

3 B. 181.

## APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and  
Mr. Justice Kemball.

ANNAPPA (Original Defendant), Appellant v. GANPATI AND  
VISHNU (Original Plaintiffs), Respondents.\*

[15th September, 1880.]

*Evidence—Registration—Act III of 1877, s. 17, cl. (c)—Mortgage—Receipts by mortgagee  
—Suit on mortgage payable on demand—Amendment of plaint.*

Unregistered receipts given by a mortgagee to a mortgagor for sums paid on account of the mortgage debt are not inadmissible in evidence under cl. (c), s. 17, of the Registration Act III of 1877.

*Shidlingappa v. Chanbasapa* (1) concurred in.

Where a mortgage debt is payable on demand, the mortgagee ought to sue, not for interest only, but for an account and payment of what remains due on the mortgage for principal and interest up to the filing of the plaint.

[F., 19 B. 36 (42); R., 24 B. 609 (614) = 2 Bom. L.R. 422; 28 P.R. 1907 = 93 P.L.R. 1908 = 140 P.W.R. 1907.]

THIS was a second appeal from the decision of A. L. Spens, Judge of Kanara, reversing the decree of the Subordinate Judge of Kumta.

This suit was brought by the plaintiffs for Rs. 35, being interest for three years due on a mortgage bond for Rs. 100, executed to their father by defendant No. 2 with the consent of his father, defendant No. 1. The bond was dated the 7th February 1866, and registered under Act XX of 1866. The plaintiffs prayed that their claim should be ordered to be satisfied out of the mortgaged property, or, in default, by the defendants themselves. Defendants 3 and 4 were joined in the suit as members of an undivided family for whose benefit the mortgage debt had been contracted.

[182] The defendants admitted the mortgage, but stated that it was cancelled by a subsequent oral agreement under which the plaintiff's father had agreed to receive Rs. 166 in liquidation of the mortgage bond in question, and another bond for Rs. 50; that the sum of Rs. 140 had already been paid to him in pursuance of the said agreement, and that only Rs. 26 remained due. The defendants produced three receipts (Exs. 67, 68 and 69) showing payments in the aggregate to the extent of Rs. 140. They were each for a sum less than Rs. 100, and not registered.

The Subordinate Judge held the oral agreement proved; also that the payments alleged by the defendants had been made, and that the plaintiffs were not entitled to the interest claimed. He dismissed the suit.

In appeal the District Judge reversed the decree of the first Court, on the ground that under the Registration Act, XX of 1866, s. 48, and the Indian Evidence Act, I of 1872, s. 92, proviso 4, the registered mortgage bond could not be cancelled by any subsequent oral agreement, such as that set up by the defendants. He, accordingly, allowed the plaintiff's claim.

On the 7th June 1880 one of the defendants filed a second appeal in the High Court on behalf of himself and the other defendants.

*Shamrav Vithal*, for the appellant, abandoned the oral agreement set up by the defendants in the Courts below, and submitted that the

\* Second Appeal No. 261 of 1880.

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SEP. 15. District Judge was wrong in not giving them credit for the amount of the three receipts, which required no registration, as held in *Shidlingapa v. Chanbasapa* (1).

APPEL- [WESTROPP, C. J.—The plaintiffs were not right in bringing their  
LATE suit for interest only. They ought to have sued for an account and for  
CIVIL. the balance due on the mortgage.]

5 B. 181. *Ghanasham Nilkanth Nadkarni*, for the respondents, prayed for permission to amend the plaint, as it would save the parties from further litigation, and offered to pay the necessary additional stamp.

The following is the judgment of the Court:—

#### JUDGMENT.

[183] WESTROPP, C. J.—Concurring in the decision of a Division Bench of this Court in *Shidlingapa v. Chanbasapa* (1) we think that the three receipts (Exs. 67, 68 and 69) were admissible in evidence for the purpose of proving payments in respect of the mortgage of the 7th February 1866 for Rs. 100. Those receipts purport to have been given for payments partly in respect of that debt and partly in respect of another debt for Rs. 50. So far as those payments were made towards satisfaction of the mortgage of the 7th February 1866 the defendant is entitled to credit as regards that mortgage to that extent. The defendant's pleader does not contend that the three receipts show a new agreement substituted for the mortgage of the 7th February 1866. He simply asks for credit for the payments in taking the account of what is due on the mortgage.

In bringing this suit in its present form, *i.e.*, for three years' interest ending in 1877, we are inclined to think that the plaintiffs were endeavouring to embarrass the defendant and to evade giving credit for the proportion of the payments mentioned in the three receipts (Exs. 67, 68 and 69), which are to be credited in respect of that mortgage.

It was not a mortgage in which it was stipulated that the payment of the principal should be deferred for any specified time. The principal would seem to have been payable on demand, and we think that this suit ought to have been brought, not for interest only, but for an account and payment of what remained due on the mortgage for principal and interest up to the filing of the plaint. The plaintiff's learned pleader has wisely asked for leave to amend his plaint by seeking for such an account and payment of the balance which may be found due. We think it desirable, in order to render further litigation than the present suit, on the mortgage of the 7th February 1866, unnecessary, to grant that request, but the plaintiff must pay the additional Court fees requisite to cover the amount of the balance which he may claim by such amendment of his plaint.

The three receipts show payments to the extent of Rs. 140 in all. The Subordinate Judge should ascertain how much of that sum [184] is to be credited to the mortgage of the 7th February 1866. In default of any satisfactory specific evidence of the apportionment made by the party who made the payments, the proper course for the Subordinate Judge will be to treat the payments as made in the same proportion as the principal moneys secured by the mortgage of the 7th February 1866 for Rs. 100, and the bond for Rs. 50 mentioned in Ex. 67.

The Subordinate Judge should also ascertain whether any other payments of interest have been made in respect of the mortgage of the 7th February 1866. In doing so, he should make such inferences from admissions of the plaintiff already made in this suit as those admissions

may justify, and should consider such other evidence as there may already be in this suit, and such further evidence (if any) as may be tendered to him by the parties on the question of payments of interest.

We reverse the decree of the District Judge and remand the cause for amendment of the plaint in the manner above mentioned, and then for a new trial. The plaintiff must pay the costs of the regular and second appeals to the defendant. The costs of the suit must be disposed of on the new trial in such manner as the Subordinate Judge may deem to be just.

*Decree reversed and case remanded.*

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APPELLATE CIVIL.

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

DULICHAND (Plaintiff) v. DHONDI (Defendant).\* [5th October, 1880.]

*The Dekkhan Ryots Act, No. XVII of 1879, ss. 7, 12, 74—Practice—Procedure—Right of defendant to call witnesses—Act X of 1877, ss. 100, 101.*

The plaintiff sued, under s. 3, cl. (w) of Act XVII of 1879, for money due on a bond dated the 8th September 1877. The defendant, though duly summoned, did not appear on the day fixed in the summons, which was for the final disposal of the suit. The Court, therefore, proceeded with it *ex parte*. The defendant, being subsequently summoned and examined as a witness under s. 7 of the Act admitted the bond sued upon, but pleaded part-payment of the plaintiff's claim. He then applied to the Court that his witnesses should be summoned, [185] and that their evidence be taken in support of his allegation. The Subordinate Judge was of opinion that he (defendant) was not entitled to offer the evidence. On his referring the case to the High Court.

*Held* that it was his duty to summon the witnesses named by the defendant.

THIS case was referred for the opinion of the High Court by Rao Saheb G. V. Limaye, Joint Subordinate Judge of Ahmednagar, under s. 617 of the Civil Procedure Code, Act X of 1877. He stated it as follows:—

“This is a suit under s. 3, cl. (w) of Act XVII of 1879 to recover the sum of Rs. 44-2-0, principal and interest, due on a bond dated 8th September 1877.

“The defendant, though duly served, did not appear on the day (28th July 1880) fixed for the final disposal of the suit. The suit was therefore proceeded with in his absence under s. 100, cl. (a) of the Code of Civil Procedure, X of 1877. The defendant was, however, summoned and examined as a *witness* under s. 7, para. 2 of Act XVII of 1879 on 16th August 1880. In his deposition he admitted the bond, but, in answer to questions put to him by the Court, he stated that he had paid plaintiff Rs. 4 in part satisfaction of the debt. On the same day he submitted an application to the Court, praying that the witnesses named in the list presented along with the application be summoned.

“He has neither (as was obligatory on him under s. 101 of the Civil Procedure Code, if he had been desirous of answering the claim) satisfied the Court that there had been a sufficient cause for his non-appearance in obedience to the summons to attend and answer the suit, nor even attempted so to do.

\* Civil Reference No. 18 of 1880.