. It is, therefore, invalid and inoperative against the defendant, who holds under registered deeds. The defendant's title is perfected both by registration and possession, and cannot be defeated by a mortgage which is neither registered nor accompanied with possession. The defendant and his vendor are *bona-fide* purchasers without notice of the plaintiff's alleged mortgage. The plaintiff's vendor was not in possession at the date of the sale, which, therefore, is invalid according to Hindu law. This suit, brought as it is on that sale, is not maintainable.

[461] *Shamrao Vitthal*, for the respondent.—The deeds (Nos. 17 and 18), relied upon by the defendant, were subject to compulsory registration

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under Acts XX of 1866 and VIII of 1871, and would have been null and void without registration. The registration of the mortgage-deed was optional under Act XIX of 1843. The question of priority, therefore, does not arise in this case, as ruled in *Khandu Dulabdas v. Tarachand Amarchand* (1). The plaintiff charged the sale (No. 17) to be fraudulent and collusive. The lower Courts have not determined that question. They have not decided, also, whether the plaintiff's mortgage was not valid without possession in the district of Kanara. It is necessary that these questions should be determined.

The following is the judgment of the Court:—

#### JUDGMENT.

WESTROPP, C. J.—The District Judge has found (and his finding must be accepted as conclusive on that point) that the document on which the plaintiff founds his claim (Ex. 46), dated 13th June, 1864, was executed *bona fide*, and that it did not need registration as against the (Exs. 17 and 18) respectively, dated 22nd October, 1868, and 7th February, 1874, as shown by *Khandu Dulabdas v. Tarachand Amarchand* (1). The learned District Judge has, however, omitted to notice the fact that neither Annapa nor the plaintiff ever had possession under the mortgage (Ex. 46), or to consider and determine whether, in Kanara, a mortgage without possession can be upheld against a subsequent purchase with possession. The plaintiff has in his plaint alleged that the purchase by Parambhat from Narsama on the 22nd October 1868, (Ex. 17) was fraudulent and collusive. The learned District Judge has not determined whether or not that allegation is true. If he, on retrial, should hold that averment to be untrue, it will become incumbent upon him to consider and determine whether, in Kanara, a mortgage without possession can be sustained as against a subsequent purchase from the mortgagor with possession. So far as we know, Gujarat is the only province in this Presidency in which a mortgage without possession is sustainable against a subsequent *bona fide* purchase with possession. In order that the foregoing questions, which have [462] been left undecided by the District Judge, may be resolved by him, we reverse his decree, and remand this cause to him for retrial, and direct that he may be at liberty to take such further lawful evidence in the cause as he may deem necessary for such retrial. The costs of the appeals must follow the final result of the cause.

*Case remanded.*

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#### APPELLATE CIVIL.

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

GURUNATH NILKANTH (*Original Defendant*), Appellant v.  
KRISHNAJI GOVIND (*Original Plaintiff*), Respondent.\*

[16th February, 1880.]

*Hindu law—Hindu widow, power of, to alienate her husband's immoveable property.*

A purchaser of immoveable property from a Hindu widow, in order to show that the property is absolutely conveyed to him, ought to aver and prove that

\* Second Appeal No. 398 of 1879.