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the covenant into operation. It is true that the defendants' term of possession has been shorter than it would have been if the law had been otherwise. But I cannot see how the defendants can lawfully complain of that. They must, in my view, be regarded as having taken their chance as to the length of their possession. As the learned District Judge observes: "Presumably the mortgagor and mortgagee knew how they stood, and I suppose the mortgagee took proper care of his interests in view of the unsatisfactory nature of his security." I am of opinion, for these reasons, that the contract between the parties has effectually been carried out subject to the law of the country according to which they must be taken to have contracted. It follows, therefore, that the defendants are not entitled to any money compensation for handing over possession to the plaintiff.

The appeal, therefore, in my opinion, fails and should be dismissed with costs.

SHAH, J:—I am of the same opinion.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Macleod.

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March 14.

DAWAL PIRANSHAH AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS v.
DHARMA RAJARAM MANGGARUDDI AND ANOTHER (ORIGINAL
DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 54—Indian Registration Act (XVII of 1908), sections 17, 50—Sale of land below Rs. 100 in value by unregistered deed of sale and delivery of possession—Sale valid on proof of sale and delivery of possession—Secondary evidence of unregistered deed of sale, whether admissible.

* Second Appeal No. 312 of 1916.

On the 10th May, 1899, defendant No. 1 sold the land in dispute to the plaintiffs' father for Rs. 40, and delivered possession thereof to him. At the same time defendant No. 1 executed a sale deed in favour of the plaintiffs' father which was not registered. The plaintiffs remained in possession till 1911 when they were dispossessed by defendant No. 2. In the suit to recover possession of the lands, the plaintiffs having lost the unregistered deed of sale adduced secondary evidence of its contents. The lower Courts accepted the evidence and decreed the suit. The defendants having appealed,

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Held, that the appeal failed inasmuch as the plaintiffs' title was based on a contract of sale accompanied by delivery of possession which was proved.

PER BEAMAN, J.:—"I am clearly of opinion that neither the original unregistered deed of sale of 1899 nor secondary evidence of it was admissible in the present case to support the plaintiffs' allegation that in 1899 there was a complete and valid sale of the property in suit effectuated by delivery of possession."

PER MACLEOD, J.:—"In my opinion in cases of transfer of property under the value of Rs. 100, if the transfer is effected by delivery of possession accompanied by an unregistered document that document can be adduced in evidence in order to show what was the character of the possession given by the vendor of the land to the purchaser."

SECOND appeal from the decision of K. H. Kirkire, First Class Subordinate Judge, A. P., at Nasik, confirming the decree passed by S. A. Gupte, Subordinate Judge at Malegaon.

Suit to recover possession of land.

On the 10th May, 1899, the defendant No. 1 sold to plaintiff's father the land in dispute for Rs. 40 by an unregistered deed of sale and delivery of possession. The sum of Rs. 40 was paid by plaintiffs to one Tukaram to whom the defendant No. 1 was indebted. The plaintiffs remained in possession of the land till June 1911, when they leased it to defendant No. 2 by an oral lease for a period of eleven months. At the end of the term, defendant No. 2 declined to hand over possession to plaintiffs. The plaintiffs accordingly filed the present suit to recover possession of the land.

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The defendants contended *inter alia* that the land was their ancestral property; that it was never sold by them to plaintiffs; and that they were never indebted to Tukaram.

At the trial, the unregistered deed of sale could not be produced, for it was burnt in a fire. It was, however, produced at a previous revenue inquiry. The plaintiffs therefore examined Tukaram to prove the contents of the document and the fact of the sale accompanied by delivery of possession.

The lower Courts let in the secondary evidence, and decreed the suit.

The defendants appealed to the High Court.

W. J. Nimbkar, for the appellants:—The sale in this case was effected by an unregistered deed. It could not be received into evidence though it was for a value under Rs. 100, by virtue of amendments effected by Act III of 1885: see *Narain Chunder Chuckerbutty v. Dataram Roy*⁽¹⁾ and *Makhan Lal Pal v. Bunku Behari Ghose*⁽²⁾. If primary evidence of the deed is inadmissible, more so inadmissible is its secondary evidence.

Nor can the plaintiffs succeed on the plea of adverse possession. It was not raised in the lower Courts and no issue was framed on the point in the first Court. At any rate, it should not be permitted to plaintiffs who were all along holding the land under a sale-deed which was void.

W. B. Pradhan, for the respondents, was not called upon.

BEAMAN, J.:—Speaking for myself I am in agreement with the contention of the learned pleader for the

⁽¹⁾ (1882) 8 Cal. 597.

⁽²⁾ (1892) 19 Cal. 623.

appellants touching the admissibility of the unregistered sale-deed of 1899. The point is one of some interest and considerable importance. Not only has it been the occasion of much discussion in the Calcutta High Court (see *Narain Chunder Chuckerbutty v. Dataram Roy*⁽¹⁾ and *Makhan Lal Pal v. Bunku Behari Ghose*)⁽²⁾ but I believe it has already come up for consideration in this High Court on more than one occasion. Unfortunately I have not been able to come across the particular appeals in which this may have occurred. The point is this. In 1899 the plaintiffs allege the defendant sold to their father the land in suit by an unregistered sale-deed for the sum of Rs. 40 and at the same time delivered possession. Now, in the Courts below the evidence of the sale, wherever it was separable from the fact of possession, seems to have been principally secondary evidence of the missing unregistered sale-deed of 1899. The learned Appellate Judge of the lower Court has accepted the plaintiffs' story that the original was burnt. It is admitted that the original deed was unregistered. Before the passing of the Transfer of Property Act of 1882, questions arising under section 50 of the old Registration Act, which gives priority to registered over all unregistered instruments, had often arisen and caused much difference of opinion in the Calcutta High Court. As the law then stood, transfers of immoveable property of less value than Rs. 100 could have been validly effected by an unregistered sale-deed, or they might have been effected by delivery of possession, or by delivery of possession accompanied by an unregistered sale-deed; but the priority given to registered sale-deeds over unregistered sale-deeds by section 50 of the Registration Act was shown to have occasioned very great hardship in many cases, and there can be little doubt that it was in

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consequence of the judicial pronouncements of the learned Judges of the Calcutta High Court upon the great injustice, which was often thus worked by the strict application of section 50 of the Registration Act, that section 54 of the Transfer of Property Act was enacted in the year 1882. That section altered the law to this extent that it declared that no sale of immoveable property although the value was less than Rs. 100 could be effected by an unregistered writing. Such transfers could thus be effected in one of two ways only, either by a registered writing or by delivery of possession. That cleared up some of the doubts and difficulties which had arisen in interpreting section 50 of the Registration Act along with section 17 (b); and as long as the law remained in that state, the position was this, that if a sale of immoveable property of the value of less than Rs. 100 had been effected both by an unregistered instrument and by delivery of possession, although the unregistered instrument would have no legal effect, that is to say, would not have transferred the property, it could not have been excluded from evidence under section 49 of the Registration Act; because it still stood entirely outside the category of writings compulsorily registrable under section 17 (b). It is true that unless such a transfer had been made by delivery of possession as well as by an unregistered writing; the production of an unregistered writing in evidence would have been entirely useless. The party relying on it might have proved, it is true, that the writing was executed and that the intention was to convey the property. But inasmuch as after the passing of the Transfer of Property Act such a writing would not have that legal effect, his rights would have remained entirely unaffected by leading such evidence. The case is different where the sale had been effected both by an unregistered writing and by delivery of possession, for

between the years 1882 and 1885, as I have said, there could have been no objection to tendering the unregistered writing as evidence of the nature of the transaction under which possession had been given. Thus, where the Court found possession as a fact, and the only question was as to the nature of its origin, an unregistered sale-deed might very well have been offered in explanation of the transaction pursuant to which possession had been delivered. In my opinion, however, the law was materially altered by the amending Act of 1885. That Act *inter alia* declared that section 54 of the Transfer of Property Act was thenceforward to be treated as supplemental to the Registration Act. Judges have before this commented on the infelicitous use of the language employed, but I can find no other intelligent meaning in it than that section 54 is thereafter to be read and applied by all Courts as supplemental to so much of the Registration Act and to so much only as that to which in reason it belongs. Again, it appears to me that the only portion of the Registration Act to which section 54 can in reason belong is section 17, which declares what instruments are compulsorily registrable. Before section 54 of the Transfer of Property Act was passed, sales of immoveable property of less value than Rs. 100 might have been effected by instruments which were not registered and were certainly not compulsorily registrable. Section 54 said that thenceforward no sale of immoveable property, no matter what its value, could be effected by any unregistered instrument. Now, annexing that to section 17, which, as I say, is in my opinion the only section to which it can properly be annexed, the effect would be to add to clause (b) of that section the words: "all deeds of sale of immoveable property whatever its value." If I am right in this interpretation of the meaning of Act III of 1885, the legal consequences

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become apparent, for then any unregistered deed of sale of immoveable property below the value of Rs. 100 would not only not be effectual to transfer the property, but would also fall within the comprehensive and stringent prohibition of section 49. That section declares in the most unambiguous language that documents which are made compulsorily registrable and have not been registered shall not be received in evidence of any transaction, &c. So that if after the Act of 1885 all sales of immoveable property, whatever the value of that property might be, were intended to be made compulsorily registrable under section 17, it will be seen to follow clearly that they could not be given in evidence of the transaction, namely the sale, although that transaction might have been effected and have been quite legal, complete and valid by mere delivery of possession. If this be true of the document itself, it necessarily follows that no secondary evidence can be given. For I think it is a self-evident proposition that secondary evidence may not be given of that which the law declares shall not be given as primary evidence.

I am, therefore, clearly of opinion that neither the original unregistered deed of sale of 1899 nor secondary evidence of it was admissible in the present case to support the plaintiffs' allegation that in 1899 there was a complete and valid sale of the property in suit effectuated by delivery of possession. That, however, does not in my opinion conclude the case, and in what follows I believe that I may speak for my learned brother as well as for myself. Section 54 still leaves it open to the parties desirous of doing so to make a valid sale of immoveable property of less than Rs. 100 by oral contract and delivery of possession. In the present case we think that it was quite open to the learned Judges below to find that the property in suit had been sold in that manner. Even without adverting in any

way to the unregistered sale-deed of 1899, we think that there is ample evidence on the record to support the decision to which the Court of first appeal has come. Both the Courts have clearly found as a fact that the plaintiff has had possession of the land since 1899 up to the year 1911, and they have also held, though here no doubt they have been influenced by the secondary evidence of the unregistered sale-deed, that that possession was given pursuant to a sale. There is evidence *dehors* the unregistered sale-deed which is amply sufficient, in our opinion, to support that conclusion. There is the evidence of Tukaram, for example, who appears to have been the intermediary in the matter and to have first-hand knowledge of all the details of the transaction that in 1899 the defendants did sell the land in suit to the father of the plaintiff and that it was he, Tukaram, himself who delivered possession of the land to the plaintiff pursuant to the sale. That finding of fact would be quite sufficient, standing alone, to meet the defendants' contentions in this appeal. But there is another ground on which the conclusion of the Courts below can be very confidently supported. The Courts below have found as a fact that the plaintiffs have been in possession from 1899 till 1911, and looking to the pleadings and the evidence we cannot doubt that the meaning of the words "till 1911" is that the defendants in that year entered into possession under the lease given them by the plaintiffs. We have not the date of the lease but it is common ground that its currency was at least eleven months and during that period at any rate the character of the plaintiffs' adverse possession could not have been altered by the *de facto* possession of the defendants. So that in any event it is clearly found that the plaintiffs have had more than twelve years adverse possession from May 1899 till some period very near the end of 1911; and the title

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thus acquired by adverse possession would be quite sufficient for all the purposes of the present suit even had there been no allegation of sale at all.

On these grounds, then, we think that the decision of the lower appellate Court ought to be confirmed and this appeal dismissed with all costs.

MACLEOD, J.:—I agree that this appeal should be dismissed on the ground that both the Courts below have found as a matter of fact that there was a sale accompanied by delivery of possession, and that is a finding of fact which we are not at liberty to disturb.

But I regret that I cannot agree with my learned brother in the conclusion that the Courts below were wrong in admitting secondary evidence of the deed of 1899, which is said to have been burnt. In my opinion in cases of transfer of property under the value of Rs. 100, if the transfer is effected by delivery of possession accompanied by an unregistered document that document can be adduced in evidence in order to show what was the character of the possession given by the vendor of the land to the purchaser. I think it must be admitted that it would be so but for section 4 of the Transfer of Property Act, and I am not prepared to say that the effect of that section is to make documents purporting to be sale-deeds of immovable property under the value of Rs. 100 compulsorily registrable, so that if they are not registered they cannot be adduced in evidence under section 49 of the Registration Act. Section 4 of the Transfer of Property Act says that paragraphs 2 and 3 of section 54 shall be read as supplemental to the Indian Registration Act, 1877. The first part of section 4 says: "The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act." Therefore, the section makes a distinction

between those sections which relate to contracts which are to be taken as part of the Contract Act and certain sections which relate to registration which are to be read as supplemental to the Registration Act. Now, supposing paragraphs 2 and 3 of section 54 of the Transfer of Property Act were to be found at the end of the Registration Act, then in my opinion that would not have the effect of including transfers or documents which purport to transfer an interest in property of the value of under 100 in section 17 so as to make them compulsorily registrable. I confess that I cannot see what particular effect it would have if paragraphs 2 and 3 of section 54 of the Transfer of Property Act were read at the end of the Registration Act. But there is one thing I am perfectly clear about that it would not have the effect of introducing instruments relating to transfer of property under the value of Rs. 100 into section 17. In my opinion, therefore, if a contract for sale is made between two parties of property under the value of Rs. 100 and possession is given, then a transfer takes place under section 54 and if it so happens that at the same time a sale-deed has been executed, and a question arises in future whether as a matter of fact the sale was effected, then that unregistered document can be given in evidence in order to prove that possession was given to the person setting up a right as a purchaser either in pursuance of a contract of sale or to effect a sale. Therefore, in my opinion, the evidence regarding this burnt sale-deed of 1899 was rightly admitted in the Court below.

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Decree confirmed.

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