

## APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Chaulal.*

MAHMAD MUSE UMARJI AND OTHERS (ORIGINAL DEFENDANTS),  
APPELLANTS, v. BAGASS AMANJI UMAR (ORIGINAL PLAINTIFF),  
RESPONDENT.\*

1908  
July 8

*Construction of deed—Mortgage—Mortgage for a term of years—Profits to go in liquidation of debt—Redemption suit before the expiry of the period fixed.*

By a deed bearing date the 4th July 1903, it was provided that in consideration of Rs. 725 advanced to the plaintiff (an agriculturist), the defendant was to take possession of certain lands belonging to the plaintiff, for 199 years and to apply its profits in liquidation of the debt. The deed was headed "Lease in respect of Valatdan<sup>(1)</sup>." Before the expiration of the period the plaintiff brought a suit for redemption of the mortgage and for possession of the lands, alleging that the transaction evidenced by the deed was a mortgage.

*Held*, that the transaction was a mortgage.

*Tukaram v. Ramchand*<sup>(2)</sup>, followed.

SECOND appeal from the decision of C. E. Palmer, District Judge of Broach, confirming the decree passed by K. V. Desai, Subordinate Judge of Broach.

Suit to redeem a mortgage.

The mortgage was executed by the plaintiff on the 4th July 1903 in favour of defendant. The document ran as follows:—

"Lease in respect of Valatdan."

"(This deed is written (*i.e.*) executed) on Saturday the 10th of Ashad Sud of Samvat 1959 (corresponding with) the 4th of July in the year 1903 in favour of Patel Muse Umarji Adam, and Abhram Akuji Umarji, minor, by him guardian the said Muse Umarji Adam, inhabitants of Tankaria, by Patel Bagas Amanji Umar, an inhabitant of the same village, now residing at Vahalu. To wit: The particulars of Rs. 725, namely, seven hundred and twenty-five flat coins in cash (are) as follows... On account of (*i.e.* as security for) the said (amount of) Rs. 725 I have given to you the below-

\* Second Appeal No. 844 of 1907.

(1) "Valatdan" is a kind of mortgage under which the produce of land goes towards the payment of the principal and interest, the land being redeemed as soon as the debt is cleared.

(2) (1901) 26 Bom. 252.

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mentioned land...for 199, namely, one hundred and ninety-nine years on condition of Valatdana in order that you may grow (crops) therein and reap the same (during the same period). And I have given the said land in your possession...The abovementioned land (admeasuring acres 3.10 gunthás has been given (p mortgaged) to you for a period of 199 years on condition on Valatdana as security for the said amount, together with the borders, edges, trees, etc, thereof and all sorts of rights appertaining to the interior and exterior of this land, and together with the limits (thereof) and with whatever may be hidden (therein), in order that you may grow crops therein and reap the same. This land has been given in your possession. Hereafter you are to pay the Government dues in respect of this land, and you may enjoy and manage the said lands as you like. You have full powers to transfer this right to any person whatever in any manner. And I shall act in accordance with the provisions of this lease with regard to the person to whom you may transfer this right...After the expiry of the said period I or my representatives and heirs are to take the said land in our possession from you and from your representatives and heirs without paying anything whatever. And at that time you or your representatives and heirs are to give (the same) in the possession of me or of my heirs, without raising any objection whatever."

The plaintiff alleged that though the mortgage was for a term of 199 years, he was entitled to redeem it, for if accounts were taken as provided by the Dekkhan Agriculturists' Relief Act (XVII of 1879), the defendants would be found to have been paid this amount.

It was contended for the defendants that the plaintiff could not sue before the expiry of 199 years and that the suit was therefore premature.

The Court of first instance took accounts between the parties in the mode indicated by the Dekkhan Agriculturists' Relief Act (XVII of 1879) and ordered that on plaintiff paying to the defendants Rs. 20-10-6 and costs of the suit, the mortgage should be redeemed.

On appeal, this decree was confirmed by the District Judge. The learned Judge observed as follows:—

"At the hearing, the appellants drop the contention urged in the memo. of appeal that Exhibit 25 is a sale-deed and asks this Court to hold that it is a lease. Except that the period for which the land is given is for 198 years as against 10 in the deed in *Tukaram v. Ramchand* (I. J., R. 26 Bom. 252) the two documents are pretty like. Therefore I hold that the document is a mortgage deed. In the document itself the land is said to be given as *Valatdan*—defined in Robertson's Glossary as "a kind of mortgage."

The defendants appealed to the High Court.

*L. A. Shah*, for the appellant:—We submit the document in question is a lease and not a mortgage. In *Nidha Sah v. Murlidhar*<sup>(1)</sup>, the Court had to construe a document which was similar in terms to the documents in question and which was held to be a lease. The full bench ruling in *Tukaram v. Ramchand*<sup>(2)</sup> is no doubt against me: but the Privy Council ruling is binding upon this Court.

*N. V. Gokhale* for the respondent was not called upon.

BACHELOR, J.:—Although in general the decision of a Court upon one document is not conclusive as to the character of another document, yet the instrument with which we are here concerned, namely exhibit 25, bears such close and intimate resemblance to the deed which was construed in the Full Bench decision of this Court in *Tukaram v. Ramchand*<sup>(2)</sup>, that in our opinion we are bound to follow that decision. No substantial difference that we can discover exists between the two documents. Here, as there, the relation of debtor and creditor was established prior to the execution of the deed. Here, as there, the creditor is to appropriate the income of the land towards the liquidation of the pre-existing debt; and when the creditor has managed the land for the prescribed period and appropriated the produce, the debtor will understand that his debt has been paid off, and that he is free to resume possession of the land. There is no mention of any premium or periodical payment of rent or share of the produce. Moreover, reading the deed as a whole, we are of opinion that the parties clearly intended that the relation between them should be that of mortgagor and mortgagee. The deed is described as a "*Valatdan Patta*", and though the word "*Patta*" is no doubt equivalent to the English "*Lease*" yet the word "*Valatdan*" is rendered "*a kind of mortgage*" in *Robertson's Glossary*. The other considerations to which the Full Bench called attention apply here as forcibly as they applied in that case, for this also is a suit under the *Dekkhani Agriculturists' Relief Act*.

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<sup>(1)</sup> (1902) 25 All. 115; 5 Bom. L. R. 111.      <sup>(2)</sup> (1901) 26 Bom. 252.

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Following, therefore, the decision of the Full Bench, we come to the conclusion that this exhibit 25 is a mortgage-deed. No other point has been taken and we, therefore, confirm the decree under appeal and dismiss this appeal with costs.

*Decree confirmed.*

R. R.

## APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Chaulal.*

1908  
 July 16.

PARASHRAM HANMANTA PATIL (ORIGINAL DEFENDANT No. 2),  
 APPELLANT, v. BALMUKUND LACHIRAM MARWADI AND  
 OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS. \*

*Civil Procedure Code (Act XIV of 1862), secs. 311, 312, 344 (c)—Decree—  
 Execution of decree—Sale—Absence of notice to judgment-debtor—  
 Application to set aside sale on ground of absence of notice and property  
 sold at undervalue—Dismissal of application—Second appeal—"Pub-  
 lishing or conducting" sales, meaning of.*

Certain property was sold in execution of a decree against the applicant. He applied to the Court seeking to have the sale set aside on the ground that no notice had been issued to the applicant under section 248 of the Civil Procedure Code, 1882, and that in consequence the property was sold at an undervalue. The Court of first instance dismissed the application; and the dismissal was upheld by the lower appellate Court. On second appeal a preliminary objection was taken that the order dismissing the application fell under section 312 of the Code and was not appealable.

*Held*, that the application did not fall under section 311 and the order dismissing the same did not come within section 312 of the Code.

*Held*, further, that the order fell under section 244 (c) of the Code and was appealable as a decree. The question involved was "a question relating to the satisfaction of the decree" within the meaning of the clause.

The non-issue of a notice to a party concerned is not a material irregularity in publishing or conducting the sales, within the meaning of section 311 of the Civil Procedure Code (Act XIV of 1882). It is rather an irregularity in proceedings which are anterior to the publishing or the conduct of the sale.

\* Second Appeal No. 883 of 1907.