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Shantaram Narayan, for respondent:—The lower appellate Court has found that the defendant No. 1 has held adversely to the plaintiff for more than twelve years. That finding is conclusive.

JUDGMENT.

The judgment of the Court (PARSONS and CANDY, JJ.,) was delivered by

PARSONS, J.—The First Class Subordinate Judge, A. P., erred in holding that art. 127 of the Limitation Act, 1877, applied only to Hindus, and so did not govern this suit, which is one by a Mahomedan to enforce his right to a share in the property left by his father and to recover that share by partition. The case of *Sayad Gulam Hussein* v. *Bibi Anvarnisa*(1) is a distinct authority that "joint family property includes property left by a deceased Mahomedan and divisible among his heirs until it is divided." If, therefore, there has been no division of his property, the present suit cannot rightly be held to be time-barred, unless it is found that the plaintiff has been excluded to his knowledge from the property for twelve years before suit. See *Hari* v. *Maruti*(2). The Judge of the original Court, on the assumption that there had been no division, rightly applied art. 127 to the case. The Judge of the appellate Court, without finding whether there had been a division or not, wrongly reversed the decree, on the ground that art. 127 did [72] not apply to the property of Mahomedans. That article will apply if there has been no division. It will not apply, if there has been a division. We, therefore, reverse the decree of the lower appellate Court, and remand the appeal for a retrial with reference to the above remarks. Costs to abide the result.

Decree reversed.

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

GOPAL RAMCHANDRA (*Original Plaintiff*), *Appellant v.* GANGARAMANANDISHET (*Original Defendant*), *Respondent.**

[25th April, 1889.]

Champerty—Mortgage—Equity of redemption, assignment of—Suit on such assignment—Public policy, such assignment not opposed to.

The plaintiff sued, as the assignee of the equity of redemption, for account and redemption, alleging that the lands in dispute had been mortgaged to the defendant in 1844 by the ancestor of his (the plaintiff's) assignor. The defendant admitted the mortgage, but set up an unregistered *bedavapatra* (release) of the equity of redemption, dated 1865, alleged to have been passed to him by the father of the plaintiff's assignor for a consideration of Rs. 800. He also contended that the plaintiff's assignment was champertous, and made with the view of depriving him of the property. The Court of first instance held that the assignment was "a gambling transaction and entered into with the object of gaining the spoils of an unrighteous litigation, and null and void as opposed to public policy," and that the release set up by the defendant could not be given in proof for want of registration, and, therefore, rejected the plaintiff's claim. On appeal to the High Court.

* Appeal No. 21 of 1887.

(1) Printed Judgments for 1885, p. 170. (2) 6 B. 741.

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Held, reversing the decree of the lower Court, that although the transaction might not be a praiseworthy one *in foro conscientiæ*, it could not be regarded by a Civil Court as one entered into "with the object of gaining the spoils of an unrighteous litigation." The equity of redemption was an interest in the land which it was open to any one to purchase, however speculative the transaction might be under the special circumstances of the case.

[F., 18 M. 374 (378); Appr., 6 O.C. 305 (322); R., 22 M. 310=9 M.L.J. 17; 2 N.L.R. 17; 26 P. R. 1906=20 P.L.R. 1906; 1 S.L.R. 60 (64); D., 9 Bom.L.R. 462.]

THIS was an appeal from a decision of Rav Bahadur Chunilal Maneklal, First Class Subordinate Judge of Thana.

Suit by an assignee of the equity of redemption to redeem the mortgage and for account.

[73] The plaintiff alleged that the lands in question had been mortgaged to the defendant in 1844, by the ancestor of his (the plaintiff's) assignor.

The defendant admitted the mortgage, but at the same time pleaded (*inter alia*) that in 1865 he had purchased the equity of redemption for Rs. 800 from the father of the plaintiff's assignor, and had obtained a *bedavapatra* (release), which was unregistered. He contended, therefore, that the lands were no longer redeemable; that the alleged assignment of the equity of redemption to the plaintiff had been effected with a view to deprive him (defendant) of the land; that it was champertous, and should not be enforced.

The Subordinate Judge, who tried the suit, rejected the plaintiff's suit as champertous.

The following is a portion of his judgment:—

" * * Now, let us see whether the conduct of the plaintiff and of his assignor was that of a *bona-fide* vendor and purchaser. A *bona fide* purchaser of an equitable right to redeem a mortgage would ascertain, as far as possible, the value of the property and the amount of the mortgage-debt charged upon it. He would further ascertain whether the mortgage is subsisting mortgage liable to be redeemed. In short, he will make such inquiries as will lead him *bona fide* to believe that his vendor has a good and just claim to redeem, and that he would gain some reasonable profit by the transaction. The conduct of a *bona fide* vendor would be exactly similar. Such does not, however, appear to have been the conduct of the plaintiff and of his assignor. The plaintiff did not know,—in fact, he says he did not even care to know,—whether the bargain would prove a losing concern or a profitable one * * * *. All these facts show that the assignment has not been made *bona fide* to recover a good and just claim against the defendant, but it was entered into with some improper object best known to the plaintiff and his assignor, with a view of harassing the defendant. Again, the transaction amounts to gambling in litigation, because the parties to it did not know,—in fact, did not care to know,—whether it would prove losing or profitable * * * *. Then comes [74] the *bedavapatra* in 1865 passed by the father of the plaintiff's assignor for Rs. 800 paid to him in cash. Under the Registration Act of 1864, the *bedava* was inadmissible in evidence, and could not have been acted on by any Court. But that does not mean that the party executing it was not bound by it in conscience. So long as he, his heirs and representatives keep time to their conscience, the person in whose favour it has been passed, has nobody to disturb his title. In the present case, however, a son of the executant of the *bedava* has thought fit to act against

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good conscience, and in that the plaintiff has assisted him. It is, therefore, clearly a case of an unrighteous litigation * * *. The plaintiff has purchased another litigation against the defendant. I, therefore, hold that the assignment is an extortionate and unconscionable bargain ; that it is a gambling transaction entered into with the object of gaining the spoils of an unrighteous litigation, and it is null and void as being opposed to public policy. * * *."

From this decision the plaintiff appealed to the High Court.

Latham, Advocate-General, (*Manekshah Jehangirshah* with him) for the appellant :—The assignment to the appellant is not champertous. It was not obtained with the intention of stirring up litigation or disturbing the peace of the family. No bad motive is shown to have actuated the appellant in buying the right of the mortgagor. The assignor was a poor man, and sold his right to redeem. The assignor himself does not complain of it. The equity of redemption could be bought by any body. The appellant was not aware of the *bedavapatra* of the defendant. The *bedavapatra* not being registered should not have been taken into consideration by the Subordinate Judge, and the transaction could not be proved by other evidence under s. 91 of the Evidence Act. There was nothing champertous in the assignment. The case of *Tarachand* v. *Sukall*(1) is a stronger case than this, and the agreement therein, though expressly for sharing the profits of the property in litigation was held enforceable. The suit of the appellant, therefore, does lie. The accounts were taken improperly, personal and mortgage debts have been mixed [75] up, and compound interest charged, though there was no express provision in the deed to charge compound interest, which without such provision cannot be charged.

Telang (*Mahadev Chimnaji Apte* with him) for the respondent:—Here there was collusion between the assignee and the assignor. The release in question was passed shortly after the Registration Act of 1864 came into operation. Since the release, respondent's possession became adverse, for it no longer was mortgagee's possession, but was that of a full owner. The release may not affect immoveable property for want of registration, but the transaction could be proved by other evidence. It may be looked at to explain the nature of the respondent's possession. It was for an actual consideration. Respondent's accounts show that the consideration was not repaid. Respondent obtained *kabulayatas* in his name as owner from the tenants, and some of them were even attested by the assignor. There was an intention to consolidate the personal and mortgage debts, and compound interest was charged, as the deed recited that the accounts should be made at the end of each year, and interest run thereon. The assignment was rightly held to be champertous, for it was obtained with the knowledge of the defect in the respondent's release.

JUDGMENT.

The judgment of the Court was delivered by

SARGENT, C. J.—This is a suit by the assignee of the mortgagor to redeem two mortgages to which the defendant has pleaded, among other things, that the assignment to the plaintiff is champertous, and that the equity of redemption had been released to him by a *bedavapatra* in *Shake* 1786. The Subordinate Judge found that the assignment to plaintiff

(1) 12 B. 559.

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was "a gambling transaction entered into with the object of gaining the spoils of an unrighteous litigation, and was null and void as being opposed to public policy," but that the release of the equity of redemption to defendant was not proved, the alleged *bedavapatra* not being registered, and dismissed the plaintiff's claim, with costs. The Subordinate Judge has referred to the decisions of the Privy Council in *Fischer* v. *Kamala Naicker* (1) and *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (2) for the principles which he considers [76] should govern the case before him, and in applying those principles he considered first whether the consideration mentioned in the assignment to the plaintiff actually passed, and found that issue in the negative, and at the same time expressed the opinion that even if it had passed, the transaction was of an "extortionate and unconscionable nature;" secondly, he held that the plaintiff was not, in any view of the case, a *bona fide* purchaser of the equity of redemption, but that he entered into it without taking any precaution to ascertain whether his vendor "had a good and just claim to redeem" and that "he would gain some reasonable profit by the transaction," and that it was, therefore, a "mere gambling transaction entered into with the object of gaining the spoils of an unrighteous litigation." In thus applying the principles laid down in the cases referred to, the Subordinate Judge has, we think, to a great extent, misunderstood their spirit and the character of the litigation with which they are concerned.

The question whether the arrangement between the plaintiff and his assignor was "an unconscionable one," does not arise in the present case. It is not impugned by the assignor, who was not a party to the suit, and who, moreover, appeared as a witness and took no objection to the plaintiff's title.

The Subordinate Judge, however, says that it was clearly "a case of unrighteous litigation" within the meaning of the Privy Council decision, because the "*bedava*" passed by the father of the plaintiff's assignor in 1865, although not registered, was binding on the conscience of plaintiff's assignor, and the plaintiff is assisting his assignor in disputing defendant's title. But the Registration Act of 1864 was itself essentially one dictated by public policy, and if its effect was to render the "*bedava*" inoperative for any jural purpose, a Civil Court cannot regard those who assert the right of redemption against the defendant by ignoring the *bedava* as engaging on that account in "unrighteous litigation," *i.e.*, as being "in a legal sense immoral." See *Fischer* v. *Kamala Naicker* (1).

Again, there is no evidence in the case to show that the plaintiff entered into the arragement with his assignor with any [77] other motive than to avail himself of a defect in defendant's title and to redeem the mortgaged property in the hope of deriving profit. The equity of redemption was an interest in the land which it was open to any one to purchase, however speculative the transaction might be under the special circumstances of the case. And, therefore, for the reasons above given, although the transaction might not be a praiseworthy one *in foro conscientiæ*, it could not be regarded by a Civil Court as one entered into "with the object of gaining the spoils of an unrighteous litigation."

Passing to the merits of the case, we stated at the hearing that the accounts of the two mortgages should be taken separately, the defendant to

(1) 8 M. I. A. 170. (2) 4 I. A. 23=2 C. 233.

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be debited with Rs. 330 in taking the account of the mortgage of 1761 *Shake* to secure Rs. 125. The account stated on 5th *Vayashak Vad*, *Shake* 1769, in which the unsecured debts were included, showing a balance of Rs. 1,336-10-6, was a general and not a mortgage account, and no inference can, therefore, be drawn from it of an agreement on the part of the mortgagor that the above debts should be regarded as further charges on the mortgaged properties. They must, therefore, be omitted in taking the account.

As to compound interest, we think that the provisions in the mortgage-deed for annual accounts being made up is sufficient to show in this country, where it is the universal practice to convert interest into principal in taking such accounts, that the parties intended that compound interest should be charged.

We must, therefore, reverse the decree of the Court below and send back the case for the mortgage accounts to to taken afresh with due regard to the above remarks, and new decree to be passed. Appellant to have his costs of this appeal.

Decree reversed.

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14 B. 78.

[78] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

ABDUL RAHIM AND OTHERS (*Original Plaintiffs*), *Appellants v.* MADHAVRAV APAJI (*Original Defendant*), *Respondent.**

[29th April, 1889.]

Mortgage—Clause of conditional sale—Gahan lahin—Merger—Redemption—Admissions in depositions or pleadings—Estoppel.

The land in dispute was mortgaged with possession to the father of the defendant by the father of the plaintiffs in 1854, on condition that the same was to be considered as sold to the mortgagee if Rs. 240 were not paid to the mortgagee within five years from the date of the mortgage. No such payment, however, was made. In 1860 the plaintiffs' father executed to defendant's father another deed respecting another land, which deed mentioned the land in dispute as being in the possession and enjoyment of the same mortgagee as purchaser thereof. In 1866, the defendant mortgagee brought a suit on the mortgage of 1854, as also on other mortgages, and claimed Rs. 721 as due upon the mortgage after deducting Rs. 240 as the price of the land mortgaged. The mortgagor objected to the claim, but his objection was overruled, and the account was taken, allowing Rs. 240 as the consideration for the sale of the land under the conditional sale-clause, and the claim was decreed accordingly.

In 1884 the present suit was brought to redeem the mortgage. The defendant contended that under the conditional sale clause the mortgage did not subsist, and that the present suit was barred by the suit of 1866. The lower Courts held the plaintiffs' claim to be too stale for admission, and the mortgage of 1854 to be merged in the decree of 1866, and rejected the claim. On appeal by the plaintiffs to the High Court.

Held, reversing the decree of the lower Courts, that the mortgage in question still subsisted, regard being had to the rule in *Ramji* v. *Chinto* (1), which is still in force in the Presidency of Bombay with regard to mortgages containing clauses of conditional sale, whether executed before or after 1864.

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* Second Appeal No. 585 of 1887.

(1) 1 B. H. C. R. 199.