

from the date of the cause of action accruing under the registered mortgage deed, and therefore he held that the suit was not time-barred. We are of opinion that the learned Judge was in error. According to section 24 of the Contract Act the consideration or part of the consideration being unlawful the mortgage deed was void, and the agreement contained in the mortgage to pay the mortgage debt was void. That being so, the consideration failed *ab initio*, and the mortgagee's right was, as held in *Javerbhai Jorabhai v. Gordhan Narsi*,⁽¹⁾ to claim repayment of the money advanced to the mortgagor within 3 years of the date of the mortgage deed as money had and received, but after 3 years by reason of Article 62 of the Limitation Act, his remedy was barred. For these reasons we set aside the order of the Joint Judge and restore that of the Subordinate Judge with costs throughout on the plaintiff.

Order set aside.

J. G. R.

⁽¹⁾ (1914) 39 Bom. 358 at p. 366.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

NARHAR DAMODAR VAIDYA (ORIGINAL PLAINTIFF), APPELLANT v. BHAU MORESHWAR JOSHI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*
Hindu Law—Mitakshara—Vyavahara Mayukha—Hindus in Mahad governed by Mitakshara.

In the town of Mahad in the Kolaba District Hindus are governed by the Mitakshara and not by the Vyavahara Mayukha.

SECOND appeal from the decision of V. G. Kaduskar, First Class Subordinate Judge, A. P., at Thana, confirming the decree passed by B. G. Sabnis, Second Class Subordinate Judge at Mahad.

* Second Appeal No. 258 of 1915.

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Suit to redeem a mortgage.

The property mortgaged was situated in the town of Mahad. It was originally owned by one Narayan. On Narayan's death, it passed to his sister Kashibai. She had a son Vishnu by name and a daughter named Krishnabai. The property was mortgaged after Kashibai's death by her husband Balaji as guardian of Vishnu and Krishnabai to defendants Nos. 1 and 2. Subsequently Vishnu sold his interest in the property to the plaintiff; while Krishnabai sold hers to defendant No. 3.

The plaintiff next sued to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act. The claim was resisted by defendant No. 3. It, therefore, became necessary to determine which of the two assignments was valid, in other words, whether Vishnu or Krishnabai was the heir of Kashibai. If the Mayukha applied to the parties, Vishnu was the preferential heir; and if the Mitakshara applied, Krishnabai was the preferential heir. The question then resolved itself into, whether the Mitakshara or the Vyavahara Mayukha applied to Hindus in the town of Mahad.

Both lower Courts declared in favour of the Mitakshara and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Jayakar, with *J. R. Gharpure* and *P. B. Shingne*, for the appellant:—The parties here are governed by the Mayukha, for the town of Mahad is in the North Konkan. Mahad is on the Northern side of the river Savitri which forms the Southern boundary of the North Konkan: see *Sakharam Sadashiv Adhikari v. Sitabai*.⁽¹⁾

(1) (1879) 3 Bom. 353 at p. 367.

G. S. Rao and *D. C. Virkar*, for respondent No. 3 :—
The town of Mahad is not in the North Konkan but in the South Konkan. Bombay Government Gazetteer, Vol. J, Part II, p. ix, gives the extent of Konkan. It is sub-divided into North and South. The Northern portion lies to the North of Bombay; while the Southern portion lies to the South: see *ibid.*, p. x. In the Government Selections, New Series, No. 278, pages 12, 13, the term South Konkan is explained as the tract including the whole of the present Kolaba District except the Talukas of Karjat and Panvel. Looking into the past, Mahad never formed part of the Kingdom of Guzerat which only extended as far as Cheul or Revdanda; and early in the sixteenth century the coast boundary shrank from Cheul to Bombay: Kolaba Gazetteer, Vol. XI, p. 142; Erskine, Vol. II, p. 20; Nairne's History Gazetteer, Vol. I, Part II, p. 34 and Elphinstone, p. 763.

Nilakantha, the author of *Mayukha*, lived about 1600 A. D.: his works came into general use about 1700 A. D. The *Mayukha* was the recognized authority in provinces conquered by the Marathas. Mahad is only eight miles South of Raighad, capital of Shivaji, in the 17th Century, and was part of the Maratha Kingdom long before the *Mayukha* was recognised as authority.

The cases of *Krishnaji Vyanktesh v. Pandurang*,⁽¹⁾ *Vijiarangam v. Lakshuman*,⁽²⁾ *Narayan Babaji v. Nana Manohar*⁽³⁾ and *Lallubhai Bapubhai v. Mankuwarbai*⁽⁴⁾ referred to.

Jayakar, in reply:—The present divisions of Konkan cannot help us. The former divisions as demarkated by the Savitri river must be looked to.

(1) (1875) 12 Bom. H. C. R. 65 at p. 68.

(2) (1870) 7 Bom. H.C.R. (A.C.J.) 153 at p. 167.

(3) (1871) 8 Bom. H.C.R. (O.C.J.) 244 at p. 273.

(4) (1876) 2 Bom. 388 at p. 418.

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BATCHELOR, J.:—The question before us is whether the Vyavahara Mayukha or the Mitakshara is, upon a point of disputed succession, the predominant authority in the town of Mahad in the Kolaba District. That question arises in this way. The property involved in the litigation belonged to one Narayan, and on his death was inherited by his sister Kashibai, who, under the law of this Presidency, took an absolute estate. Kashibai, dying, left a son and a daughter, and the controversy is as to which of these two is the preferential heir. Under the Mitakshara, the daughter, and under the Mayukha, the son, would be preferred. The present appellant, who was the plaintiff below, claims as a purchaser from the son of Kashibai, and contends for the paramount authority of the Mayukha. The contention has been disallowed both in the lower appellate Court and in the trial Court, where the learned Subordinate Judge, Mr. Sabnis, has written a well considered judgment. Geographically the town of Mahad is situate in the southernmost Taluka of the Kolaba District, and, though it stands on the Northern bank of the Savitri river, it is well within the Maratha or Maharashtra country, as that term is popularly understood. It is eight miles from Rayagad, formerly a stronghold and capital of the Marathas. *Prima facie* it would seem, therefore, that the Vyavahara Mayukha would not be the prevailing authority.

It is, however, argued for the appellant that Mahad must be taken to fall within a somewhat ill-defined phrase "the Northern Konkan," where, it is said the Mayukha is predominant. Following the argument at the Bar, I will assume that the Mayukha is predominant in the Northern Konkan, leaving that phrase for further explanation. There are dicta to that effect of many Judges, and it is unnecessary for our present purposes to question the authority of these dicta.

The question, then, will be whether the town of Mahad falls within or without what was meant by the Judges when they said that the Mayukha is the prevailing authority as well in the North Konkan as in the island of Bombay and the province of Gujarat. In the first place, it is desirable to have a clear understanding as to what is meant by the "Konkan." That phrase is explained in the first sentence in the introduction to the Bombay Gazetteer, Vol. I, Part II, where we read:—

"The Konkan is now held to include all the land which lies between the Western Ghats and the Indian Ocean, from the latitude of Daman on the North to that of Terekhol, on the Goa frontier, on the South." In Vol. II at p. 20 of Mr. Erskine's History of the Emperors Babar and Humayun, the learned author says:—"After the death of Muzaffar Shah, several of his descendants increased the territory of Gujarat. His grandson, Ahmed Shah, a very distinguished prince and the founder of Ahmedabad, reduced under his power nearly the whole country that forms the present Gujarat, including the low lands to the South below the ghats, the Northern Konkan and the island of Bombay." This passage is cited towards the end of Sir Michael Westropp's judgment in *Sakharam Sadasiv Adhikari v. Sitabai*,⁽¹⁾ and constitutes one of the earliest pronouncements of the Court in favour of the predominance of the Mayukha in the Northern Konkan. The boundary of the Northern Konkan is not described in this judgment, but at p. X of the Gazetteer, Vol. I, Part II; we read:—"Whatever the old signification of the word may have been, the name Konkan is now used in the sense first mentioned, and the modern division of the District is into North and South Konkan, meaning the parts North and South of Bombay. The boundary between the North and South Konkan is, however,

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sometimes considered to be the Savitri river, which divides the Habshi's territory from Ratnagiri, as, for some years after the English conquest, the District of the North Konkan included the sub-divisions as far South as the Savitri." It is, in my opinion, reasonable to suppose that the "North Konkan" of Westropp, C. J.'s judgment in *Sakharam's case*⁽¹⁾ was the tract denoted by the modern usage of the phrase, and not the tract extending to the Savitri river. Indeed the line of division between the North and the South Konkan for our present purposes is not, I think, difficult to fix if we remember the reason upon which the difference is founded. That reason is historical and flows from the circumstance that the tract called the North Konkan was, while the South Konkan was not, under the immediate sway of the kingdom of Gujarat.

From a passage to be found at p. 763 of Elphinstone's History of India, it appears that Bassein and Bombay were detached possessions of the kingdom of Gujarat, and it seems to me clear, from the various passages to which Mr. Rao has drawn our attention, that that kingdom never extended South of the towns or villages Cheul and Nagothna, which are to be found in the Northern or Alibag Taluka of the Kolaba District.

In Vol. I, Part II of the Gazetteer we read at p. 34 :—
"The kingdom of Gujarat extended as far South as Nagothna" and at p. 45 "The Northern Konkan as far South as Nagothna had always belonged to Gujarat but the Southern Konkan had only just been divided between the dynasties of Bijapur and Ahmednagar." In the Kolaba Gazetteer, Vol. XI, p. 142, it is stated :—
"Towards the close of the 15th century (1489) the inland parts of Kolaba passed from the Brahmini to the Ahmednagar Kings. The sea coast, including at least Nagothna and Cheul, remained in the hands of the

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Gujarat Kings, till, in 1509, the overlordship of Cheul passed from Gujarat to the Portuguese. After this, though the coast boundary of Gujarat shrank from Cheul to Bombay, the Gujarat Kings continued to hold the fort of Sangaza or Sankshi in Pen till 1540 when it was made over to Ahmednagar." In the Thana Gazetteer, Vol. XIII, Part II, there are two passages bearing upon the same point. One of them runs:— "Some years later (1508) Mahmud Begada still further increased his power. He effected his designs against Bassein and Bombay, established a garrison at Nago-thana, and sent an army to Cheul. At this time when Gujarat power was at its highest, according to the Mirat-i-Ahmadi, Daman, Bassein and Bombay were included within the Gujarat limits" (p. 443). The other passage, at p. 448, referring to a later period says:— "A few years later (1514) the Southern boundary of Gujarat had shrunk from Cheul to Bombay."

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In accordance with the history thus narrated, we find that, after the establishment of British authority, Mahad was by the earliest authorities included in the Southern Konkan. At p. 159 of the Kolaba Gazetteer, Vol. XI, the change is described in these words:—“After they came into the hands of the British in 1818, the three sub-divisions of Sankshi (Pen), Rajpuri (Roha), and Rayagad formed the Northern part of the South Konkan or Ratnagiri Collectorate;” and in a foot-note in which the details of these acquisitions are set forth, we read that “the British Government took possession of the sub-divisions of Sankshi, Rajpuri, and Rayagad, then forming the Northern part of the South Konkan.” This tradition is continued in the Government Selections, New Series, No. 278, pp. 12 and 13, where the term ‘South Konkan’ as distinguished from ‘North Konkan’ is explained as the tract including all the present Kolaba District, except the Talukas Karjat and Panvel,

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which are to the North of the Alibag Taluka of Kolaba, being separated from it by the Dharamtar creek.

These historical references satisfy me that when the learned Judges of this Court spoke of the tract of country known as the North Konkan being under the predominance of the Mayukha, that tract was understood to extend no further South than the Alibag Taluka, and therefore cannot be held to have comprised the town of Mahad.

The only decided case from which the appellant seeks support for his argument is Sir Michael Westropp's decision in *Sakharam Sadashiv Adhikari v. Sitabai*.⁽¹⁾ There, as I have stated, the passage from Mr. Erskine's history is cited, and the undefined term "Northern Konkan" is brought within the ambit of the paramountcy of the Mayukha. That case, however, is, in my opinion, of no assistance to the present appellant, for the learned Judges there did not define what they meant to include in the term "North Konkan," and the case before them came from Karanja, which is just across the harbour from the island of Bombay. The historical references in the judgment are no more than the basis for the conclusion which is expressed on pp. 367-368, that it would be incongruous to declare that the Hindus on the one side of the harbour were subject to another law of succession from that which governed those on the other side. At the most the case would be an authority for the view that the phrase "North Konkan" must be held to include Karanja, but as Karanja is very much to the north of Mahad, that decision would not serve the appellant's turn. It is also to be observed that the observations now under notice were made *obiter* as the decision of the case was based on other grounds which will be found explained at

(1) (1879) 3 Bom. 353.

pp. 363 and 368 of the report. This being so, it is not possible to follow Mr. Jayakar's argument when he would fasten supreme importance on a passing phrase in which the learned Chief Justice notices the historical fact that "formerly, the boundary between the Northern and Southern Konkan was deemed to be the Savitri river, which divides the Habshi's territory from the Ratnagiri Collectorate and enters the sea at Bankot." The Court by no means decides, as would be necessary for the plaintiff's case, that the Savitri river was then the boundary between the North and South Konkan. It is merely stated that at some previous time the river was deemed or supposed to be the boundary. In my opinion, the authorities, to which I have alluded, establish that the town of Mahad is not within the Northern Konkan, which the Judges have referred to as subject to the predominance of the Mayukha, and the predominance of the Mayukha cannot either on principle or on authority be taken further South than Cheul and Nagothna or than the point where it appears to have been carried by the decision in *Sakharam Sadashiv Adhikari v. Sitabai*.⁽¹⁾ For these reasons, I think that the lower appellate Court's decree is right, and that this appeal should be dismissed with costs.

SHAH, J. :—I am of the same opinion, generally for the reasons given by my learned brother.

It is quite clear that Mahad forms part of the Southern Konkan, where the Mitakshara and not the Vyavahara Mayukha is the governing authority on points of Hindu Law, when there is a conflict between them.

Appeal dismissed.

R. R.

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