

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Aston.

1902.
December 23.

SHARFUDIN VALAD TAJUDIN AND OTHERS, HEIRS OF THE DECEASED TAJUDIN (ORIGINAL PLAINTIFF), APPELLANT, v. GOVIND BHIKAJI BADE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Registration Act (III of 1877), sections 17 and 50—Registration—Constructive notice—Possession—Evidence Act (I of 1872), section 90—Documents thirty years old—Proper custody—Presumption.

A registered document contained a recital of unregistered incumbrances, and a question having arisen as to whether the recital of the unregistered incumbrances amounted to notice,

Held, that registration is at most constructive notice and the doctrine of constructive notice cannot be so extended as to cover unregistered documents under which the holders of registered documents derive title.

The defendants further relied on their being in actual possession.

Held, that possession amounts to notice of such title as the person in possession may have, and any other person who takes a mortgage or other charge upon, or purchases, immoveable property without ascertaining the nature of the claim of the person in possession, does so at his own risk.

The general consensus of opinion of all the High Courts in India is that possession is at least very cogent evidence of notice which a purchaser cannot, with safety, disregard, and that section 50 of the Registration Act (III of 1877) does not do away with the effect of notice in favour of the registration to which *ceteris paribus* it gives preference.

Per Batty, J.—Section 90 of the Evidence Act (I of 1872) 'admits a presumption of the genuineness of documents purporting to be thirty years old, if produced from custody proved to have had a legitimate origin or an origin the legitimacy of which the circumstances of the case render probable. It is not necessary that the documents should be found in the best and most proper place of deposit. The section read with the explanation seems to insist only on a satisfactory account of the origin of the custody and not on the history of its continuance.'

Per Aston, J.—Section 90 of the Evidence Act requires that a document must be produced from the proper custody.

SECOND appeal from the decision of F. K. Boyd, Assistant Judge of Ratnágiri, amending the decree of Ráo Sáheb G. D. Deshmukh, Subordinate Judge of Dápoli.

Suit for redemption. The property in dispute originally belonged to one Bhaudin Mukadam, the grandfather of defendant 1, Bhikya *alias* Mahmad Ismail valad Salaudin. On the 17th December, 1837, Bhaudin mortgaged the property for Rs. 645-12-3 to Bapuji Chintaman Bade, the grandfather of defendants 2-5 and paternal uncle of defendant 6. The plaintiff subsequently purchased the equity of redemption from defendant 1 by a deed of assignment dated the 3rd December, 1897. The consideration for the assignment was Rs. 645-12-3, the mortgage-debt due to Bapuji Chintaman Bade, and Rs. 50 paid in cash. On the strength of the deed of assignment the plaintiff brought the present redemption suit alleging that defendants 7-10 were joined because they were in possession of the property.

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Defendant 1 denied having passed the assignment to the plaintiff. He contended that the plaintiff had fabricated the assignment and that he alone had the right to redeem Bade's mortgage.

Defendants 2-6, who were members of a joint family, admitted the mortgage relied on in the plaint and contended that the son of the original mortgagor had made a further charge upon the property, that defendant 2 made repairs to the property at his own cost and paid Government assessment, that their rights as mortgagees were sold to defendants 7-10, and that the plaintiff was aware of the sale.

Defendants 7-10 answered that they had purchased the property in suit from defendant 2 for Rs. 1,275 under a sale-deed dated the 12th April, 1893, that the transaction was effected through plaintiff, that the plaintiff's assignment was colourable, that defendant 1 had no right to make the assignment, that the original mortgagor's sons and daughters had passed other money bonds to the mortgagee Bade, that they had improved the lands at considerable cost amounting to Rs. 1,225, and that the total money due to them on the mortgage was Rs. 2,500 which ought to be paid to them.

At the trial the following issues were framed :

1. Whether or not the plaintiff's assignment is proved ?
2. If not, whether or not the plainsiff has a right to bring this suit ?

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3. What amount is due on the mortgage sought to be redeemed, including cost of repairing and improving the property and the payment of *dast* (assessment) thereon by Bade?

4. If redemption is to be allowed, on what terms can it be allowed?

5. To what relief, if any, is the plaintiff entitled?

The Subordinate Judge found on the evidence that the plaintiff's assignment was not proved. He therefore dismissed the suit without recording findings on the other issues.

On appeal by the plaintiff, Ráo Bahádur Vaman M. Bodas, First Class Subordinate Judge of Ratnágiri with appellate powers, found that the plaintiff's assignment (Exhibit No. 78) was satisfactorily proved and that he was entitled to redeem the mortgage in question. The Judge, therefore, reversed the decree and remanded the case for findings on other issues and a fresh decision according to law.

On the remand the Subordinate Judge found that the plaintiff's assignment was proved, that the plaintiff had a right to bring the suit, that Rs. 1,130-12-3 were due on account of the mortgage sought to be redeemed, the costs of repairs and the payment of *dast* (assessment) on the lands being not proved, and that on payment of Rs. 1,130-12-3 within six months from the date of the decision (30th October, 1900) to defendants 7-10 the plaintiff could redeem the property in suit from the mortgage and recover its possession from the defendants. The following are extracts from the Subordinate Judge's judgment:

The plaint has alleged that this property originally belonged to Bhaudin valad Kutubudin Mukadam, the grandfather of defendant No. 1, Bhikya *alias* Mahmud Ismail valad Salaudin Mukadam; that Bhaudin, the said grandfather of defendant No. 1, mortgaged the said property with Bapuji Chintaman Bade, the grandfather of defendants Nos. 2 to 5 and paternal uncle of defendant No. 6, for Rs. 645-12-3 on the 17th December, 1837. The plaintiff subsequently on the 3rd day of December, 1897, purchased the said property from defendant No. 1, Bhikya, by a deed of assignment (Exhibit No. 78) for Rs. 695-12-3.

The defendants have produced four mortgage-bonds (Exhibits Nos. 56, 57, 58 and 59) relating to the plaint property. The first mortgage-bond is Exhibit No. 56, and that subsequently the mortgagor contracted a further debt of Rs. 242-8-0 on the said mortgage, agreeing to pay this further debt before redeeming the first mortgage (Exhibit No. 56).

Witness No. 61 has proved the mortgage-bonds Exhibits Nos. 57, 58 and 59. Defendant No. 2 admits Exhibit No. 56.

Defendant No. 2 in his examination (No. 60) admits all these mortgages, namely, Exhibits Nos. 56, 57, 58 and 59.

The plaintiff therefore is bound to pay all these mortgages before he can redeem the plaint property which was mortgaged with Bapuji Chintaman Bado. The first mortgage is for Rs. 645-12-3 and the subsequent mortgages (Exhibits Nos. 57, 58 and 59) are for Rs. 242-8-0. There is an agreement to pay interest on this subsequent sum advanced on the security of the original mortgage. The mortgaged property has been in the possession and enjoyment of the mortgagee from the date of the original mortgage. The mortgagee has no accounts to show the profits. The plaintiff has not also proved the profits. The plaintiff therefore is bound to pay interest as stipulated in the mortgage-bonds (Exhibits Nos. 57, 58 and 59). The rule of *dāmdupat* applies to mortgages and according to that rule the interest amounts equal to the principal sum, namely, Rs. 242-8-0.

The amount of subsequent mortgages, therefore, with interest amounts to Rs. 485, to which, if the amount of the original mortgage, namely, Rs. 645-12-3, be added, the total sum of the whole mortgage money amounts to Rs. 1,130-12-3, which the plaintiff, under the circumstances discussed above, is bound to pay to the mortgagee before he can redeem the plaint property from mortgage.

Both the parties having preferred cross appeals the Assistant Judge amended the decree in the following terms :

I amend the decree of the lower Court, and direct that plaintiff do pay to defendants 7-10 the sum of Rs. 1,838-5-10 within six months from the date of this decree (17th September, 1901), together with further interest at 6 per cent. on Rs. 242-8-0 from date of suit to date of payment or expiration of the above six months, and redeem the plaint property from mortgage and recover possession of the same from defendants 7-10. Plaintiff to bear costs of both appeals and in the lower Court. In default of payment as above, plaintiff's right to redemption shall be foreclosed.

The following are the material extracts from the Judge's judgment :

The original mortgage of 1837 is Exhibit No. 56 and is admitted on either side. The terms laid down are that profits are to be enjoyed by the mortgagee in lieu of interest. Exhibits Nos. 57-59 are produced by defendant 2 on behalf of defendants 7-10, against whom alone, as will be seen later, the present claim lies. These are money bonds creating further charges on the mortgaged property, dated March 1864, February 1865, and March 1866, and passed by defendant 1's father Salaudin and by a daughter of the original mortgagor, defendant 1's grandfather. The first is for Rs. 57-8-0, the second for Rs. 95, and the third for Rs. 90. The rate of interest is fixed in all three at 12 per cent. The total amount is Rs. 242-8-0. The learned Subordinate Judge has found these bonds to be proved and by application of the rule of *dāmdupat* has fixed the amount now payable thereon at Rs. 485. It is not asserted

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that any payment on account of interest has ever been made. These bonds constitute the only question raised in the present appeals. For with regard to the claims on account of cost of improvements and payment of Government assessment, I agree with the estimation of the evidence and the decision arrived at by the lower Court.

Plaintiff contends that these bonds are not genuine and that two of them (Exhibits 58 and 59) are not admissible for want of registration and proper stamping. With regard to the first point, the learned Vakil for the plaintiff has quoted *Trailokia Nath Nundi v. Shurno Chungoni*⁽¹⁾ to show that the presumption laid down in section 90, Evidence Act, is permissive only—a point sufficiently obvious. The three bonds are produced by defendants 2-6 and are over thirty years old. Now defendants 2-6 are representatives of the original mortgagee, Bapuji Chintaman Bade. On 12th April, 1893, they sold absolutely their right, title and interest in the mortgage to defendants 7-10 for Rs. 1,275. This sale deed is Exhibit 55 and is duly registered. The following recital, *inter alia*, is of interest: "We (*i.e.*, defendants 2-6) hold this property in mortgage from deceased Bhaudin under a mortgage bond dated Shake 1759 (*i.e.*, 1837), and his direct heirs have received more money from our ancestor and have passed separate documents on stamped paper." This is a clear allusion to the bonds now in dispute and further accounts for the fact that they are produced by defendants 2-6 and not by defendants 7-10. The latter should, of course, have taken the bonds into their own custody. But with a clear allusion thereto in their bond (Exhibit 55), it is quite possible that they thought this unnecessary. I therefore cannot hold that the custody from which the bonds were produced was improper.

It is further objected that these bonds (Exhibits 57-59) were not produced at the proper time. Defendant 1 is merely plaintiff's assignor of the equity of redemption; defendants 2-6 are merely vendors of defendants 7-10. It will therefore be seen that only the latter have any particular concern in the case. And they had not got the bonds. They are also illiterate men of the lowest caste, while defendants 2-6 are educated Brahmins. The latter must at the time of Exhibit 55 have known perfectly well that Exhibits 57-59 ought to be handed over to their vendees, while these may very easily not have known this. It is sufficiently obvious, even with regard to a case like the present, why they were not handed over; and probable that the expenses incurred by defendants 7-10 in the case include at any rate one item not altogether official. Under these circumstances I do not regard the time of production as very material. Again, Exhibit 55 further recites: "Besides this (*i.e.*, the bonds mentioned), if we make account of the whole the amount due will be very large, but we accept the above sum (*i.e.*, Rs. 1,275) and sell you all our mortgage rights." The amount of the original mortgage of 1837 is Rs. 645-12-3 and the arrangements being profits in lieu of interest, that mortgage could at any time before the expiration of sixty years from 17th December, 1837, have been redeemed by payment of the

⁽¹⁾ (1885) 11 Cal. 539.

original amount only: It is therefore clear that there were further charges the right to which was sold under Exhibit 55. In the face of the unsatisfactory evidence as to the improvements, I cannot believe they were on that account. And plaintiff, very naturally, does not assert this. The only other explanation possible is that the further charges consist of these money bonds now disputed. I therefore do not hesitate in finding them proved.

The second part of plaintiff's contention in the matter of these bonds must now be examined. Exhibit 58 undoubtedly requires registration, in that it extends the period of redemption by twenty-five years (*vide* section 13 of Act XVI of 1864 which was then in force). But the only effect of the want of registration is that the redemption period cannot be extended. This is perfectly clear from the ruling in *Lachimpat Singh Dugar v. Khairat Ali* (1) followed in *Monomothonath Day v. Sreenath Ghose*. (2) And there is no question of its being used for that purpose in the present case. * * *

The only question remaining is the amount now payable on the money bonds (Exhibits 57-59). The principal of these three bonds amounts to Rs. 242-8-0. The lower Court is wrong in applying the rule of *dāmdūpat*. The original mortgagor in this case was Bhaudin valad Kutubudin Mukadam, a Mahomedan. His heir, defendant 1, is also a Mahomedan, and so is his assignee, present plaintiff. In *Harilal Girdharlal v. Nagar Jeyram* (3) it is clearly laid down that the rule of *dāmdūpat* does not apply to transactions to which a Mahomedan is a party; *vide* also *Dawood Durvesh v. Vallubhdas* (4) and *Ali Saheb v. Shabji*. (5) I have calculated the sum due upon these lands to amount to Rs. 212-8-0 principal + Rs. 950-1-7 interest due up to date of suit at 12 per cent. which is the rate named in the bonds; in all Rs. 1,192-9-7. To this must be added the principal amount of the original mortgage, Rs. 645-12-3.

The plaintiff preferred a second appeal, and as he died pending the second appeal his heirs were brought on the record.

Narayan V. Gokhale for the appellant (plaintiff):—We sued for redemption and we have been ordered to redeem on payment of the original mortgage debt due under the principal bond as well as the sums due under the unregistered money bonds, Exhibits 57, 58 and 59. We contend that the liability of discharging the debts due under the other three bonds was wrongly placed on us. In the first place, these bonds did not come from proper custody. Under section 90 of the Evidence Act, documents more than thirty years old may be presumed to be genuine, but that presumption does not dispense with the necessity of their

(1) (1869) 4 B. L. R. 13; 12 Cal.

W. R. (F. B.) 11.

(2) (1878) 20 W. R. 107.

(3) (1895) P. J. p. 304; 21 Bom. 38.

(4) (1893) 18 Bom. 227.

(5) (1895) P. J. p. 362; 21 Bom. 85.

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coming from proper custody. It does not require that such documents should be formally proved, but it is necessary that there must be some proof in their support. Further, one of the bonds (Exhibit 59) purports to have been executed by a female named Fatma. She has merely put her mark. There is no evidence to show that she was in any way connected with the mortgagor's family or that she had any right to further encumber the mortgaged property.

Our next contention is that these bonds required registration and being unregistered are inadmissible in evidence. Under each of the said bonds, which stipulate that the amount secured in each shall be paid at the time of redemption of the mortgage, the equity of redemption is worth more than one hundred rupees, and therefore they ought to have been registered. One of the bonds, namely, Exhibit 58, even postpones the equity of redemption for twenty-five years. Such bonds require registration: *Vithal Krishna v. Shaik Mugut* (1); *Gopal Mahipal v. Ganpatrao*. (2)

The said bonds being unregistered, they cannot have priority over our registered sale deed under section 50 of the Registration Act.

[*S. R. Bakhle* for the respondent:—This point was not raised in the lower Courts nor was it taken in the memorandum of the second appeal. It is now urged for the first time, to which we object.]

The point is purely one of law, and such points can be raised in second appeal: *Giriapa v. Ningapa* (3); *Nagesh v. Gururao*. (4)

We are *bond fide* purchasers for value, having no notice of the unregistered incumbrances, which were merely passingly mentioned in the defendants' sale deed. Registration is merely a constructive notice of the registered document, but it cannot be said that the registration of a document operates also as a constructive notice of the unregistered instruments recited therein: *Chunilal v. Ramchandra* (5); *Lachman Das v. Dip Chand* (6); *Gungaram Ghose v. Kalipodo Ghose* (7); *Shivram v. Saya* (8); *Kanit-*

(1) (1883) P. J. p. 34.

(5) (1896) 22 Bom. 213.

(2) (1893) P. J. p. 95.

(6) (1880) 2 All. 851.

(3) (1832) 17 Bom. 100.

(7) (1885) 11 Cal. 661.

(4) (1892) 17 Bom. 303.

(8) (1888) 13 Bom. 229.

kar v. Joshi⁽¹⁾; *Bapuji Balal v. Satyabhamabai*⁽²⁾; *Rajaram v. Krishnasami*⁽³⁾; *Patman v. Harland*.⁽⁴⁾

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Sadashiv R. Bakhle (for *Daji A. Khare*) for the respondents (defendants):—The question with respect to the proper custody of the bonds cannot be entertained in second appeal. The Judge has found on the evidence that the custody was proper. That being so, it becomes a question of fact, and the Court in second appeal cannot question that finding.

As to Exhibit 59, it is now too late to question Fatma's right to encumber the property. In the lower Courts the case was argued on the assumption that she had the right to do so.

On the point of registration, we submit that the bonds do not create a new incumbrance and therefore they are admissible, though unregistered. The first bond is dated 1864, that is, before any Registration Act was passed, therefore it did not require registration, though the debtor has thereby undertaken the liability to pay the whole debt. The subsequent bonds also contain the same stipulation as to the payment of the debt, but they do not create any fresh charge, the liability for the payment of the debt having been already undertaken.

With respect to the question of priority under section 50 of the Registration Act, we submit that the question was not raised in the Courts below. If it had been raised there, we would have clearly shown by reference to the positive evidence in the case that the plaintiff had actual notice of our claim. The question of notice by registration of a document cannot arise when the person concerned has actual notice. We as well as our predecessor have been all along in actual possession of the property. Our actual possession was sufficient notice to put the plaintiff on his guard when he effected the purchase. It is for the plaintiff to prove that he had no knowledge of our claim and that he had made inquiry. There is nothing in the case to show that he did so.

Gokhale in reply.

(1) (1881) 5 Bom. 442.

(2) (1882) 6 Bom. 490.

(3) (1892) 16 Mad. 301.

(4) (1881) 17 Ch. D. 353.

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BATTY, J :—In this case the plaintiff, as purchaser of the equity of redemption, sued to redeem and recover possession of certain *thikáns* originally mortgaged with possession by the plaintiff's vendors to the ancestors of defendants 2-6, who, on 12th April, 1893, had by Exhibit 55 transferred their rights to defendants 7-10 for Rs. 1,275.

The defendants contended that plaintiff could not recover possession without redeeming three bonds (Exhibits 57, 58 and 59) as well as the original mortgage of 1837 (Exhibit 56). The Court of first instance and the lower Appellate Court held that this contention was correct, but while the Court first mentioned limited the interest payable by applying the rule of *dámdupát*, the lower Appellate Court decided that full interest on the three bonds was payable by plaintiff at the rates in those bonds specified. Exhibit 55, the registered instrument whereby defendants 2-6 transferred their rights to defendants 7-10, recited that the property in question was held in mortgage from one Bhaudin under the mortgage bond of 1837 (Exhibit 56), and added that Bhaudin's direct heirs had received more moneys from the original mortgagee and passed separate documents on stamped paper, and that if accounts were taken of the whole the amount would be very large, but that Rs. 1,275 had been accepted by the original mortgagees from defendants 7-10 and that in consideration of that sum all the mortgaged rights were accordingly sold to defendants 7-10.

The original mortgage deed of 1837 (Exhibit 56) was for Rs. 645-12-3, and possession was given thereunder to the mortgagees, profits being taken by them in lieu of interest. This mortgage deed (Exhibit 56) is stated by the lower Appellate Court to be admitted by all parties as the mortgage referred to in the document (Exhibit 55) which transferred the original mortgagee's rights to defendants 7-10.

The later documents (Exhibits 57, 58 and 59) were not specifically described in the defendants' assignment. They were not handed over by the original mortgagees to the defendants 7-10 either at date of Exhibit 55 or at any time before suit; nor were they specifically described in the written statements put in for the defence. The written statement of defendant 2 refers only

to a further charge on the mortgaged property made by the son of the original mortgagor; while defendants 7-10 in their joint written statement alleged that the original mortgagor's sons and daughters had passed other money bonds to Bade, the original mortgagee. These Exhibits 57 to 59 were not produced by defendants 7-10, but by the defendants 2-6.

Exhibit 57 purports to have been executed in March, 1864, by one Salaudin, son of the original mortgagor, for Rs. 57-8-0. It is unregistered. It recites the fact that the mortgage of 1837 for Rs. 645-12-3 (Exhibit 56) had been executed by the obligor's father and purports to confirm it by an undertaking to pay the amount thereof together with the sum of Rs. 57-8-0, which is stated to have been advanced on the same security, and with interest on the Rs. 57-8-0 at 12 per cent. per annum. Exhibit 58 purports to have been executed by the said Salaudin for Rs. 95 "advanced on the same security" in February, 1865, contains recitals and undertakings similar to those in Exhibit 57 with regard to the mortgage of 1837, and adds, "I will not interfere with the land for twenty-five years."

Exhibit 59 purports to have been executed in March, 1866, by one Fatma Bibi, the daughter-in-law of the original mortgagor, for Rs. 90 as a charge on the same land, bearing interest at Rs. 18 per cent., and to refer to and confirm Exhibits 56 and 58.

All these three documents purporting to be more than thirty years old, the question arose whether they were admissible as produced from proper custody.

For the appellants it is contended that these Exhibits 57 to 59 required more proof than had been adduced, and could not be accepted merely on the ground of their alleged antiquity and of their production by defendants 2-6; that section 90 of the Indian Evidence Act, 1872, was therefore inapplicable to them, and that under the ruling in *Uggrakant Chowdhry v. Hurro Chunder Shickdar*,⁽¹⁾ Exhibit 59 at least required proof of execution by the person Fatma, whose mark alone purports to have been affixed thereto, and further that all the three documents, as purporting to extend the interests created by Exhibit 56, were compulsorily registrable and inadmissible for want of registration,

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(1) (1880) 6 Cal. 209.

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and in any case were ineffectual by reason of section 50 of the Registration Act, 1877, as against the registered deed under which the plaintiff claims, and that plaintiff as a *bond fide* purchaser without notice could not be affected thereby.

In support of the first of these contentions, viz., that the documents were not sufficiently proved by evidence of production from proper custody, the rulings in *Mussamat Phool Bibee v. Goor Suran Doss*⁽¹⁾ and *Mussamat Fureedoonnissa v. Ram Onogra Singh*⁽²⁾ were cited for the appellants. The first of these decisions was passed only a few days after the present Evidence Act of 1872 came into force, makes no reference to that enactment and refers to the rule relating to ancient documents as one of English Law to be applied subject to conditions and precautions which are suggested in English text books, such as Pitt Taylor and Phillips, and which have not been embodied in section 90 of the modern Indian Evidence Act. The later ruling practically accepts as sufficient the test required by section 90 of the Indian Evidence Act, which, however, is not there cited.

Now, the section itself admits a presumption of the genuineness of documents purporting to be thirty years old, if produced from custody proved to have had a legitimate origin or an origin the legitimacy of which the circumstances of the case render probable (*vide* explanation to section 90). It is not necessary that the document should be found in the best and most proper place of deposit (*Bishop of Meath v. Marquis of Winchester*⁽³⁾), and the section read with the explanation attached thereto seems to insist only on a satisfactory account of the *origin* of the custody and not on the history of its continuance. Possibly the origin of the custody was alone regarded as material, because it is intelligible that ancient documents may be overlooked and left undisturbed notwithstanding a transfer of old, or creation of new, interests. In the present instance, it is true, Exhibits 57, 58 and 59 were not mere links in the chain of title, but the basis of rights alleged to have been transferred, and it might have been expected that they would have been handed over at the transfer of the mortgagee's rights. But the circumstance that they were not so handed over

(1) (1872) 13 Cal. W. R. 485.

() (1873) 21 Cal. W. R. 20

(3) (1836) 3 Bing. N. C. 183 pp. 201, 202.

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affects rather the history of the subsequent transactions than the probabilities as to the origin of the custody. The question of proper custody is no doubt one which would in England be left to the Judge and not to the jury : Pitt Taylor on Evidence, section 22. But this does not prevent the question from being one entirely dependent upon findings of fact, for, as stated by Pitt Taylor (p. 37) "the question of admissibility must be exclusively decided by the Judge, however complicated the circumstances may be, and though it may be necessary to weigh the conflicting testimony of numerous witnesses in order to arrive at a just conclusion." Whether it were credible or not that the documents in question were originally left in the custody of the mortgagee in whose favour they were executed appears to me to be as much a question of fact as the question whether they were executed by the alleged obligors or not, and even if it were a question of law, it would, I think, be impossible to hold that the *origin* of the mortgagees' custody was not both legitimate and probable. The further question whether the alleged subsequent history of those documents was sufficient to throw suspicion on their authenticity and rebut any presumption arising under section 90 was, I think, undoubtedly one of fact with which it is impossible to interfere on second appeal, regard being had to the decision of the Privy Council in *Durga Chowdhriani v. Jewahir Singh Chowdhri*.⁽¹⁾ In these circumstances, I think, there is no alternative but to accept the finding of the lower Appellate Court that these Exhibits 57 to 59 were produced from custody which is proper within the meaning of section 90 of the Evidence Act, and that they were duly executed by the persons by whom they purport to have been executed. The objection that Exhibit 59 bears only the mark of the alleged obligor appears to have no weight in face of the concluding words of the section, for it is not contended that the document does not purport to have been executed by the person whose mark it purports to bear, and this, in the case of a document falling under section 90, is sufficient, although had it been necessary to prove execution, it would have been necessary to prove the identity of the executing party.

The question whether Fatma, who purports to have executed

(1) (1890) 18 Cal. 23.

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Exhibit 59, was competent to create a charge upon the property to be affected thereby, does not appear to have been specifically raised in the memorandum of this appeal or in the lower Appellate Court or even in the Court of first instance, and should not, I think, be entertained now.

Next, it is contended that none of the documents in question are admissible, as they were all compulsorily registrable.

So far as Exhibit 57 is concerned this contention must necessarily fail, inasmuch as it purports to have been executed in March, 1864, and the Registration Act XVI of 1864 did not come into operation in this Presidency (*vide* section 71) until 1st January, 1865.

The other two documents, Exhibits 58 and 59, being respectively dated February, 1865, and March, 1866, both come within the operation of Act XVI of 1864 and, it is urged, are both compulsorily registrable under section 13 thereof, as though the consideration appearing on the face of the documents is in each case under Rs. 100, each of them undertakes liability for the previous deed and provides for the redemption of that mortgage for Rs. 645. In this connection appellants rely on the unpublished case of *Vithal Krishna v. Shaik Mugut*,⁽¹⁾ which distinguishes the case of an agreement undertaking a liability for a mortgage not otherwise binding, from the case of a mere recital or declaration of a fact such as in *Sakharam Krishnaji et al. v. Madan Krishnaji*⁽²⁾ was held not to render registration necessary. The case of *Gopal Mahipat Pangaokur v. Ganpatrav*⁽³⁾ was further relied on as showing that Exhibit 58, which postpones the date at which the original mortgage of 1837 should be redeemable, limited the equity of redemption under that mortgage, and therefore required to be registered, and being unregistered could not affect the equity of redemption. As to the first of these cases (*Sakharam Krishnaji v. Madan Krishnaji*), it is to be noted that the mortgages therein related to lands that were *wakf* and were not effected for *musjid* repairs, so that "it was admitted, under these circumstances, the mortgages could not be supported against the religious endowments." And it was for this reason that it was sought to

(1) (1883) P. J. p. 34.

(2) (1881) 5 Bom. 232.

(3) (1893) P. J. p. 95.

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charge the sons of the original mortgagor by the agreement entered into by them subsequently in an unregistered writing to pay off the mortgages, and it was also endeavoured to use that agreement as an estoppel which would prevent the plaintiffs from pleading that they were not bound by the first mortgage. It was because the plaintiffs were not, *ex concessis*, bound by the first mortgage, as it could not be supported against the religious endowment, that it was necessary to prove the agreement against them, and for this purpose it was inadmissible in evidence inasmuch as it was not registered. But in the present instance there is no plea that the plaintiff is not bound by the first mortgage. He sues to redeem it and has never disputed liability to pay it off. The subsequent documents, Exhibits 58 and 59, were not required as evidence to prove that liability and are not inadmissible to establish the liability for the sums respectively secured by them, viz., Rs. 95 and Rs. 90. They do not, therefore, impose or create, or in any way affect, the undisputed liability for the mortgage of 1837 which arises *aliunde*, and are a mere declaration of the fact of a liability which the plaintiff has throughout made no attempt to dispute. In the case of *Gopal Mahipat v. Ganpatrar*,⁽¹⁾ cited above, the liability of the sons for their father's mortgage was unquestioned, but their father's agreement to pay off a subsequent money bond for Rs. 175 before paying off the mortgage was held inadmissible as an unregistered document. And in holding it inadmissible the case of *Narayan Govind v. Ravji Balwant*⁽²⁾ was cited. A reference to that last cited case shows that the reason for holding such subsequent document inadmissible was that it had the effect of limiting the interest of the mortgagor to the extent of Rs. 100, and therefore required to be registered. This ground cannot apply to Exhibits 58 and 59, all of which limit the mortgagor's interest to an extent less than Rs. 100. These cases appear, therefore, inapplicable for the purpose of showing that these documents were compulsorily registrable. They did not operate to impose liability for the mortgage of 1837, which liability plaintiff admits, while he disputes the existence of the agreements which

(1) (1893) P. J. p. 95.

(2) (1884) P. J. p. 254.

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Exhibits 58 and 59 purport to evidence. And they do not limit the rights of redemption under the mortgage of 1837 to the extent of Rs. 100. It is possible that under the recent rulings in *Noakes v. Rice* ⁽¹⁾ and *Jarrāh Timber v. Samuel* ⁽²⁾ the agreement in Exhibit 59 to postpone the time for redemption of the mortgage of 1837 for twenty-five years might have been regarded as void on the ground that it clogged the equity of redemption. But no such point has been taken and the time has long passed at which it might have been taken. The documents Exhibits 57, 58 and 59 all purport to be fresh charges on the same security, and are therefore otherwise free from such objection.

The next point taken for appellant is that the provisions of section 50 of the Registration Act, 1877, apply to these documents Exhibits 57, 58 and 59, viz., that every registered document of the kinds mentioned in clauses (a), (b), (c) and (d) of section 17, and therefore Exhibit 56 which falls within that description, shall take effect as regards the property comprised therein, against every unregistered document relating to the same property, and therefore as against such documents as Exhibits 57, 58 and 59. To this contention respondents objected that it had not been raised in the Courts below or in the memorandum of appeal in this Court. The objection is met by appellant citing the cases of *Giriapa v. Ningapa* ⁽³⁾ and *Nagesh v. Gururao* ⁽⁴⁾ as the new point is purely a question of law, arising on the findings of the Courts below and not affected by any facts outside these findings. The point was, therefore, allowed to be fully argued. And the wording of the section is so clear that the respondents were unable seriously to contend that its provisions would not be fatal to their attempt to charge the property with liability in respect of the unregistered documents (Exhibits 57, 58 and 59) apart from the operation of the equitable doctrine of notice. This grave ground of objection, indeed, forms the really important matter of contest in this appeal. The appellant contends that he is a purchaser *bonā fide* without notice, and on its being objected that Exhibit 55 is a registered document containing a recital of incumbrances, it is urged

(1) (1902) A. C. 21.

(2) (1902) 2 Ch. 479.

(3) (1892) 17 Bom. 100.

(4) (1892) 17 Bom. 303.

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for appellant that registration is at most constructive notice, and that the doctrine of constructive notice cannot be so extended as to cover unregistered documents under which the holders of registered documents derive title, and *Chunilal v. Ramchandra* ⁽¹⁾ is cited as authority. In that case the plaintiffs were out of possession and had purchased under a registered deed from a vendor whose title deed was unregistered, and it was held that plaintiff and his grantors were mere strangers to the land, unless they could rely on the unregistered conveyance which could take no effect upon the property when brought into competition with the registered conveyance to the defendant. And when it was argued that the defendant had notice of the unregistered document through the registered document, the Court held that it would be pushing the doctrine of constructive notice beyond all bounds to hold that it is notice of the unregistered documents under which the holders derived their title. If, then, in this case the question rests merely on the competition between registered and unregistered documents, the ruling in *Chunilal v. Ramchandra* ⁽¹⁾ would be decisive against the defendants. Appellant relied also on *Lachman Das v. Dip Chand*, ⁽²⁾ a Full Bench ruling of the Allahabad High Court, where the plaintiff sued unsuccessfully to recover money by sale of properties hypothecated on unregistered bonds against a defendant to whom the same property had been transferred by registered deed. The case of *Gungaram Ghose v. Kalipodo Ghose*, ⁽³⁾ also cited for appellant, is essentially to the same effect. *Shivram v. Saya*, ⁽⁴⁾ *Kanithkar v. Joshi*, ⁽⁵⁾ and *Bapuji Balal v. Satyabhamabai* ⁽⁶⁾ were also cited, but appear irrelevant. The appellant further cites the case of *Rajaram v. Krishnasami* ⁽⁷⁾ and the case there quoted of *Patman v. Harland* ⁽⁸⁾ as authority for the position that constructive notice of a deed is constructive notice of its contents, provided the deed is a deed relating to the title and forming part of the chain of title. The case of *Patman v. Harland*, however, on a careful perusal appears to me in no

(1) (1896) 22 Bom. 213.

(2) (1876) 2 All. 851.

(3) (1885) 11 Cal. 661.

(4) (1893) 13 Bom. 229.

(5) (1831) 5 Bom. 442.

(6) (1882) 6 Bom. 490.

(7) (1892) 16 Mad. 301.

(8) (1881) 17 Ch.D. 353, 2 pp. 357-358.

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way to support the appellant's argument. For that case relates to the duty of a purchaser or lessee to look into the chain of his vendor's or lessor's title, and with special reference to the cases of *Jones v. Smith* ⁽¹⁾ and *Carter v. Williams* ⁽²⁾ appears to exonerate the purchaser or lessee from the duty of enquiry as to a document of which he has constructive notice, only in cases where he might get a complete chain of title without any notice of that document where he would be justified in resting assured that it could not affect him. But Jessel, M.R., was careful to say, "that line of cases has no bearing at all on a case where you know the deed does affect the land." For reasons to be stated below, however, the cases of *Rajaram v. Krishnasami* ⁽³⁾ and *Patman v. Harland* ⁽⁴⁾ appear to me to lay down no principle on which the plaintiff in this case could be relieved from the duty of enquiry. The arguments for the appellant throughout assume that the plaintiff was affected only by the constructive notice which might have been afforded by Exhibit 55, the registered documents under which the defendants claimed. Thus they rely upon *Doorga Narain Sen v. Baney Madhub Mozoomdar*, ⁽⁵⁾ which is a case in which the Court held that the circumstances were not sufficient to fix the plaintiff with constructive notice or to put him upon enquiry. And the case is spoken of as falling within the language of the Privy Council in *Ram Coomar v. McQueen* ⁽⁶⁾ wherein the principle appropriate rested upon the equity that "where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner, in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title," unless he can show direct notice, constructive notice or circumstances putting the purchaser on an enquiry. It is clear that such a case can have no bearing in the present instance. In the case cited there was no actual notice, and the vendors had been placed in such a position as to be the apparent owners, and it was with reference to those circumstances that the Calcutta High Court held that unless

⁽¹⁾ (1841) 1 Hare 43.⁽²⁾ (1870) L. R. 9 Eq. 678.⁽³⁾ (1892) 16 Mad. 301.⁽⁴⁾ (1881) 17 Ch. D. 353, 2 pp. 357-358.⁽⁵⁾ (1881) 7 Cal. 199.⁽⁶⁾ (1872) 11 Beng. L. R. 53; 18 Cal. W. R. 166.

there is wilful or fraudulent turning away from enquiry, the doctrine of constructive notice would not apply. The case *Re Bright's Trusts* ⁽¹⁾ was also referred to. That relates to a charge without notice on a chose in action, and it appears that except so far as the actual notice was given, subsequent incumbrancers could have no knowledge whatever of the existence of any prior charge. In that case the charge was one on a fund in the hands of trustees, and notice was given only of one of two charges created in the same deed, that for the life policy being unmentioned, and that the express notice given implied that no other charge was alleged. It is clear that the principles of that case apply only to the duty of enquiry arising in cases where, apart from constructive notice, there is nothing to put the purchaser on enquiry. In the present instance the appellant has put his case as if there were nothing but the constructive notice furnished by the registered deed of assignment to the defendants 7-10 (Exhibit 55), and they rely, therefore, on the inadequacy of such notice as an all-sufficient protection. For this purpose they lay stress on the cases already cited of *Chunilal v. Ramchandra* ⁽²⁾ and *Rajaram v. Krishnasami* ⁽³⁾ and on the ruling in *Inderdawan Pershad v. Gobind Lall Chowdhry*, ⁽⁴⁾ where approving *Shan Maun v. Madras Building Company* ⁽⁵⁾ it was held, notwithstanding Bombay decisions, that mere registration is not notice within the meaning of section 81 of the Transfer of Property Act such as to put on a purchaser responsibility for abstention from enquiry. And if the present case rested only upon the question whether Exhibit 55 was constructive notice of Exhibits 57, 58 and 59, I think that the authorities cited on behalf of appellant would be apposite on the point whether the plaintiff was bound by the incidental reference to those documents. But the case does not rest there. For, the defendants were admittedly in possession. And it has been held in a long series of cases in this Presidency that possession is notice: see especially *Lakshmandas v. Dasrat*, ⁽⁶⁾ *Dundaya v. Chenbasappa* ⁽⁷⁾

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(1) (1856) 21 Beav. 430.

(4) (1896) 23 Cal. 790.

(2) (1893) 22 Bom. 213.

(5) (1891) 15 Mad. 238.

(3) (1892) 16 Mad. 301.

(6) (1880) 6 Bom. 168.

(7) (1883) 9 Bom. 427.

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The case of *Moreshtar Balkrishna v. Dattu*,⁽⁸⁾ it may be noted, is not really opposed to this principle, for the *ratio decidendi* there proceeded upon the fact that the plaintiff, the prior unregistered mortgagee, was not in actual possession and that his mortgagor was, and that persons subsequently dealing with the property had no reason to suppose that he was in possession otherwise than as owner. But in the present instance the mortgagee was in possession and apparently had been continuously from 1837. And therefore the plaintiff had every reason to suppose that there was an incumbrance on the property and does not profess to have supposed that there was not. "Possession," according to the Full Bench ruling in *Lakshmandas v. Dasrat*,⁽⁹⁾ "has been deemed by Hindu and Mahomedan laws, as interpreted in this Presidency, to amount to notice of such title as the person in possession may have, and any other person who takes a mortgage or other charge upon, or purchases, immoveable property, without ascertaining the nature of the claim of him in possession, does so at his own risk. This is so in England also. See *Daniels v. Davison* ⁽¹⁰⁾ and the other cases in which its authority has been recognised, collected in Sugden's *Vendors and Purchasers* (page 1052, edition 11th) and 2 *White and Tudor's Leading Cases in Equity*, page 61 *et seq.*" This principle is quite distinct from that which was adopted in the same case, on the authority of American cases, as to registration being in itself notice to subsequent purchasers and mortgagees, and appears from note 2 on page 188 of the Full Bench judgment to be based on the remark of Wigram, V.C., in *Jones v. Smith*⁽¹¹⁾ that "possession is *prima facie* evidence of a *seisin in fee*." In the passage preceding that remark the Vice-Chancellor stated as a proposition which he did not dispute, "that if a person purchases

(1) (1879) 4 Bom. 126.

(6) (1872) 9 Bom. H. C. Rep. 151 f.n.

(2) (188.) 6 Bom. 193 at p. 231.

(7) *Ibid* p. 147.

(3) (1872) 9 Bom. H. C. Rep. 21.

(8) (1888) 12 Bom. 569.

(4) (1867) 4 Bom. H. C. Rep. 69 (n. c.)

(9) (1880) 6 Bom. 168.

(5) (1869) 6 Bom. H. C. Rep. 59 at p. 62.

(10) (81) 17 Vesey 433.

(11) (1841) 1 Hare 43, *vide* p. 60.

an estate which he knows to be in the occupation of another than the vendor, he is bound by *all the equities* which the person in such occupation may have in the land." *Daniels v. Davison*,⁽¹⁾ then spoken of "as an extreme case," has, as observed in *Mancharji Sorabji v. Kongseoo*,⁽²⁾ been repeatedly acted upon. The Full Bench case of *Lakshmandas v. Dasrat*⁽³⁾ was followed by Sir Charles Sargent and Mr. Justice Melvill in *Dundaya v. Chenbasappa*,⁽⁴⁾ where it was said (pages 428-9), "assuming that the defendant was in possession when the mortgage deed was executed to plaintiff, or that plaintiff had otherwise notice of defendant's purchase, it is clear that the latter could derive no advantage from the registration of his mortgage." This was with special reference to section 50 of the Registration Act of 1877 and does not rest on the doctrine of constructive notice by registration. *Shivram v. Genu*,⁽⁵⁾ dealing with section 50 of Act XX of 1866, was cited as to similar effect. *Dundaya v. Chenbasappa* was followed in *Hathising v. Kararji*.⁽⁶⁾ *Sobhagchand v. Bhaichand*⁽⁷⁾ is another Full Bench ruling laying down that possession is notice to all subsequent intending mortgagees or purchasers of the title of the party in possession. Of the earlier cases—prior to the Registration Act of 1877—*Balaram Nemchand v. Appa*⁽⁸⁾ was apparently approved in *Sambhubhai v. Shivalaldas*,⁽⁹⁾ though distinguished from a case where the prior unregistered document being compulsorily registrable was not admissible in evidence at all. In all the Bombay decisions cited above, the reason for withholding preference from the subsequent registered purchase was based, *not* on the doctrine that registration was constructive notice, for the prior alienation was in most of them unregistered, but upon the long established and undisputed principle that a purchaser is always bound by all the equities of a third party in possession, because possession presupposes title and therefore is notice which ought to put a purchaser on enquiry. In all the cases relied on by appellant as to the inadequacy of constructive notice of

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(1) (1811) 17 Vesey 433.

(5) (1882) 6 Bom, 515.

(2) (1869) 6 Bom. H. C. Rep. 59 at p. 62.

(6) (1885) 10 Bom. 105.

(3) (1880) 6 Bom. 168.

(7) (1882) 6 Bom. 193.

(4) (1883) 9 Bom. 427.

(8) (1872) 9 Bom. H. C. 121.

(9) (1867) 4 Bom. 89 at p. 92.

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documents mentioned in a registered deed, this element of the prior purchaser being in possession was wanting, and in such cases mere registration, as held in *Inderdawan Pershad v. Gobind Lal*⁽¹⁾ and *Shan Maun v. Madras Building Co.*,⁽²⁾ was therefore deemed insufficient. The principle on which possession is recognised as an element for consideration in cases of competing purchasers, appears to be quite independent of the now discredited doctrine as to the necessity of possession to the validity of a sale under Hindu and Mahomedan laws. For that principle rests on the English equitable doctrine of notice. It seems hardly necessary to observe that in *Trikam v. Hirji*⁽³⁾ possession failed to give priority because it was obtained with constructive notice of a prior registered incumbrance, so that the decision in no way questions the effect to be given to possession under a deed prior to that of a rival purchaser. The operation of registration as constructive notice has been questioned by the other High Courts. But *Krishnamma v. Suranna*⁽⁴⁾ and the cases there cited of *Nani Bibee v. Hafizullah*⁽⁵⁾ and others show that the doctrine of notice by possession has been regarded as standing on another and a sounder footing. The Calcutta High Court regards possession as "very cogent evidence of notice" (*Nani Bibee's case*), and the Allahabad High Court in *Ram Autar v. Dhanauri*⁽⁶⁾ refused possession to a mortgagee under a registered possessory mortgage, as against a prior unregistered mortgage accompanied with possession, notwithstanding the provisions of section 50 of the Registration Act, 1877. This ruling has been more recently referred to in the Allahabad case of *Diwan Singh v. Jadhoo Singh*,⁽⁷⁾ which cites with apparent approval the Bombay case of *Hathising v. Kuvarji*,⁽⁸⁾ which is based on *Dundaya v. Chenbasapa*⁽⁹⁾ and *Abool Hossain v. Raghu Nath Sahu*,⁽¹⁰⁾ which accepts the principle laid down in *Bhalu Roy v. Jakhu Roy*,⁽¹¹⁾ *Nemai v. Kokil Bag*,⁽¹²⁾ and by this Bombay High Court in *Waman v. Dhondiba*.⁽¹³⁾

(1) (1896) 23 Cal. 790.

(2) (1891) 15 Mad. 268.

(3) (1893) 18 Bom. 332.

(4) (1892) 16 Mad. 148.

(5) (1884) 10 Cal. 1073.

(6) (1886) 8 All. 540.

(7) (1896) 19 All. 145.

(8) (1885) 10 Bom. 105.

(9) (1882) 6 Bom. 515.

(10) (1886) 13 Cal. 70.

(11) (1885) 11 Cal. 667.

(12) (1880) 6 Cal. 534.

(13) (1879) 1 Bom. 126.

It is true that the notice referred to in these cases does not in each instance appear to have consisted solely in possession. But the general consensus of opinion of all the High Courts, following English decisions, appears to be that possession is at least very cogent evidence of notice which a purchaser cannot with safety disregard, and that section 50 of the Registration Act, 1877, does not do away with the effect of notice, in favour of the registration to which *ceteris paribus* it gives preference. It appears to be the result of the Bombay decisions that no purchaser can protect himself merely by registering his document of title, against the title of a person in possession of the subject-matter, and if he ignores that possession and fails to make inquiry into its nature and origin, he will be affected by all the equities which the person in possession is proved to have. This being the case, I think that when the plaintiff found that the property of which he bought the equity was in the possession of the defendants, it was for him to inquire into the nature of his vendor's title and the extent of the liabilities to which he was subject. It was contended for respondents that he had actual notice in the shape of direct information. That contention was not substantiated. But he had full knowledge that there was some incumbrance apart from the registered assignment (Exhibit 55), to defendants 7-10. He contends that at most he had constructive notice through that registered document, and that it was not explicit or binding as to Exhibits 57, 58 and 59. But the question is whether he can shield himself under that document as affording him misleading information with regard to his vendor's title. I do not think he can. For the document (Exhibit 55), though not explicit, does mention the further charges and could not relieve the plaintiff from further inquiry. Moreover, it was not the basis of his vendor's title and if there had been no such document in existence, and if defendants 2-6 had never assigned their mortgage rights, the plaintiff finding them in possession would have been no less bound to inquire as to the title of his vendor and the manifest incumbrance on it. And this duty would not have been fulfilled by his assuming, on the discovery of one of the liabilities attaching to the property, that there were no others to support the claim of the person in possession. That is to say, he was not entitled,

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merely because he may have known of the mortgage of 1837, to abstain from all further inquiry and profess that he could not be bound by any other title-deed, however genuine, in favour of the person in possession. The recent case of *Hunt v. Luck*⁽¹⁾ seems to make this clear in the passage which says: "If a purchaser or mortgagee has notice that the vendor is not in possession of the property, he must make inquiries of the person in possession, of the tenant who is in possession, and find out from him what his rights are, and, if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession." And it seems to me that if the Exhibits 57, 58 and 59 are genuine, as the lower Appellate Court has found as a fact they are, the plaintiff is no more exonerated in respect of those documents than he would have been if they had been the only liabilities justifying the possession of the defendants. In the face of Exhibit 55 it would be difficult (if the plaintiff relied on that document as excusing him from further inquiry) to say that the plaintiff had no reason, because he had notice of Exhibit 55, to make any further inquiry. It showed at least that a charge very largely in excess of Rs. 645 was alleged in favour of those in possession, and was, therefore, no excuse for stopping all the inquiry which, had no such document existed, the plaintiff would have been bound to make. The case has been obscured, I think, by arguments as to constructive notice given by Exhibit 55. But it was defendants' possession which gave the real ground for inquiry, and Exhibit 55 would not entitle plaintiff to dispense with any inquiry which he would have been bound to make if that document had never been passed. The case, therefore, seems a very simple one when reduced to its ultimate issues. The lower Appellate Court has found that "on the 3rd December, 1897, plaintiff purchased the equity of redemption from defendant 1 for Rs. 50," and that the defendant 1 had "mortgaged with possession." It was then for the plaintiff to find out what the state of the title was, and if he did not do so, he would be bound by all the rights proved in favour of the defendants in possession. They lower

(1) (1902) 1 Ch. 428, 433.

Appellate Court has found as a fact what those rights were, holding Exhibits 57, 58 and 59 genuine. That finding on second appeal is, I think, binding, and though the non-delivery to, and non-production by, the assignees of those exhibits may be ground for suspicion, the finding cannot be interfered with, and it is conceivable that the defendants 2-6 being descendants of the original mortgagees may not at first have been able to lay their hands on those documents, which were of minor importance, and were possibly disregarded at date of the assignment when no question of redemption had been mooted. Had the plaintiff insisted on information being furnished, they might possibly have been brought forward earlier. But there is no allegation that he ever made inquiry and was refused information as to their existence. They have been found genuine. And I think the plaintiff could escape liability for them only by showing that he had made inquiry and had no reason on inquiry to believe in their existence. He cannot now urge that defendants could not or would not have disclosed them on inquiry made. The utmost he can claim is to show that they were actually suppressed or that he was misled on his applying to the defendants in possession for information. This is not a point which seems to have been considered in the Courts below. The lower Appellate Court appears to have treated the case as one in which no such suggestion had been raised in argument. And neither Court has dealt with the case at all with reference to the liability of the plaintiff as a purchaser, who having notice of defendants' possession had abstained from inquiry into the title. The question of limitation as to Exhibits 57, 58 and 59 does not appear to have been urged, those documents being payable according to their tenour, it would seem, only when redemption was claimed, so that till redemption was sought time would not begin to run in respect thereof under article 132, and the point does not seem to have been taken in the lower Courts. The only real questions in the case appear to be (a) whether the defendants' possession was notice which bound plaintiff to inquire, (b) whether, if this be so, he could rely on section 50 of the Registration Act as giving him an absolute priority which could not be affected by the equitable doctrine of notice arising from possession in the

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defendants, and (c) whether, if the plaintiff cannot rely on section 50 of the Registration Act as giving him absolute priority, but was also bound by the possession of the defendants to inquire into the nature and extent of their rights, he had made due inquiry and been misled, or put off his guard or been refused information altogether. This last question is one of fact, which, owing to the view the lower Courts took of the case, was not inquired into and decided, and I would, therefore, send the case back to the lower Court for a decision on the above question, viz., whether the plaintiff did inquire and, if so, whether he was misled, put off his guard or refused information. Return to be made in two months.

ASTON, J. :—The main question in this case is whether appellant Tajudin (original plaintiff) should be treated as fixed with knowledge of the contents of Exhibits 57, 58, 59 when he purchased the plaint lands in 1897 from defendant 1. But certain features in the case require preliminary consideration.

On the 17th December, 1837, the grandfather of defendant 1 mortgaged the plaint lands to one Bapuji Chintaman Bade, the ancestor of defendants 2-6, for Rs. 645-12-3, the mortgage being usufructuary and the profits to be enjoyed in lieu of interest.

The plaintiff Tajudin, on 3rd December, 1897, by registered deed (Exhibit 78) purchased the plaint lands from defendant 1 and became owner of the equity of redemption. He brought this suit to redeem this one mortgage and recover possession on payment of Rs. 645-12-3, the amount of the said mortgage which he sought to redeem.

Defendants 2-6, descendants of Bade, replied that they had transferred their rights to defendants 7-10.

Defendants 7-10 disputed the plaintiff's purchase of the equity of redemption, and replied further that the original mortgagor's sons and daughters had passed other "*money bonds*" to Bade and that they ought to be parties to this suit: and defendants 7-10 further pleaded that they had purchased the plaint lands from defendant 2 on 12th April, 1893 (under Exhibit 55, a registered document), for Rs. 1,275 and had spent Rs. 1,225 on improving the land, and that the total money due to them on the *said mortgage* was Rs. 2,500 which ought to be paid to them.

It will be observed that Rs. 2,500 is exactly Rs. 1,275 plus Rs. 1,225 and that there is no mention, in this defence of defendants 7-10, of any claim in respect of any other mortgage or charge. There is no mention of the number, dates or amounts of the other bonds vaguely referred to: they are expressly called "money" bonds, and the plea raised in respect of them is not any claim to increase the redemption money payable, but a plea that the sons and daughters of the original mortgagor should be made parties.

Nor is there any mention in the issues framed in the suit of any mortgage other than the one which the plaintiff Tajudin sued to redeem, that is, the mortgage of 17th December, 1837, for Rs. 695-12-3.

The issues framed were :

1. Whether or not the plaintiff's assignment is proved ?
2. If not, whether or not the plaintiff has a right to bring this suit ?
3. What amount is due on the mortgage sought to be redeemed, including cost of repairing and improving the property and the payment of *dast* thereon by Bade ?
4. If redemption is to be allowed, on what terms can it be allowed ?
5. To what relief, if any, is the plaintiff entitled ?

The Subordinate Judge first decided that the plaintiff Tajudin's purchase of the equity of redemption (Exhibit 78) was not proved, and dismissed the suit. This decree was reversed in appeal on the finding that "the plaintiff is entitled to redeem the mortgage in question," and the suit was remanded for findings on the other issues and a fresh decision according to law.

After this remand the Subordinate Judge decided, under the third issue already repeated above, that "Rs. 1,130-12-3 are due on account of the mortgage sought to be redeemed," and decreed redemption on payment of this sum with costs in proportion to defendants 7-10.

The above amount, Rs. 1,130-12-3, is in fact made up of Rs. 645-12-3 on account of the mortgage sought to be redeemed and Rs. 242-8-0 plus interest Rs. 242-8-0 on account of three other mortgages not mentioned in the pleadings or issues, disputed by the plaintiff and introduced into the case in the following manner.

The deed (Exhibit 55) of 12th April, 1893, under which the defendants 7-10 purchased from defendant 1, Govind Bhikaji

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Bade, the rights of the original mortgagee for Rs. 1,275, has been translated and runs as follows :

Sale-deed. The 11th of Chaitra Vadya in Shake 1815, the 12th of April, 1893, the cyclical name of the year being Vijaya. On this day (this) sale-deed is passed in writing to Sonya bin Bham Mhetar, Pandya bin Somya Mhetar, Tanya bin Bham Mhetar and Nama bin Bham Mhetar, Chambhars, residing at Panchnadi, by Govind Bhikaji Bade, residing at Kalthare, taluka Dápoli, at present at Ratnágiri. I give in writing as follows:—I have this day taken from you Rs. 1,275, namely, twelve hundred and seventy-five in cash. (In consideration) for the same (1) sell the following property situate at the village of Kashe Panchnadi, sub-district Dápoli, district Ratnágiri. The said property has been with me (*i.e.*, my grandfather) for *vahivat* under a mortgage by a deed dated the 9th of Margshirsha Vadya Shake 1759 (21st December, 1837) from the deceased Bhaudin valad Kutubudin Mukadam of Kolthare for the principal sum of Rs. 645-12-3 and on the security of the same (property) his direct heirs took (*i.e.*, borrowed) from me (from my father) further sums of money and executed documents in respect thereof on stamped papers. In addition to this I made repairs, &c., to the said *thikán* for which money is due to me under the terms of the original deed on account of expenses. Making up the whole account including this (last) item, a very large sum becomes due to me. However, on receiving from you now the amount above mentioned, I have sold to you my right as mortgagee of this property. The said property is as follows:—Survey No. 87, sub. No. 1, area 2 acres and 21 gunthás, assessment Rs. 16-8. I have sold the mortgage right of this property to you as stated above. You should therefore carry on the *vahivat* thereof from generation to generation through sons, grandsons, &c., pay the Government assessment and take the hot season and rainy season profits in lieu of interest. The profit or loss is yours. Should the owner come to you to pay the mortgage amount within the period prescribed by law, you should receive the amount in accordance with the terms of the deed executed by him, and make over the property to him. If thereby you receive an amount more or less than the amount now received by me, the same shall be yours. Neither myself nor my kinsmen have anything to do with the same. Should any obstruction be caused by my kinsmen as regards the said property, I will remove the same. Also, I shall get the *kháta* in respect of assessment transferred (to you). I have duly executed this sale-deed, of my own free will and pleasure. The handwriting of Hari Balwant Limaye, inhabitant of Ratnágiri.

It will be seen that there is mention of further sums having been borrowed on the security of the same property, but the further documents as to which no particulars are given as to number, date or amount are not called mortgage-bonds, but are called "documents on stamped papers." Mention is made of an account being made up which by including expenses for repairs

(since 1837) amounted to a "very large sum." There is no express statement that the debts subsequently incurred were assigned to the persons in whose favour Exhibit 55 was passed, and the words "I have sold to you my right as mortgagee of this property," read with the express mention of the mortgage of 1837 and the passage later on "Should the owner come to you to pay the mortgage amount within the period prescribed by law, you should receive the amount in accordance with the terms of the deed executed by him and make over the property to him," are sufficiently general to leave room for contention that this was a sale of the mortgage rights under the mortgage-deed, Exhibit 56 of 1837, and nothing more. It was contended for the appellant Tajudin (original plaintiff) that this was clearly what defendants 7-10 understood as shown by their written statement and defence to this suit, already described above, as well as by the fact that none of these further bonds called "money bonds" by defendants 7-10 were made over by defendant 1 to defendants 7-10.

It appears, however, that at the hearing of the suit there were produced from the custody of defendant 2, Govind Bhikaji Bade (who, it will be remembered, was the person who executed Exhibit 55), three bonds purporting to be more than thirty years old but unregistered. They are Exhibits 57, 58, 59. They purport to create further charges on the property mortgaged in 1837, and to be dated March 1864, February 1865, and March 1866, and two of them to have been executed by Salaudin, father of defendant 1, and the third by Fatmabibi, a daughter of the original mortgagor, the grandfather of defendant 1. The first is for Rs. 57-8-0, the second for Rs. 95 and the third for Rs. 90—in all Rs. 242-8-0—and the rate of interest fixed in each is twelve per cent.

The Subordinate Judge, without discussing the custody from which these three unregistered documents had come into Court, considered them proved by the evidence of witness 61 and because defendant 2 (who has no interest in the plaint property) admits all these mortgages in his examination (Exhibit 60).

The Assistant Judge who decided the appeal does not mention the evidence of witness Exhibit 61, but held these three bonds

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(Exhibits 57, 58, 59) to be genuine, and to be the identical bonds mentioned in Exhibit 55 without number, dates or amounts. His reasons for coming to this conclusion as far as can be gathered from his judgment recorded are: first, that defendants 7-10 are illiterate men of the lowest caste, while defendants 2-6 are educated Brahmins who probably took advantage of the ignorance of defendants 7-10, and therefore retained Exhibits 57, 58, 59 for some purpose of their own instead of handing them over to defendants 7-10, as they must have known perfectly well that they should have done; secondly, because Exhibit 55 makes mention of other stamped documents passed by direct heirs of the original mortgagor, and the evidence that there were any improvements which could have raised the purchase value of the mortgage rights from Rs. 645-12-3 to Rs. 1,275 in Exhibit 55 is unsatisfactory.

The Assistant Judge, holding that the rule of *dāmdapat* does not apply where the original mortgagor was a Mahomedan, varied the decree in the cross appeal of defendants 7-10 by raising the Rs. 485 calculated by the Subordinate Judge as due under these three bonds to Rs. 1,192-7-7, making the total amount payable by plaintiff Tajudin for redemption Rs. 1,838-5-10 instead of Rs. 1,130-12-3.

It has been contended for the appellant Tajudin (original plaintiff) that the lower Appellate Court's finding of fact that Exhibits 57, 58, 59 are genuine documents is vitiated by the method by which this conclusion is arrived at, because the Assistant Judge seems to have dispensed with formal evidence as to their execution by treating them as ancient documents coming from proper custody and by drawing the presumption permissible under section 90 of the Evidence Act (I of 1872) as to handwriting, execution and attestation.

This contention would be sound if the Assistant Judge had really adopted such a presumption, under section 90 of the Evidence Act, as the basis of his decision that Exhibits 57, 58, 59 are genuine.

Illustration (a) to section 90 says:

A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

The "particular case" in the present suit is the exact converse. The defendants 7-10, under the new case they set up at a later stage of the suit, claimed to have become assignees under Exhibit 55 passed by defendant 2 of the three several debts charged upon the plaint property by Exhibits 57, 58, 59, and they produced the latter three documents from the custody of defendant 2 when, according to the case for defendants 7-10, these three documents (Exhibits 57, 58, 59) ought to have been produced from their own custody if these particular charges became assigned to them under Exhibit 55 by defendant 2 in April, 1893.

But though the Assistant Judge describes the custody of defendant 2 as "not improper," he seems to have merely meant that he preferred to believe that defendant 2 had overreached defendants 7-10 and had improperly retained documents he should have handed over to defendants 7-10, rather than believe that Exhibits 57, 58, 59 are fabricated or that other bonds—simple money bonds—have been suppressed by defendants 7-10.

In fact, the judgment says that Exhibits 57, 58, 59 should have been handed over by defendant 2 to defendants 7-10 when Exhibit 55 was passed: in other words, the proper custody in this particular case for Exhibits 57, 58, 59 is the custody of defendants 7-10 from which they were not produced. There cannot, I think, be two different proper custodies for any document at a given time in any particular case. I agree, therefore, with the view of the lower Appellate Court that if Exhibits 57, 58, 59 had been produced in this particular case from the custody of defendants 7-10 they would have come from proper custody. They did not come from the custody of defendants 7-10, who, therefore, cannot obtain advantage from the provisions of section 90 of the Evidence Act. The explanation suggested by the Assistant Judge as to why they came from defendant 2 may help to remove suspicion as to their being genuine, but it does not relieve defendants 7-10 of the necessity of proving Exhibits 57, 58, 59 independently of the provisions of the said section. Nevertheless, I read the judgment of the lower Appellate Court as recognising this and as basing the finding of fact, that these unregistered Exhibits 57, 58, 59 are genuine and are the identical documents on stamped papers referred to in

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Exhibit 55 and were assigned by defendant 2 to defendants 7-10 upon the evidence actually recorded in the suit, such as it is.

There remains the question whether it was rightly decided that the appellant Tajudin is bound to pay the charges created by Exhibits 57, 58, 59 in addition to the mortgage-debt of Rs. 645-12-3 before he can recover possession of the plaint property from defendants 7-10.

The plaintiff's purchase from defendant 1 of the equity of redemption in 1897 by Exhibit 78 is registered, whilst Exhibits 57, 58, 59 are not registered. Section 50 of the Registration Act (III of 1877) "confers priority on documents required to be registered and accordingly registered since Act III of 1877 was passed over all prior unregistered documents of an antagonistic character": *Jethabai v. Girdhar*.⁽¹⁾ But "in spite of the large words of the enacting part this Court has consistently limited them to the cases where the subsequent purchaser has no notice of the prior unregistered conveyance": *Keshav v. Vinayak*.⁽²⁾ The respondent's pleader, relying, therefore, on the equitable doctrine of notice, contended that by reason of the registration of the deed of assignment (Exhibit 55) passed by defendant 2 in April, 1893, the appellant-plaintiff had notice of the transactions set out in the unregistered documents (Exhibits 57, 58 59), so far as they can be taken to be dealt with by Exhibit 55. This contention is sufficiently met by the decision in *Chuvilal v. Ramchandra*,⁽³⁾ where it was said by Farran C.J., "the register may be notice, and in most cases under the rulings of this Court doubtless is, of the registered documents which it contains, but it would be pushing the doctrine of constructive notice beyond all bounds to hold that it is notice of the unregistered documents under which the holders of registered documents derive their title."

But possession being equivalent to notice of such title as the person in possession may have, both under Hindu, Mahomedan and English laws (see *Lakshmandas v. Dasrat* ⁽⁴⁾) and the respondents being in possession as assignees of the usufructuary mortgage of 1837 when appellant bought the equity of redemption from defendant No. 1 in 1897, the point has been raised, without,

(1) (1895) 20 Bom. 158.

(3) (1896) 22 Bom. 213.

(2) (1893) 18 Bom. 355.

(4) (1882) 6 Bom. 163.

however, any argument being specially directed to it at the hearing, whether such possession was notice to appellant of the subsequent charges purporting to be created by the unregistered Exhibits 57, 58, 59.

In equity it is sufficient to charge a man with knowledge that he had that before him which, if he had used due diligence, would have afforded the knowledge he desires: *per* Lord St. Leonards in *Spackman v. Evans*,⁽¹⁾ quoted by Couch, C.J., in *Mancherji v. Kongseoo*,⁽²⁾ where, on the English authorities cited, the duty to make inquiry into the title when the vendor is not in possession is insisted upon. In the case of *Mancherji v. Kongseoo* there was neglect to make such inquiry. In the case of *Kanayalal v. Pyarebai*⁽³⁾ it was said by Melvill, J.: "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."

In *Patman v. Harland*,⁽⁴⁾ where it was held that a purchaser or lessee having notice of a deed passing part of his vendor's or lessor's title has constructive notice of the contents of such deed, it was said by Jessel, M.R.: "Supposing you are buying land of a married man, as in *Jones v. Smith*,⁽⁵⁾ and you are told at the same time that there is a marriage settlement but the deed does not affect the land in question, you have no constructive notice of its contents, because although you know there is a settlement you are told it does not affect the land." And again at page 358: "Therefore I think there was sufficient to put the lessee off his guard."

In *Williams v. Williams*⁽⁶⁾ it was said by Kay, J.: "These questions of notice and of the effect of notice are some of the most difficult questions which a Court of Equity has to deal with, and I cannot help feeling that we must be very careful not to strain the doctrine of notice too far and to make it involve consequences of liability to persons who may be practically innocent." And again at page 443: "If a man has notice that there is a deed

(1) (1868) 3 E. and 1 App. 171 at p. 221.

(2) (1869) 6 Bom. H. C. 59.

(3) (1883) 7 Bom. at p. 145.

(4) (1881) 17 Ch. D. 353.

(5) (1841) 1 Hare 43.

(6) (1881) 17 Ch. D. at p. 442.

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or document and at the same time has notice that that deed or document is entirely worthless or does not affect the property with which he is going to deal, he is put so completely off his guard that a Court of Equity does not treat him as fixed with knowledge of the document or the effect of it."

Under section 3 of the Transfer of Property Act (IV of 1882) a person is said to have "notice" of a fact when he actually knows that fact, or when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Indian Contract Act, 1872, section 229.

Now in the present case though defendants 1 and 2 after parting with all their respective interest in the plaint land have shown a readiness to support the belated claim of defendants 7-10 to hold the plaint land subject to the charges purporting to be created by Exhibits 57, 58, 59 after the mortgage of 1837, it does not follow that this was the attitude adopted by defendants 1 and 2 all along.

The reference in Exhibit 55 to other documents on stamped paper is vague and the written statement of defendants 7-10 does not suggest any belief on the part of these defendants that they held the plaint land subject to any such further charges. They in fact resisted redemption until they were paid Rs. 1,275, the price paid to defendant 2, and Rs. 1,225 for improvements, and they described the later bonds as "money bonds" without basing any claim upon them.

There is nothing on the record to show that the plaintiff made no inquiry when he purchased the equity of redemption from defendant 1, nor does the written statement of defendants 7-10 suggest that any such inquiry would have led to an assertion by defendants 7-10 in 1887 of any claim under Exhibits 57, 58, 59 or to the production of those documents which were not in the custody of defendants 7-10 at any time.

The claim put forward under Exhibits 57, 58, 59 is, as already pointed out, a later development of the defence. The point whether Tajudin was fixed with knowledge of the contents of Exhibits 57, 58, 59 by means of the possession of defendants 7-10

is a still later development, and Tajudin, the appellant-plaintiff, has not been given a proper opportunity to meet the new case thus brought forward for the defendants 7-10. For the above reasons I concur entirely in the view that this appeal cannot be decided on the ground that plaintiff was at the time of his purchase fixed with the knowledge of the charges purporting to be created by Exhibits 57, 58, 59 until the plaintiff has been given the opportunity to show whether at the time of his purchase from defendant 1 he did make inquiries as to the possession of defendants 7-10, and with what result, so that it may be ascertained whether he was offered the same information as that given in the written defence of defendants 7-10 and was misled or put off his guard as to the nature and extent of the rights of defendants 7-10.

Issue sent down.

PRIVY COUNCIL.

HAJI SABOO SIDICK AND OTHERS (DEFENDANTS) *v.* AYESHABAI
AND ANOTHER (PLAINTIFFS).

Hindu law—Outchi Memons—Marriage, evidence of, where disputed—Omission to mention nika wife in will made after marriage—Unchastity of widow as disentitling her to maintenance—Charge not specifically raised in pleadings or issues.

The omission, in a will made after an alleged *nika* marriage, of all mention of the *nika* wife, is, so far as it goes, an item of evidence against the marriage having taken place; but its cogency must depend on whether the circumstances of the marriage made it natural that the wife should be an object of the husband's testamentary bounty and improbable that he should have left her to depend on her legal right to maintenance. In this case it was *held* that the circumstances of the marriage made it not unlikely that the testator would have taken the latter course.

A draft of the will, written by a person other than the testator, tendered as furnishing similar evidence to that afforded by the will, was held to be rightly rejected as evidence, not being a written statement by the testator.

* *Present*: LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE, and, SIR ARTHUR WILSON.

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