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1889), on the ground that the partnership of the plaintiffs was a partnership by contract and not a family partnership, and directed them to produce the certificate within a particular time.

The plaintiffs applied under the extraordinary jurisdiction, and obtained a *rule nisi* calling on the defendants to show cause why the order of the Subordinate Judge should not be set aside on the ground that he was wrong in holding that a certificate under the Succession Certificate Act was necessary for the maintenance of the suit.

*Kalabhai Lallubhai* appeared for the plaintiffs in support of the rule.—On the deaths of Chunilal and Fatechand their interest in the mortgaged property survived to their sons, and, therefore, no succession certificate was necessary. Further, our claim is in respect of rent, which accrued due after the deaths of Chunilal and Fatechand. We do not seek to recover rent which became due during their lifetime, and if we had done so, a succession certificate would have been necessary.

[396] There was no appearance for the opponents (defendants) to show cause.

#### ORDER.

SARGENT, C.J.—As the rent sued upon became due after the deaths of Chunilal and Fatechand it formed no part of their estates at the time of their respective deaths, and, therefore, no certificate was necessary under the Act of 1889. We must, therefore, make the rule absolute and reverse the decree of the Court below and send back the case for trial.

*Order reversed and case sent back.*

18 B. 396.

#### APPELLATE CIVIL.

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

SHRIDHAR BALLAL KELKAR (*Original Plaintiff*), *Appellant v.*  
CHINTAMAN SADASHIV MEHENDALE AND ANOTHER (*Original*  
*Defendants*), *Respondents.\** [12th July, 1893.]

*Registration—Registration Act (III of 1877), s. 17, cl. (h)—Sale—Construction—Document creating a right to obtain another document.*

By an unregistered writing, dated 17th April, 1889, A. agreed to sell to B. certain landed property on his (B's.) paying off the mortgage-debt due upon it and a further sum of Rs. 1,500. The agreement also stated that B. had on that day paid A. the Rs. 1,500 and might pay off the mortgage-debt at any time he liked, and that A. would execute a valid deed of sale. In a suit brought by A. upon the agreement the lower Court held that the agreement was an agreement of the equity of redemption and required registration, and that being unregistered, the plaintiff's claim based on it could not be maintained. On second appeal,

*Held*, following *Chunilal Panalal v. Bomanji* (1) that the agreement did not require registration.

SECOND appeal from the decision of A. D. Pollen, District Judge of Poona.

The plaintiff sued for a declaration that a deed of sale, dated the 28th January, 1890, of two houses in Poona executed by defendant No. 1 to

\* Second Appeal, No. 43 of 1892.

(1) 7 B. 310.

defendant No. 2 was fraudulent and invalid. He alleged that defendant No. 2 had previously agreed to sell the property to him by an unregistered agreement, dated the 17th April, 1889, under which he had paid the defendant No. 1 a sum of Rs. 1,500. The property was mortgaged, and by the agreement the plaintiff was to pay off the mortgage.

[397] The following is the material part of the agreement passed by defendant No. 1 to the plaintiff, on which the latter relied :—

“At present I have mortgaged the said properties to Rajashri Shankarrao Krishna Limaye, minor, by his guardian and administrator (of the property)—as owner—Krishnaji Vishnu Limaye, under a mortgage-deed for Rs. 5,000. I have agreed to sell the above-mentioned properties to you on your paying the whole amount, (that is to say), on your paying directly to the mortgagee, in respect of his mortgage right to the said properties, the amount that may be found due to him after deducting the payments, &c., made to him, and paying me this day a further sum of Rs. 1,500, namely, fifteen hundred. You have accordingly paid me this day fifteen hundred rupees. Now you should pay off directly the amount due to the mortgagee on (making account), without waiting for me. You may pay off the same at any time from this day you like. I will execute a proper and valid deed of sale in respect of the above-mentioned properties, together with their appurtenances and rights after taking upon me the responsibility of removing obstructions and obstacles caused, if any, to the above properties, and will get the same registered. You should take into your possession the above-mentioned properties which are in the possession of the mortgagee after paying him the amount due to him.”

Defendant No. 1 alleged that a second agreement had been executed on the same day, which provided that, if he (defendant No. 1) repaid the plaintiff the sum of Rs. 1,500 within a year, the first agreement for sale should be null and void. He contended that the plaintiff might claim the Rs. 1,500 and interest, but not the property itself, which he admitted he had subsequently sold to defendant No. 2 under a duly registered sale deed.

The following is the material part of the second agreement relied on by the defendant. It purported to be passed by the plaintiff to the defendant No. 1 :—

“I entered into an agreement for the purchase from you of your house, No. 489 \* \* \* \* and paid you Rs. 1,500, fifteen hundred, out of the price of the same which was due to you; and I have this day taken from you an agreement in writing for having a purchase deed of the said properties executed (to me). But it has been stipulated between you and me that should you within six months from this day repay (pay ?) to me the interest on the Rs. 1,500 paid to you this day which at the rate of rupees one and a half per cent. per month comes to Rs. 135. (one hundred and thirty-five), and (repay) the remaining rupees fifteen hundred within the further period of six months which at the said rate of interest comes to rupees one hundred and thirty-five, then only the agreement which I have this day taken from you in writing for having a purchase-deed executed by you to me will be null and void. If any of the instalments be not paid within the fixed periods as mentioned above, this agreement will be null and void immediately on the failure of payment of the instalment. This agreement is duly given in writing.”

[398] Defendant No. 2 pleaded that he had purchased the property *bona fide* from defendant No. 1, and that he had no notice of the previous transaction with the plaintiff.

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The Subordinate Judge found that the later sale by defendant No. 1 to defendant No. 2 was colourable and collusive, and passed a decree declaring that it was void as against the plaintiff.

On appeal by the defendants the Judge reversed the decree and rejected the plaintiff's claim on the ground that the agreement of sale relied on by him needed registration, but was not registered:—

“Now this agreement (relied on by the plaintiff) by its terms really assigns to the plaintiff the equity of redemption to be exercised at any moment for the consideration of Rs. 1,500 actually received. It is thus more than a mere contract to execute a conveyance; it evidences a complete transaction in itself. \* \* \* \* \*

Now it seems to me that the above agreement really operated as a transfer of an interest in immoveable property exceeding Rs. 100 in value, and that it needed registration, and that it does not fall under the exception (b) to s. 17 of the Registration Act.

“The counter agreement executed by plaintiff to defendant No. 1 on the same day, namely, 17th April, 1889, provides that if defendant No. 1 repaid Rs. 1,500 with interest within one year, the previous agreement should thereupon be considered as cancelled. Defendant No. 1 contends that the two agreements taken together were only intended to be an assurance that the loan of Rs. 1,500 would be repaid. The Subordinate Judge also regards the two agreements read together as amounting to a mortgage; but even then the agreement would require to be registered. It seems to me that the two agreements when read together constitute a conditional assignment of the equity of redemption to become void on the occurrence of a specified contingency, and as such they require registration, and should not be admitted in evidence being unregistered; and that plaintiff's claim founded on such agreements cannot be maintained.”

The plaintiff filed a second appeal.

[399] *Mahadeo B. Chavbal*, for the appellant (plaintiff).—The agreement we rely on, is not a conveyance of the equity of redemption. It is merely an agreement and nothing more. It contemplates the execution of another document, and, therefore, its registration is not necessary. It is the conveyance which requires registration—*Jusab Haj? Jafar v. Haji Gul Muhammad* (1); *Burjorji v. Muncherji* (2); *Chunilal Panalal v. Bomanji Mancherji* (3). We are entitled to specific performance of our contract—*Kadar v. Ismail* (4); *Adakkalam v. Theethan* (5).

*Nagindas T. Marphatia*, for respondent 1 (defendant 1).—We contend that the agreement requires registration because it effected a complete sale of the equity of redemption—*Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy* (6). Although the agreement in question contemplates the execution of a formal document, still the intention of the parties is to be gathered from the agreement itself, and the intention being to convey an interest in immoveable property, the agreement requires registration—*Purmanandas Jiwandas v. Dharsey Virji* (7).

#### JUDGMENT.

SARGENT, C.J.—We think the document passed by defendant No. 1 to the plaintiff was not, as the lower Court of appeal has held, merely,

(1) 12 B.H.C.R. 175.  
(5) 12 M. 505.

(2) 5 B. 143.  
(6) 8 B. 323.

(3) 7 B. 310.  
(7) 10 B. 101.

(4) 9 M. 119.

an assignment of the equity of redemption, but was an agreement for the sale to the plaintiff of the entire interest in the properties therein mentioned for Rs. 1,500 and the sum due on the mortgage to Limaye, with a further agreement by the defendant to execute a formal deed of conveyance as soon as the above sums were paid. The defendant No. 1 says: "I have agreed to sell the above-mentioned properties to you on your paying the whole amount (that is to say), on your paying directly to the mortgagee in respect of his mortgage right the amount that may be found due to him and paying me the further sum of Rs. 1,500." There is no sale in terms of the equity of redemption as such, but an agreement to sell complete ownership in the property after the mortgage has been paid off, and the mere fact that the Rs. 1,500 is recited as having been paid, cannot affect the plain meaning of the language of the instrument.

[400] Such being the nature of the document according to its terms, the question is, whether it required registration, having regard to sub-cl. (h) of S. 17 of the Registration Act. This was decided, and in our opinion rightly decided, in the negative with respect to a similar document by Birdwood, J., in *Chunilal Panalal v. Bomanji Mancherji* (1). We must, therefore, hold that the agreements referred to in the judgment of the Court below do not require registration, and must reverse the decree of the Court below and send back the case for a fresh decision. Costs to abide the result.

*Decree reversed and case sent back.*

18 B. 400.

### CRIMINAL REFERENCE.

*Before Mr. Justice Candy and Mr. Justice Fulton.*

*In Re LAKMIA.\** [13th July, 1893.]

*Bombay District Municipal Act (VI of 1873), s. 84—Non-payment of taxes—Liability to penalty—Offence—Penal Code (XLV of 1860), s. 40—Penalty—Imprisonment in default of payment of penalty.*

There is no distinction between the word "penalty" as used in the Bombay District Municipal Act (VI of 1873) and the word "fine" as used in s. 64 of the Indian Penal Code (XLV of 1860). Imprisonment can, therefore, be awarded in default of any penalty inflicted under s. 84 of the Municipal Act.

THIS was a reference by J. Davidson, Esquire, District Magistrate of Kanara, under s. 438 of the Code of Criminal Procedure (Act X of 1882).

One Lakmia was prosecuted by the Municipality of Haliyal for not having paid wheel tax alleged to be due.

The Third Class Magistrate, acting under s. 84 of the Bombay District Municipal Act (VI of 1873) as amended by s. 49, cl. (1) of Bombay Act II of 1884, ordered Lakmia to pay the arrears of the tax, together with a penalty of annas 4 or in default to undergo three days' simple imprisonment.

The District Magistrate, on examining the record of this case, entertained considerable doubts as to the legality of the order of imprisonment

\* Criminal Reference, No. 76 of 1893.

(1) 7 B. 310.