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would otherwise have been retained by the Rajah himself. It was as if a portion of the zemindar's own income was reserved as a charitable allowance for Jagar Nath Panday. It was not even assigned by any written instrument. If this was the position, I do not consider that there was any grant within the terms of Regulation XIX of 1793 as extended to Benares by Regulation XLI of 1795, and I, therefore, do not think that those Regulations or the Acts of 1873 would apply to the case. The suit appears to have been one with which a Civil Court had jurisdiction to deal.

OLDFIELD, J.—S. 30, Act XVIII of 1873, and s. 79, Act XIX of 1873, declare grants of land exempt from the payment of rent to be null and void and resumable, with the exception of the rent free grants especially reserved from the application of s. 79 by the provisions of ss. 80, 81, 82, Act XIX of 1873. The plaintiff, therefore, cannot succeed in his suit.

APPELLATE CIVIL.

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Before Mr. Justice Pearson and Mr. Justice Straight.

SAFDAR ALI KHAN (PLAINTIFF) *v.* LACHMAN DAS AND OTHERS (DEFENDANTS).*

Release—Reception in evidence of Unstamped and Unregistered Document—Appeal—Fraud—Act VIII of 1859 *(Civil Procedure Code), s.* 350 *—Act X of* 1877 *(Civil Procedure Code), s.* 578*—Stamp—Registration—Mortgage.*

In June, 1875, *L* executed a bond in favour of *S* in which he mortgaged, amongst other property, a village called Chand Khera, as security for the payment of certain moneys. He subsequently sold such village to *A*, concealing the fact that it had been mortgaged to *S*. On this fact coming to the knowledge of *A*, he threatened *L* with a criminal prosecution, whereupon *L* proposed to *S* in writing that the security of a share in a village called Kelsa, which he alleged was his property should be substituted for the security of Chand Khera. *S* accepted this proposal by a letter in which he referred to *L's* proposal in terms. It subsequently appeared that the share in Kelsa did not belong to *L* but to another person. *S* having sued upon his bond, claiming to enforce thereunder a lien upon Chand Khera, *A* set up as a defence to the suit that *S* had agreed to substitute Kelsa for Chand Khera in the bond, producing *S's* letter as evidence of the agreement. *Held* that such letter operated as a release and should therefore have been stamped and registered.

* First Appeal, No. 72 of 1879, from a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Moradabad, dated the 31st March, 1879.

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Held also that an objection may properly be taken in a Court of first appeal to an unstamped document, and such Court is bound to entertain the objection and may direct that the document be stamped and the penalty imposed.

Held also that *L*'s fraud vitiated *S*'s agreement to substitute the security of Kelsa for the security of Chand Khera in the bond, and *S* was entitled, notwithstanding *A* might have purchased the latter property in good faith, to the enforcement of the lien created thereon by the bond.

Mark Ridded Currie v. *S. V. Mutu Ramen Chetty* (1) discussed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court to which the plaintiff appealed from the decree of the Court of first instance.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Bishambhar Nath*, Babu *Ratan Chand*, and Shah *Asad Ali*, for the respondents.

The judgment of the High Court (PEARSON, J. and STRAIGHT, J.) was delivered by

STRAIGHT, J.—This [illegible] lant, to recover the sum of Rs. 20,375, principal and interest, on a bond dated the 18th of June, 1875, executed by the defendant Afzal Ali. The plaintiff also sued the defendant Lachman Das for the amount under another bond of the same date, whereby he had given security for the loan and interest, and hypothecated certain properties scheduled in the deed, including 20 biswas of mauza Chand Khera, pargana Amroha, the bounds and limits whereof were duly and properly detailed. The plaintiff further prayed for enforcement of lien against the property hypothecated.

The defence put forward by Afzal Ali substantially amounted to this, that he was a mere dummy in the transaction, that Lachman Das was the real borrower, and that the bond on which it was sought to make him liable was fictitiously executed in his name for some motives of expediency. Lachman Das admitted his liability under the security-bond, and that he did in the first instance hypothecate the several properties therein specified, but he went on to allege that, with the consent of the plaintiff to an agreement of the 16th December, 1876, the mauza of Chand Khera was withdrawn from the list, and 2½ biswas of mauza Kelsa and a shop, together with a

(1) 3 B. L. R., 126.

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note of hand for the amount of the loan of one Sahu Sham Saran Das, treasurer of Rampur, were substituted.

The Subordinate Judge held that Afzal Ali and Lachman Das were both responsible for the payment of Rs. 20,375, and that the mauza of Chand Khera had been exempted from the operation of the security-bond of the 18th June, 1875, with the sanction and consent of the plaintiff. For reasons that will presently appear, when we come to the facts, Sheikh Ali-uddin had come into the suit as a defendant by making certain objections to the plaintiff's claim, and had formally been made a party to it under an order of the Court of the 6th September, 1878, pursuant to s. 32, Act X of 1877. His interference related solely to mauza Chand Khera, and as appears from what has already been stated, he was successful in securing the exemption of that property from the decree. The Subordinate Judge ultimately passed an order in plaintiff's favour for the amount of his claim by enforcement of lien on the property hypothecated in the security-bond of June, 1875, excluding mauza Chand Khera and substituting in lieu thereof the 2½ biswas of Kelsa already mentioned. From this decision the plaintiff appealed and the following shortly state his grounds of appeal: (i.) That mauza Chand Khera has been exempted on illegal and insufficient evidence: (ii.) That a letter of the plaintiff of the 3rd May, 1877, being without a stamp and unregistered, ought not to have been received in evidence, as it was put in to prove the relinquishment of an interest in immoveable property above the value of Rs. 100: (iii.) That even if there had been any relinquishment by the plaintiff it was only conditional and was so regarded by the defendant Sheikh Ali-ud-din: (iv.) That plaintiff was no party to the document of the 16th December, 1876, put forward by Lachman Das and never gave his consent to it.

The facts of the case appear to be as follows: The plaintiff is a native gentleman of some position resident at Rampur. The two defendants Afzal Ali and Lachman Das both come from Moradabad or thereabouts, while the third, Ali-ud-din, is a pleader living and practising there and in the district. It seems altogether indifferent to the question we have to decide whether the Rs. 20,000 were advanced to and for the use of Afzal Ali or Lachman Das. Certain

it is that they are both liable for its repayment, and we accept without hesitation the finding of the Subordinate Judge as to their joint and several responsibility to the plaintiff.

The substantial point for our consideration, as in the determination of it all the other pleas in appeal must be disposed of, is, was the Subordinate Judge right in law and fact in excluding mauza Chand Khera from enforcement of lien and in substituting for it the 2½ biswas of mauza Kelsa and the shop?

The loan had been made and the two bonds executed on the 18th June, 1875. At some time after that and before the end of 1876 Lachman Das, under circumstances most strongly indicative of fraud, sold to the defendant Ali-ud-din out and out, for a sum of Rs. 9,500, the mauza of Chand Khera, concealing the hypothecation already made to the plaintiff, and acting as if the property were free and unincumbered and capable of disposal. It is impossible to avoid making the remark in passing, that it seems very strange that the defendant Ali-ud-din, a pleader, who could readily have searched the district register of charges on immoveable property, never took the precaution to do so, though by this simple and to him necessarily well understood proceeding, he might have ascertained, what only came accidentally to his knowledge, namely, that the very mauza he had bought was already incumbered to the plaintiff at the time of his purchase. Naturally Ali-ud-din, when he became aware of the cheat that had been practised on him, was very indignant and threatened Lachman Das with prosecution, who in his alarm to escape from the consequences of one fraud, seems to have thought the best way out of his difficulty was to commit another. For this purpose he opened communications with the plaintiff, the object of which was to induce him to accept 2½ biswas of mauza Kelsa, a shop, and a note of hand of the treasurer of Rampur, in lieu of mauza Chand Khera. A proposal to this effect embodied in writing appears to have been prepared and forwarded by Lachman Das on or about the 16th December, 1876, but no formal signature of the plaintiff to it was ever obtained, and it was not till the 3rd May, 1877, that a letter was written by the plaintiff to the defendant Ali-ud-din, by the terms of which it is contended the document of December, 1876, was accepted and Chand Khera was exempted from

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the bond of the 18th June, 1875. According to Ali-ud-din, this set at rest all his fears, he was content to let his bargain with Lachman Das stand, and abandoned his threatened prosecution. If his mind was so completely set at rest by the plaintiff, it seems strange, to say the least of it, that on the 1st July, 1877, he requested Lachman Das to execute a deed of agreement, which, after recapitulating all the circumstances relating to the sale, proceeded to hypothecate certain properties as security for the carrying out the contract. The remaining facts to be enumerated are but few. It turned out that the 2½ biswas of mauza Kelsa which Lachman Das had put forward as his own did not belong to him but to his minor nephew, and it is curious to observe, in his judgment, that the Subordinate Judge seems to have studiously kept this, the most important fact, in the back ground. The real struggle now is necessarily between the plaintiff and Ali-ud-din, indeed, as parties to the suit, the other defendants may be dismissed from our consideration.

The suit brought by the plaintiff is on his bond of June, 1875, and he claims to enforce the hypothecation against Chand Khera as if the documents of December, 1876, and 3rd May, 1877, had never been written. The defendant Ali-ud-din, who is in possession of Chand Khera under his purchase, put forward those two documents as evidence of his title and showing that the plaintiff released Chand Khera from the bond of 18th June, 1875. One of the pleas in appeal sets up a technical objection to the admission of the letter of the plaintiff of the 3rd May, 1877, and it was argued before us that, having regard to the terms of the deed of December, 1876, to which this referred and expressed its acceptance of, this document must be considered a release, or, in other words, an instrument "purporting to extinguish a contingent interest to and in immoveable property" and as such, not only liable to stamp but to registration under s. 17, Act III of 1877. We are of opinion this contention is correct and that the letter does amount to a release. It was in that very sense and for the purpose of fixing responsibility on the plaintiff as to the exemption of Chand Khora from the bond, that the defendant Ali-ud-din tenders it, and indeed without it, it is not very easy to see what sort of defence he could have made. The document therefore ought to have been stamped and registered and should not have been admitted in evidence in

the lower Court, though it does not seem that there any objection was taken. But it does not appear necessary to the decision of the case for us to pass any formal or deliberate expression of opinion upon these two questions, so far as they are made matter for objection to the admissibility of the release of the 3rd May, 1877, in this Court. As to its acceptance in proof without stamp, there is a judgment of Sir Barnes Peacock in *Mark Ridded Currie* v. *S. V. Mutu Ramen Chetty* (1), wherein acting upon the terms of s. 350, Act VIII of 1859, with which s. 578, Act X of 1877, closely corresponds, he held "that the error, if any, of receiving the document without a stamp, did not affect the merits of the case or the jurisdiction of the Court, although it might have affected the Government revenue." It should, however, be noticed that this decision only disposes of the objection within the terms of s. 350, so far as it was a fit ground for appeal from the finding of the lower Court. The difficulty that presents itself to our minds is as to how far this Court, sitting in appeal from an original decree and therefore having to deal with evidence as well as law, can fail to notice an objection to its receiving as proof and taking cognizance of a document which is both unstamped and unregistered? It may be, that so far as it relates to the finding and order of the lower Court it has no force, but "non constat" that when brought under our notice we are not to entertain it. So to the question of registration the same observations apply, only with greater force, for registration can hardly be called a matter "affecting the Government revenue," when it is obviously intended to prevent fraud by parties to instruments of a certain description. Upon this point a decision of West and Pinhey, JJ., in *Basawa* v. *Kalkapa* (2) was quoted, which seems to bear directly upon the whole subject of registration and to treat it from a practical and intelligible point of view. We must not, however, be taken as expressing any definitive opinion upon these two questions, though it is irresistible to remark that at first sight the argument seems a strange one, as has been before remarked, that a Court of Appeal, where it is dealing with fact as well as law, is to accept and treat as evidence that which two Acts have in prohibitory language declared shall not be received. Upon one point, however, we feel no doubt, namely, that an objection may properly be taken in this Court to an unstamped document and that

(1) 3 B. L. R., 126. (2) I. L. R., 2 Bom., 489.

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we are bound to entertain it. In that case we may direct that the document be stamped and the penalty imposed, but for the unregistered instrument there is no "*locus penitentiæ*," if the time has run out within which it should have been presented for registration, and we are powerless to give any assistance. We have already said that, for the purpose of our disposing of this appeal, it does not appear to us necessary to express any final opinion upon these two questions, indeed from our point of view and the conclusion at which we have arrived we think it sufficient to deal with the case upon the first ground of appeal. Our judgment would have been the same whether the letter of the 3rd May, 1877, be shut out or admitted. But with the object, as far as lies in our power, of finally disposing of the litigation, we have accepted that document as part of the evidence in the case, and have accorded to it all the importance and weight requested by the respondent Ali-ud-din. Even had the agreement, as it is called, of the 16th December, 1876, been signed by the plaintiff, it would have made no difference, to our minds, in the result of this appeal, and this for the very simple reason, that the fraud of Lachman Das, by whose misrepresentations and false pretences as to the 2½ biswas of mauza Kelsa, the plaintiff was induced to substitute them for the twenty biswas of mauza Chand Khera, vitiates the whole transaction, documents and all, and restores to operation in its precise terms the bond of the 18th June, 1875, with its appended security. That there was positive, direct, and deliberate fraud, and that it acted immediately and directly on the mind of the plaintiff is a matter beyond all controversy, and how would it be possible for us as a Court of Equity, as well as of Law, to allow such a contract, whether verbal or written, under such circumstances to stand? It is abundantly clear that the plaintiff would never have altered his security had he been aware that he was surrendering twenty biswas for 2½ biswas, as to which his hypothecator had no title, and his whole action in the matter, as deposed to by the witnesses, goes to show that he implicitly believed in the honesty and *bona fides* of Lachman Das. We fail altogether to remark any laches or negligence of any sort on the part of the plaintiff to disentitle him to the relief he asks, on the contrary he appears to have acted in a perfectly straightforward way and to have fallen a victim to the falsehoods of a clever cheat, who was driven to his wit's end to escape from prosecution and, as it would

seem, from well merited conviction. That Ali-ud-din had still some suspicions about Lachman Das, after his receipt of the letter of the plaintiff's of the 3rd May, 1877, is plainly evidenced by the agreement of the 1st July of the same year, but this has in no way affected us in our view of the facts or the decision of the case, though it is a strong indication that the defendant Ali-ud-din had considerable doubt as to the safety of his purchase. That Ali-ud-din has his remedies, either in the Civil or Criminal Courts, or both, is a matter beyond dispute, but however *bonâ fide* his purchase, he cannot set it up to defeat the lien of the plaintiff on mauza Chand Khera under his bond of 18th June, 1875, in satisfaction of the amount and to the extent, for which, it will, with the other properties hypothecated, share as security. The fraud of Lachman Das towards the plaintiff goes back to the inception of the transaction and renders all subsequent proceedings in reference to the property in suit void and of no effect.

The appeal will therefore be allowed and the decision of the lower Court reversed, so far as relates to its order exempting mauza Chand Khera from the operation of the bond of 18th June, 1875. For purposes of convenience and to avoid mistakes we think it best to say in terms, that a decree is passed in plaintiff's favour for Rs. 20,000, and interest to this date, at the rate specified in the bond, against Mir Afzal Ali, Lachman Das, and Ali-ud-din, by enforcement of lien against twenty biswas of mauza Chand Khera, two and a half biswas of mauza Kelsa, and twenty biswas of mauza Ismailpur, as specified and defined in the schedule to the bond of 18th June, 1875, and thereby hypothecated The whole of the costs in this and the lower Court are to be paid by Lachman Das.

Appeal allowed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

AUDH KUMARI AND OTHERS (DEFENDANTS) *v.* CHANDRA DAI (PLAINTIFF) AND PRAN DAI AND SITA DAI (DEFENDANTS).* 1879 December

Hindu Law—Right of succession of daughters to father's estate.

Held that comparative poverty is the only criterion for settling the claims of daughters on their father's estate. *Bakubai* v. *Manchhabai* (1) and *Poli* v. *Narotum Bapu* (2) followed.

* First Appeal, No. 55 of 1878, from a decree of Maulvi Sultan Husain, Subordinate Judge of Gorakhpur, dated the 9th February, 1878.

(1) 2 Bom. H. C. R. 5. (2) 6 Bom. H. C. R. 183