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the plaintiff cannot claim a period of limitation and a right to redeem as if he were a party to the mortgage of the 28th February, 1877, or as if the defendants Nos. 1 and 2 were then mortgaging his share as his agents. The possession of Bábáji and of the defendants Nos. 3 to 6 as mortgagees would clearly be adverse to the plaintiff as the purchaser of the one-third share of Bábáji. See *Datto v. Bábáji* (1). The suit for this parcel is time-barred also.

We confirm the decree of the lower appellate Court with costs.

Decree confirmed.

(1) P. J., 1894, p. 149.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Parsons.

1895.

June 26.

CHAMANBU JA'VJE MAHOMEDALI BOHORI. (ORIGINAL PLAINTIFF),
APPELLANT, v. MULTA'NOHAND SHIVRA'M (ORIGINAL DEFENDANT),
RESPONDENT.*

Registration Act (III of 1877), Sec. 17, Cl. (b)—Indian Evidence Act (I of 1872), Sec. 32, Cl. (6)—Will—Statement—Words not purporting or operating to extinguish an interest in the present or in future.

Section 17, clause (b) of the Registration Act (III of 1877) does not render a passage in a will inadmissible in evidence if the words of it do not purport or operate to extinguish an interest in the present or in future, but state only past facts. Such a statement would, if proved, be admissible also under section 32, clause (6) of the Indian Evidence Act (I of 1872).

SECOND appeal from the decision of S. Hammick, District Judge of Ahmednagar, confirming the decree of Rao Bahádur G. A. Mánkar, First Class Subordinate Judge.

The plaintiff sued to obtain a declaration that a certain house which she had obtained from her husband as dowry was not liable to attachment by the defendant in execution of a decree against her sons and grandsons.

The defendant contended that the house belonged to his judgment-debtors and not to the plaintiff.

* Second Appeal, No. 555 of 1893.

The Subordinate Judge rejected the claim. The following is an extract from his judgment :—

“There is no question about the property in dispute having belonged to the plaintiff's husband. But the plaintiff has not succeeded in proving her allegation that it was granted to her by her husband in lieu of dower. For the purpose of proving her allegation on this point, the plaintiff has caused a document, Exhibit A, to be produced, containing a clause relating to the grant of the property in dispute to her in lieu of dower. The document, Exhibit A, of which Exhibit B is a Marathi translation, is said to be in Gujarati, but is transliterated in Arabic according to witness No. 43, and purports to be a will of the plaintiff's husband. But the clause in the document relating to the grant of the property in dispute to the plaintiff by her husband in lieu of dower does not appear to be a testamentary disposition of the said property by him. For ‘will’ means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death according to section 3, Act X of 1865, and Act V of 1881. But in the portion of the document, Exhibit A, relating to the property in dispute, it is stated that the property in dispute was already given to the plaintiff in lieu of dower, and that the maker of the document had no longer any right to it, and that his heirs and successors should also have none. This cannot be considered to be a testamentary disposition of the property, as it was effected in the life-time of the plaintiff's husband. Supposing Exhibit A to be a will, the portion thereof relating to the property in dispute cannot be said to be a testamentary disposition of the said property. If it is not a part of the will, it requires to be stamped and registered according to the provisions of the Stamp and the Registration Acts, as it is a conveyance of immoveable property of the value of upwards of Rs. 100. But as it is neither stamped nor registered, it is not admissible in evidence. Consequently the plaintiff was not allowed to examine witnesses to prove the document. The plaintiff has not produced any other evidence relating to the alleged grant of the property in dispute to her by her husband in lieu of dower.”

The following is the translation of the material portion of Exhibit A, referred to in the above extract :—

“(As to) my wife Chamanbu, daughter of Najambhai, I have given her both the immoveable properties (namely) the two stories of the dwelling-house which have fallen to my share and the *kdilu* (that is, house built of burnt bricks and stones) as *hiba* (a gift or a bequest with a return or consideration), as gift, and as property purchased (by her) in consideration of her dowry. Chamanbu, the daughter of Najambhai, is the owner and mukhtar of both these properties. I have no right, claim or interest whatever in both these properties.”

On appeal by the plaintiff the Judge confirmed the decree. In his judgment he said :—

“The document A is in the first instance a will, and in that capacity it need not be registered. But the appellant wishes to make use of it for her own purposes as a declaration that certain property therein specified and worth more than Rs. 100 has been assigned to her in lieu of her dower. Regarded from this point of view, the

document ceases to be a will and becomes an instrument which purports to declare a right or interest of the value of Rs. 100 in immoveable property. It is included under (6) of Section 17 of the Registration Act, and not having been registered, it cannot be admitted in evidence."

The plaintiff preferred a second appeal.

P. M. Mehta (with *Gangaram B. Rele*) for the appellant (plaintiff):—The Judge held Exhibit A to be a will. Being a will it does not require registration. Further, it does not create any interest in or right to immoveable property so as to come within the pale of section 17 of the Registration Act (III of 1877). It merely contains a statement of fact and does not purport to deal with any property, because the property had already been dealt with before the document came into existence—*Sakharam Krishnaji v. Madan Krishnaji*⁽¹⁾; *Shivlingappa v. Haribai*⁽²⁾. The statement in the document is admissible under clause (6), section 32 of the Evidence Act.

Macpherson (Advocate General, with *Ghanasham N. Nalkarni*) for the respondent (defendant):—The document is relied on as a document of title. It is not produced merely to prove a fact. As a document of title, it is not admissible, being unstamped and unregistered.

JARDINE, J.:—The lower Courts held the following passage in the will inadmissible under the Registration Act of 1877:—
"I have given her both the immoveable properties, (namely) the two stories of the dwelling-house, which have fallen to my share, and the *kothu*⁽³⁾ as *hiba*⁽⁴⁾, as gift, and as (property) purchased (by her) in consideration of her dowry. Chamanbu, the daughter of Najambhai, is the owner and mukhtyar of both these (properties). I have no right, claim or interest whatever in both these two properties."

We do not think that section 17, clause (b) of that Act renders this part of the document inadmissible, as the words do not purport or operate to *extinguish* an interest in the present or in future, but state only past facts. The statement contained in the passage would, if proved, be admissible also under section 32, clause (6), of the Indian Evidence Act. We think, then,

(1) I. L. R., 5 Bom., 232.

(2) P. J., 1890, p. 78.

(3) *Kothu* probably means a house built of burnt bricks and stone.

(4) *Hiba* means a gift or a bequest with a return or consideration.

that the lower Courts were wrong in precluding the plaintiff from giving proof of the statement.

It is admitted by the learned counsel for the parties that the whole case turns on the first issue framed by the Subordinate Judge. We, therefore, refer this issue for trial and finding on the two parts thereof by the District Court after taking evidence. The finding to be certified to this Court within three months.

Issue sent down.

APPELLATE CIVIL

Before the Honourable Mr. Farran, Chief Justice, and Mr. Justice Parsons.

DOSHI FULCHAND (ORIGINAL PLAINTIFF), APPELLANT, v. MA'LEK DA'JIRA'J (ORIGINAL DEFENDANT), RESPONDENT.*

1895.

July 11

Talukdar—Gujarat Talukdars' Act (Bom. Act VI of 1888), Sec. 31—Mortgage of talukdari estate—Validity of mortgage before the Act—Decree upon the mortgage for sale of talukdari estate.

A talukdar of the Ahmedabad district mortgaged his *talukdari* property in 1886.

In 1892 the mortgagee sued to enforce his lien by sale of the mortgaged property.

The Court passed a decree against the talukdar personally, holding that it had no power under sections 31 and 32 of the Gujarat Talukdars' Act (VI of 1888)⁽¹⁾ to direct a sale of the *talukdari* estate.

* Appeal No. 53 of 1894.

(1). The following are the sections of Act VI of 1888 referred to :—

31. (1) No incumbrance on a talukdar's estate, or on any portion thereof, made by the talukdar after this Act comes into force, shall be valid as to any time beyond such talukdar's natural life, unless such incumbrance is made with the previous written consent of the Talukdari Settlement Officer or of some other officer appointed by the Governor in Council in this behalf.

(2) No alienation of a talukdar's estate or of any portion thereof, or of any share or interest therein, made after this Act comes into force, shall be valid, unless such alienation is made with the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the jama and of the village expenses and police charges due in respect of the alienated area, shall thenceforward vest in the alienee and not in the talukdar.

32. (1) No consent or sanction given under the last preceding section shall be deemed to affect any right of Government under section 3 of Bombay Act VII of 1863 (*an Act for the Summary Settlement of claims to exemption from the payment of Government land-revenue, and for regulating the terms upon which such exemption shall be recognised in future, in those parts of the Bombay Presidency which are not subject to the operation of Act XI of 1852 of the Council of India*).