

this house 154. It purports to be a conveyance from Gannibái to Dhanji Cristnáji, and it bears date the 17th March, 1860. I have no doubt that it is a genuine document in the sense that it was, in fact, executed by Gannibái, though she denies that she put her mark to it. It is proved to be attested by Dájibá Pándurang Joshi, a deed-writer who is dead, and is manifestly all in his handwriting, including the words descriptive of the marks—woman. The question is, whether that is sufficient proof of its execution to allow of its being put in evidence. I admitted it on the authority of the law laid down in *Whitelcoker v. Musgrove*<sup>(1)</sup>, and I think rightly so. Section 67 of the Evidence Act I of 1872 enacts that ‘if a document is alleged to be signed \* \* \* by any person, the signature \* \* \* must be proved to be his handwriting.’ This proof may, of course, be by any of the recognised modes of proof, and amongst others by statements admissible under section 32. The statement of the deed-writer, that the mark was Gannibái’s, is, I think, admissible under section 32, clause (2): see Taylor on Evidence, sec. 1658. No inference can, I think, under the circumstances of the case, be drawn against the plaintiff from his failing to call, or to strictly prove the death of, the other attesting witnesses. The deed appears to have been presented in the municipal office in 1863, and now comes from the proper custody. Disbelieving the evidence of the defendant Gannibái I hold that it was executed by her.”

Attorneys for the plaintiff:—Messrs. *Bálkrishna and Dikshit.*•

Attorney for the first two defendants:—Mr. *Bland.*

(1) Cr. & M., 511.

## ORIGINAL CIVIL.

*Before Mr. Justice Farran.*

*IN RE SHAIK ABDUL AZIZ.*

*Registration—Act III of 1877, Secs. 35 and 77—Denial of execution, what is—Practice—Specific Relief Act I of 1877, Sec. 45.*

A. by an indenture of mortgage dated 15th March, 1887, mortgaged certain property to S. to secure the repayment of Rs. 18,500 within two months. The deed was duly lodged for registration; but A. (the mortgagor) neglected to appear

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at the registration office to admit execution. A summons was accordingly issued against him under section 36 of the Registration Act III of 1877 to enforce his attendance, and was duly served upon him as required by section 39. He, however, did not obey the summons, and neglected to attend the Sub-Registrar's office on the day appointed. He subsequently went away to Arabia without admitting execution, and was not expected to return to Bombay. S. (the mortgagee) then applied to the Sub-Registrar to treat A.'s neglect to attend and admit execution as equivalent to a denial of execution and to "refuse to register" the deed under the provisions of section 35 (last clause), in order that an application might be made to the Registrar under section 73 for the purpose of establishing the right of S. (the mortgagee) to have the deed registered. The Sub-Registrar, however, considered that he could not treat A.'s non-appearance as a denial of execution. On application to the High Court under section 45 of the Specific Relief Act I of 1877,

*Held*, following *Rádhákissan Rowra Dakna v. Chooneeloll* (1), that the non-appearance of A. in pursuance of the summons was equivalent to a denial of execution within the meaning of section 35 of the Registration Act; and that, under the provisions of that section, the Sub-Registrar was bound to "refuse to register" the deed. The Court accordingly made an order directing the Registrar to proceed under section 74 to make the inquiry therein directed.

THE applicant, Shaik Abdul Aziz, was the mortgagee of certain property mortgaged to him by one Agá Mahomed Nabi Khán, under an indenture of mortgage dated the 15th March, 1887, to secure the repayment of Rs. 18,500 within two months. Shortly after the deed was executed it was lodged for registration by the mortgagor with the Joint Sub-Registrar of Bombay, in pursuance of the provisions of the Registration Act III of 1877. The mortgagor, however, neglected to appear to admit execution, and a summons was accordingly issued against him, under section 36 of the Act, to enforce his attendance. The summons was duly served upon him, as required by section 39. He, however, refused to obey the summons, and neglected to attend the Sub-Registrar's office on the day appointed. The mortgagee then appeared before the Sub-Registrar, and, relying upon the case of *Rádhákissan Rowra Dakna v. Chooneeloll Dutt*<sup>(1)</sup>, applied to the Sub-Registrar to treat the mortgagor's neglect to attend and admit execution as equivalent to a denial of execution; and to refuse to register the deed, under the provisions of section 35, (last clause,) in order that an application might be made to the Registrar under section 73 for the purpose of establishing the mortgagee's right to

(1) I. L. R., 5 Calc., 445.

have the deed registered. The Joint Sub-Registrar, however, considered that he could not, under the Act, refuse registration until after the expiration of eight months from the date of the execution of the deed.

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The applicant then applied to the Chief Presidency Magistrate for a warrant for the arrest of the mortgagor, but the Magistrate was of opinion that he had no power to issue such a warrant under the circumstances.

The mortgagor went away to Arabia without admitting execution, and was not expected to return to Bombay.

The deed being worthless as a mortgage until registered, the applicant applied for and obtained a rule, under section 45 of the Specific Relief Act I of 1877, calling on the Sub-Registrar of Bombay to show cause why he should not be directed to endorse the indenture of mortgage of the 15th March, 1887, with his refusal to register it under section 35 of the Registration Act III of 1877, in order to enable the applicant to take further proceedings under Chapter XII of the Act to obtain registration.

At the date of hearing the rule the Joint Sub-Registrar's office had been abolished, and the duties of that officer were performed by the Registrar of Bombay.

The Registrar of Bombay appeared in person. The points he raised are stated in the judgment of the Court.

*Lang*, for the applicant, in support of the rule:—The applicant has a mortgage under which the mortgage-debt is to be repaid to him in two months. But until the mortgage-deed is registered, it is worthless. It cannot be in any way enforced. It cannot be given in evidence. The mortgagor has refused to admit execution, and has gone to Arabia. Until our mortgage is registered, and thus made effectual, the mortgagor may deal as he pleases with the property. We contend that the conduct of the mortgagor is equivalent to a denial of execution under section 35; and the Registrar ought to have refused to register; or he could have refused to register it on the ground that he had no power to do so where the executing party did not admit execution. Then on his refusal under section 35 we could take proceedings

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under Chapter XII of the Act, and obtain registration. We ask that the Court should now direct the Registrar to treat the conduct of the mortgagor as equivalent to a denial of execution, and to proceed as directed by section 74.

FARRAN, J. :—In this matter, on the application of Shaik Abdul, I granted a rule, under section 45 of the Specific Relief Act, calling on the Sub-Registrar of Bombay to show cause why he should not be directed to endorse the indenture of mortgage of the 15th March, 1887, referred to in the applicant's petition, with his refusal to register it under section 35 of Act III of 1877, in order to allow of the applicant's taking further proceedings to have the document registered under Chapter XII of the same Act. The application should have been by motion founded on an affidavit, and not by petition. At counsel's request, I treated it as made in the proper form, as the petition was supported by an affidavit; the petition only increased the expense of the proceeding. On Saturday last, the Registrar of Bombay appeared in person, and showed cause against the rule.

The facts, as they appear from the applicant's affidavit, are these. On the 15th March last, one Agá Mahomed Nabi Khán executed a second mortgage of certain premises in Bombay, to secure payment to the applicant of Rs. 18,500 with interest, and shortly afterwards lodged the deed with the Joint Sub-Registrar for registration, but did not subsequently appear to admit execution, although requested to do so. Thereupon the applicant took out a summons ordering him to appear and admit execution on the 9th May. The summons was duly served, but Nabi Khán failed to appear. The applicant then requested the Sub-Registrar to treat the non-appearance of Nabi Khán as a denial of its execution, and to refuse to register it. The Sub-Registrar, by the direction of the Registrar-General, then directed the applicant to apply for a warrant for the arrest of Nabi Khán, and this the applicant did, but the Chief Presidency Magistrate considered that he had no power to issue such a warrant, and consequently no warrant has been issued. Agá Mahomed Nabi Khán has gone to Arabia without admitting execution, and is not expected to return to Bombay. On the 16th June, the Joint Sub-Registrar

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finally wrote to the applicant's solicitor, stating that, in accordance with the practice of the department, he was unable to refuse registration of the mortgage until after the expiration of the time prescribed by the Registration Act, *viz.*, eight months from the date of its execution.

The applicant is in this position : he has a duly executed mortgage, he has done all that he can possibly do to have its execution admitted by Agá Mahomed Nabi Khán, but, in consequence of the Sub-Registrar declining to refuse to register it, he can take no further proceedings, under Chapter XII of the Act, to have it registered for eight months. Till registered the document is worthless as mortgage. It does not affect the property comprised therein, nor can it be received as evidence. In *Hurjivan Virji v. Jamsetji Nowroji*<sup>(1)</sup> it was, in effect, decided that, in the absence of an agreement to that effect, a suit does not lie in the civil Courts to compel a person, who has executed a document to register it or admit its execution. The remedy of the person injured is by proceedings under the Registration Act. The Joint Sub-Registrar's office has been abolished, and his duties are now performed by the Registrar of Bombay. Hence the rule was addressed to that officer.

The Registrar before me contended (1) that Nabi Khán had not denied execution of the mortgage, and that, therefore, the Sub-Registrar was justified in declining to refuse to register it. (2) That until Agá Mahomed Nabi Khán appeared before the registering officer, and actually denied the execution of the mortgage, he, the Registrar, could not treat his non-appearance as a denial of execution, and could not proceed to register it under the provisions of Chapter XII of the Act. (3) That, when eight months had elapsed from the date of the document, he would refuse to register it, not because Agá Mahomed Nabi Khán denied its execution, but because the time within which the document could be registered under the Act would then have expired (section 34). (4) That upon such refusal the applicant could file a suit in the civil Court under section 77 of the Act, and thus obtain registration of the mortgage, if it was, in fact, executed

(1) I. L. R., 9 Bom., 63.

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by Nabi Khán. (5) That, in any event, there was a discretion vested in the registering officer to decline to treat the non-appearance of Nabi Khán as a denial of execution until the expiration of eight months from the date of the document presented for registration.

In dealing with this particular case I consider that I must treat the non-appearance of Agá Mahomed Nabi Khán, in pursuance of the summons and his subsequent departure for Arabia, as a wilful disobedience of the process issued by the officer appointed under section 36 of the Registration Act to issue such process. I do not stop to consider whether that officer was justified in refusing to issue a warrant. That point has not been argued. I am clearly of opinion that, if the wilful non-appearance of Nabi Khán, in obedience to the summons, be a denial of execution within the meaning of section 35, the Sub-Registrar was bound to refuse to register it, and had no discretion in the matter. The words of the section are :—“ if any of the persons by whom the document purports to be executed deny its execution \* \* \* \* the registering officer shall refuse to register the document.” The word “ shall ” is imperative, and the registering officer has no option to wait for several months before he complies with the directions of the Act. He has a duty to perform, and, when the person interested in its performance calls upon him to perform that duty, he is bound to do so. The question, whether Nabi Khán has denied execution within the meaning of the Act, is a more difficult one. It has been considered by Wilson, J., in *Rádhákissan Rowra Dakna v. Chooneeloll Dutt*<sup>(1)</sup>, where it was held that a refusal to admit is a denial within the meaning of the Act, and that a wilful refusal or neglect to attend and admit execution, in obedience of a summons for that purpose, is a refusal to admit, and, therefore, a denial. I am convinced by the reasoning in that case that the true meaning of the Act has been arrived at. If there must be an actual denial of execution before the provisions of Chapter XII can be brought into operation, the case of the representative of an executing party, who appeared before a registering officer and truly stated that he did not know whether

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the person whom he represented had executed or not, could not be treated as a denial of execution. That could not possibly be the meaning of the Legislature. A denial of execution must, I think, therefore, include a refusal to admit. Section 35 does not, in words, say that the denial or refusal to admit must be in the presence of the Sub-Registrar, and, if so held, would in many cases enable a dishonest executing party to set the law at defiance by refusing to comply with the process of the Registration Office and to defeat the claims, it may be, of his creditors, I think that the Act ought to be interpreted so as to avoid that consequence. No doubt, section 74 speaks of a denial before the Registrar; but, as pointed out by Wilson, J., that may fairly be construed to mean a denial in a proceeding before the Registrar as opposed to a proceeding before a Sub-Registrar. The object of the Act is that all documents of a certain description shall be registered as soon as possible after their execution. Before they can be registered, their execution must be established. The primary and best mode of establishing such execution is by the admission of the executing party or his agent or representative. The means provided by the Act to obtain that form of proof must be adopted before the secondary mode of establishing the execution by witnesses under Chapter XII can be resorted to; but it would not further, but defeat, the object of the Act, if it were held that a person executing a document requiring registration and successfully evading or deliberately disobeying the process of the Registration Office can prevent a document being registered at least for eight months. The logical result of the Registrar's contention is that such a person, by adopting that course, can prevent it ever being registered. It is only where there has been a denial of execution that the provisions of sections 74, 75 and 76 come into play. Proceedings under section 77 are in the nature of an appeal from an order refusing to register under section 76.

For these reasons I follow the ruling of the Calcutta High Court, and hold that there has been a denial of execution by Nabi Khan within the meaning of the Act. As the Registrar is anxious for a decision on the merits without regarding the form of the rule, I shall make an order that he do now proceed, under

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section 74 of the Act, to make the enquiry therein directed. The rule in that form will be made absolute.

Attorneys for the applicant:—Messrs. *Payne, Gilbert, and Sayani*.

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.*

DINKAR PARSHARA'M, (ORIGINAL DEFENDANT), APPELLANT, v.  
VINA'YEK MORESHWAR, (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Civil Procedure Code (Act XIV of 1882), Sec. 561—Filing of objections, time for—Practice.*

The expression "the day fixed for the hearing" used in section 561 of the Civil Procedure Code (Act XIV of 1882), means the day on which the hearing actually commences, and includes both that day and the day to which the hearing may be adjourned. The purpose of the section is to give the appellant timely intimation of the proposed objections.

Accordingly, a cross objection filed by the respondent on the day mentioned as the day fixed for hearing the appeal in the notice to the respondent, was held not too late.

*Rangildás v. Bâi Girja* (1) referred to and followed.

THIS was a second appeal from a decision of G. McCorkell, Additional Assistant Judge of Ratnâgiri.

The plaintiff having on the 3rd July, 1883, filed an appeal from a decree of a Subordinate Judge, the usual notice was served upon the defendant on the 18th August, 1883. On the 24th September of the same year, which was also the day originally fixed for the hearing of the appeal, the defendant put in cross objections. The Assistant Judge was of opinion that the objections, not having been taken seven days before the day fixed for the hearing, were taken too late under section 561 of the Civil Procedure Code (Act XIV of 1882). He, therefore, refused to entertain the objections, and heard the appeal without reference to them.

\*Interlocutory Judgment in Appeal, 263 of 1884.

(1) L. L. R., 8 Bom., 559.