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therefore, I believe that the document in question is no bond, but a simple agreement to give one thing for another.'

"In *Chimnaji* v. *Ranu* (1) the High Court decided that an instrument containing a promise to deliver grain should be stamped with an eight-anna stamp; and the document in question would under the same ruling require a similar stamp; but this ruling was under the Stamp Act XVIII of 1869, sec. 14, Sch. II, art. 11. In the Act of 1879 the word 'bond' is defined thus in section 3 (4) (*b*):—'Any instrument so attested whereby a person obliges himself to deliver grain or other agricultural produce to another.'

"This definition does not disclose whether the promise should be supported by a pecuniary consideration; but section 27 strictly enjoins that all facts and circumstances affecting the chargeability of any instrument with duty or the amount, or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein. The plaintiff having failed to do this, the accompanying instrument can, at best, be regarded as a simple agreement chargeable with an eight-anna stamp."

There was no appearance in the High Court on behalf of any party.

SARGENT, C. J.—The document is apparently a bond, and properly stamped with a two-anna stamp.

(1) I. L. R., 4 Bom., 19.

(27)

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

KANAYALAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* PYARABAI WIDOW OF RAMNARAYAN AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS.*

1882 *April* 19.

Mortgage—Conditional sale—Redemption—Foreclosure—Evidence—Secondary evidence—Evidence Act (I of 1872), *Sec.* 63.

In 1840 K. mortgaged a certain house to two brothers, R. and C. The mortgage deed contained a *gahan lahan* clause, or clause of conditional sale. It appeared that in 1852 the mortgaged house passed into the possession of R. and C., and it was alleged that in that year the mortgage had been foreclosed. At a subsequent

* Second Appeal, No. 309 of 1881.

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partition of the family property the house fell to the share of R., whose widow P. (defendant No. 1) sold it to L. (defendant No. 2) in 1868, and L. in 1871 sold it to T. (defendant No. 3). In 1881 T. brought this suit to redeem the property. The foreclosure decree of 1852 was not forthcoming, and the defendants alleged that it had been burned along with other judicial records at the burning of the Budhvar Palace at Poona in 1879. The only evidence that such a decree had been passed was a reference to a copy of the decree contained in a judgment passed in another suit, and a statement by C. (who was dead in 1881) that the mortgage had been foreclosed. The lower Courts held that the reference in the above-mentioned judgment to the copy of the foreclosure decree was sufficient evidence of the original decree under section 63 of the Evidence Act (I of 1872). On appeal,

Held by the High Court that there was no legal evidence that the mortgage had been foreclosed. A written statement of the contents of a copy of a document the original of which the person making the statement has not seen, cannot be accepted as an equivalent of that which section 63 of the Evidence Act renders admissible, namely, an oral account of the contents of a document given by some person who has himself seen it. C.'s statement could not be made use of to establish the foreclosure.

A clause of conditional sale contained in a mortgage deed does not prevent the redemption of the mortgage.

THIS was a second appeal from the decision of W. H. Newnham, Judge of the District of Poona, confirming the decree of the Joint Subordinate Judge of Poona.

Suit for redemption. In 1840 K. mortgaged a certain house to two brothers, R. and C. The mortgage deed contained a *gahan lahan* clause, or clause of conditional sale. It appeared that in 1852 the mortgaged house passed into the possession of R. and C., and it was alleged that in that year the mortgage had been foreclosed. At a subsequent partition of the family property the house fell to the share of R., whose widow P. (defendant No. 1) sold it to L. (defendant No. 2) in 1868, and L. in 1871 sold it to T. (defendant No. 3). In 1881 T. brought this suit to redeem the property, alleging that the sum borrowed had been satisfied from the proceeds of the house, but that if there was any balance due he was ready and willing to pay it.

The defendant Pyarabai answered that the house had become the absolute property of her husband and his brother Chitramal under a clause of conditional sale in the mortgage, and that she had sold it to Ladha (defendant No. 2). Ladha repeated this contention, and added that he had sold the house to Thakur.

Thakur's heirs (defendant No. 3) answered that the transaction between Kanayalal and Ramnarayan was an out-and-out sale, and not a mortgage.

The foreclosure decree of 1852 was not forthcoming, and the defendants alleged that it had been burned along with other judicial records at the burning of the Budhvar Palace at Poona in 1879. The only evidence that such a decree had been passed was a reference to a copy of the decree contained in a judgment passed in another suit, and a statement by C. (who was dead in 1881) that the mortgaged had been foreclosed. The lower Courts held that the reference in the above-mentioned judgment to the copy of the foreclosure decree was sufficient evidence of the original decree under section 63 of the Evidence Act (I of 1872).

The Subordinate Judge found that the original transaction was a mortgage, but that the mortgage had been foreclosed by a decree of Court in 1852, and that Ramnarayan had become the absolute owner. He, accordingly, rejected the plaintiff's claim for redemption.

The District Judge concurred with the Subordinate Judge for the following reasons:—

"It is not disputed that the house originally was the property of Kanayalal. It passed, however, into the possession of Ramnarayan and his brother Chitramal about 1852. His widow Pyarabai says, and Chitramal (now deceased) said in 1868, that at a division of property it fell to the share of Ramnarayan, and was subsequently mortgaged and eventually sold to Ladha in 1868, and by him to Thakur in 1871.

"The question is, what title to it did the two brothers acquire in 1852. Owing to the crime of May, 1879,* the effects of which are continually coming before this Court in the shape of the destruction of valuable evidence, the original documents, which would have been the best evidence of this, are missing. There is, however, a judgment of January 4, 1853, by Krishnaji Vithal Vinchurkar, then Sadar Amin, a certified copy of which has been filed, which contains a distinct account of the decree, in conse-

* In May, 1879, the Budhvar Palace at Poona, in which the judicial record were kept, was destroyed by fire.

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quence of which the brothers obtained possession. Appellant objects that Kanayalal was not a party to the Sadar Amin's decree, and it cannot, therefore, bind his heir, appellant. But this is not to the purpose. It is not contended that he should be bound by that decree: it is produced as the best available evidence of the purport of the decree which gave the brothers possession of the house now in dispute. Appellant's pleader disputes its admissibility for that purpose under section 63 of the Evidence Act; but if an oral account of the contents of a document given by a person, who has seen it, be admissible, *a fortiori* so must be a written recital given by a Judge in the course of his decision as a portion of the grounds on which that decision is based. The words of the Sadar Amin are to this effect:—'Chitramal produced in evidence a copy of a decree, No. 4210 of 1851, and sale-deed by Kanayalal of 1840, and it is proved that Kanayalal had sold the house to the north of the open ground, and Chintaman Hari Deshmukh gave a decree on the strength' (or title) 'of the sale *(kharediche darjyane)* to the defendants' (the brothers) 'by consent of Kanayalal, and the defendants are in possession accordingly.' It must be observed that this is a written account given after seeing *the copy* (Illustration D to the above section), and it does not appear whether the Sadar Amin saw the original; but I cannot hold that I should be justified in excluding this evidence when it is obviously the best which can after so long a time be procured.

"As to the identity of the house here mentioned with that now in question, there can be no reasonable doubt.

"It appears, then, that the document passed by Kanayalal in 1840, which the plaintiff's witnesses call a mortgage, was, at any rate, an instrument of conditional sale (compare the statement of deceased Chitramal in 1868), and that the Munsif gave a decree on it by consent of the parties, considering that the condition of sale had taken effect, and the brothers were put in possession *as owners* nearly thirty years ago; and since that time the house has been dealt with by them as their absolute property and so described in subsequent mortgage and sale deeds.

"Not only did the transaction take place at a time when the

'*gahan lahan*' custom was legal as well as generally prevalent; but the case of the defendants is peculiarly strong, as this is not an instance of mortgagees holding on with the belief that their mortgage right had merged in absolute ownership by lapse of time only, but of their being given possession as owners by purchase by decree of Court, the original owner of the property consenting to that decree. Under these circumstances it would not be just or reasonable to hold, on the now weakened authority of *Ramji* v. *Chinto* (1) and subsequent decisions, that the plaintiff as Kanayalal's heir has any right to redeem.

"The respondents told the Court that since the appeal was filed they had received information leading them to question whether the plaintiff *was* Kanayalal's right heir, but it is not necessary to enquire into this now."

The Judge accordingly confirmed the decree of the Subordinate Judge rejecting the plaintiff's claim. The plaintiff appealed to the High Court.

Shantaram Narayan for the appellant.—The Judge below misinterpreted section 63 of the Evidence Act and the Illustration D thereto in holding that a *written* account given after seeing a *copy* was secondary evidence of the contents of a document. Clause (5) of the section is clear. It says, secondary evidence means and includes "oral accounts of the contents of a document given by some person who has himself seen it." The Judge was also wrong in saying that the authority of *Ramji* v. *Chinto* (2) had been weakened. So far as this Presidency is concerned, it continues as strong as ever, and the case has always been followed by this High Court.

Pandurang Balibhadra and *Ganesh Ramchandra Kirloskar* for the respondents.—The fire which consumed the Budhvar's Palace of Poona in May, 1879, destroyed a great number of judicial records, and the original of the foreclosure decree was one of the documents so destroyed. The copy in question is the best available evidence of the contents of the decree. The remarks of the Judicial Committee of the Privy Council in *Thumbusawmy Mooddelly* v. *Hossain Rowthen*(3) show that they do not

(1) 1 Bom. H. C. Rep. 199. (2) 1 Bom. H. C. Rep. 199. (3) I. L. R. 2 Mad., 1.

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approve of the decision in *Ramji* v. *Chinto*. It would be highly inequitable to award the plaintiff's claim and upset the various sales effected in good faith by several parties.

MELVILL, J.—The facts found proved by the Courts below are as follows :—

In 1840 the house in dispute was mortgaged by Kanayalal to Ramnarayan and his brother Chitramal. At a partition of the family property the mortgaged house fell to the share of Ramnarayan, whose widow, Pyarabai, sold it to the second defendant, Ladha, in 1868. Ladha re-sold it to the third defendant, Thakur, in 1871. The present suit is brought by Panalal, as Kanayalal's heir to redeem the mortgage.

The authority of *Ramji* v. *Chinto* has not, as the District Judge supposes, been weakened, and any *gahan lahan* clause, which there may have been in the original mortgage, would not prevent the redemption. But the Courts below have found that the mortgage was foreclosed by a decree of Court in 1852. Unfortunately, this decree is not forthcoming : and the only evidence that such a decree was ever passed consists of a reference to a copy of the decree in a judgment passed by the Sadar Amin in another suit, and a statement made by Chitramal, now dead, that the mortgage had been foreclosed. The District Judge has held that the reference by the Sadar Amin to the copy of the foreclosure decree is, under section 63 of the Indian Evidence Act, sufficient evidence of the contents of the original decree. We should have been glad if we could have come to the same conclusion ; but it seems to us clear that a written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, cannot be accepted as an equivalent of that which section 63 of the Evidence Act renders admissible, namely, an oral account of the contents of a document given by some person who has himself seen it. As to Chitramal's statement (exhibit No. 46), it was put in by the plaintiff, as containing an admission of the mortgage ; and there is no rule of evidence under which it can be made use of to establish the foreclosure. Under these circumstances we are obliged to come to the conculsion that there is no legal evidence in the case that the mortgage has ever been foreclosed.

But then it is said that Thakur is entitled to be regarded as a purchaser for value without notice. Now, no doubt, his conveyance gave him no notice that the title was originally one of mortgage; but it gave him notice that his vendor, Ladha, had purchased from Pyarabai; and as Ladha could only show a title in himself extending over three years, Thakur was certainly bound to inquire into Pyarabai's title. Had he done this, he would have ascertained without difficulty that her title originated in a mortgage; and in that case a mere mistaken belief that the mortgage was irredeemable would not entitle him to be treated as a purchaser for value without notice—*Hansard* v. *Hardy*(1). Had he taken up another line of defence, we might perhaps have given him an opportunity of showing that at the time of his purchase he did make inquiries, and was informed and believed that the mortgage had been foreclosed by a decree of Court. But the case made in his written statement is, not that the mortgage had been foreclosed, but that there never was any mortgage at all. The same observations apply to Ladha, the second defendant: so that Thakur cannot shelter himself behind Ladha's purchase, as having been made without notice.

We regret, therefore, to come to the conclusion that although in all probability the mortgage of 1840 has been foreclosed, yet owing to the neglect of the defendants to furnish themselves with proper evidence of title, there is no legal ground on which redemption can be refused to Kanayalal's heir.

A suggestion has been made that the present plaintiff is not Kanayalal's heir. But he has obtained a certificate of heirship under Regulation VIII of 1827, and for the purpose of the present suit must be regarded as Kanayalal's legal representative.

We are informed that one or more of the plaintiff's witnesses state the amount of the mortgage to have been Rs. 300, and, in the absence of evidence to the contrary, we think that this may be accepted as the principal amount due. It must be assumed that the rents and profits of the house were to be taken as interest; and looking to the value of the house, as shown in the

(1) 18 Ves., 462.

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conveyance, there can be no doubt that the rents and profits were equivalent to a high rate of interest. The plaintiff must therefore, be allowed to redeem on payment, within six months, of Rs. 300.

The parties should bear their own costs throughout.

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(28)

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

1883
January 22.

SANKANA KALANA (ORIGINAL DEFENDANT NO. 2), APPELLANT, *v.* VIRUPAKSHAPA GANESHAPA (ORIGINAL PLAINTIFF) AND NINGANA (ORIGINAL DEFENDANT NO. 1), RESPONDENTS.*

Mortgage—Redemption—Prior mortgagee—Puisne mortgagee—Foreclosure—Discharge of surety—Contract Act IX of 1872, *Secs.* 134 *and* 137.

A surety liability to pay the debt is not removed by reason of the creditor's omission to sue the principal.

A puisne mortgagee is entitled to redeem from the prior mortgagee who obtains a foreclosure decree in a suit to which the puisne mortgagee is not made a party or from the purchaser in the foreclosure suit; and it is immaterial whether the puisne mortgage is or is not registered, or whether the prior mortgagee at the date of the suit had or had not notice of the puisne mortgage.

The plaintiff charging the defendants with collusion sued to eject them, but the Court found he was only a puisne mortgagee, and one of the defendants a prior mortgagee. The Court, however, allowed the plaintiff to change his case, and in the same suit permitted him to redeem the defendant.

Quære—whether the account arrived at in the decree obtained by the prior mortgagee against the mortgagor only is binding on the puisne mortgagee who had no notice of the subsequent incumbrance.

THIS was a second appeal from the decision of C. F. H. Shaw Judge of Dharwar, varying the decree of A. M. Cantem, Subordinate Judge of Dharwar.

The facts of the case, in so far as they are material, are as follows :—

The plaintiff Virupakshapa sued gingana (defendant No. 1) and Sankana (defendant No. 2) to recover possession of a piece of land. He alleged that Ningana, the original owner, mortgaged it with possession on the 12th of July, 1874, for Rs. 98 to him (the plaintiff) for fourteen years under an instrument which stipulated that Ningana was to pay the Government assessment, and that

* Second Appeal, No. 102 of 1882.