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sub-mortgagee, notwithstanding that the sub-mortgage has been redeemed, in execution of a decree obtained by the first against the second defendant, during the pendency of the present suit. He is unable to point to any evidence that such has been the case; and we observe that an allegation to that effect, made in the memorandum of appeal to the District Court, was struck out by the plaintiff's pleader. We shall, however, in our decree call the attention of the Subordinate Judge to the alleged circumstance, in order that he may inquire into the rights of the defendants *inter se*, and adjust them as the equities of the case require.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

June 22.

FAKI (ORIGINAL PLAINTIFF), APPELLANT, *v.* KHOTU (ORIGINAL DEFENDANT), RESPONDENT.*

Registration—Act XX of 1866, *Section* 17—*Act XV of* 1877, *Section* 20—*Receipt —Declaration of title.*

The defendant passed to the plaintiff a document worded, in substance, as follows :—

"Your fields * * * * are entered in my name. Ever since they came into your possession I have received from you the assessment due upon them. I have now no claim upon you for any balance of assessment. * * * * I will cause the aforesaid two fields to be entered in your name. Nothing remains due by, or to either of us in respect of the produce of these fields."

The document was stamped as a receipt with a stamp of one anna.

Held that, for the purpose of establishing satisfaction of all claims which the plaintiff and the defendant had upon one another, the document was admissible in evidence; but that, if used as evidence of title, it came within the provisions of section 17 of the Registration Act (XX of 1866), and the corresponding provisions of the Registration Act (XV of 1877), and was inadmissible unless duly registered.

THIS was a second appeal against the decision of C. E. G. Crawford, Assistant Judge of Thána, reversing the decree of the Subordinate Judge of Pen.

The plaintiff brought this suit to recover possession and the produce, for five years, of a piece of land awarded to him under

* Second Appeal, No, 108 of 1880.

two decrees passed in 1860 against the defendant. The plaintiff alleged that he obtained possession of the land under those decrees, and let it to certain persons who having colluded with the defendant, the latter wrongfully and fraudulently asserted his own title and possession. The defendant denied the plaintiff's claim, and contended that all his averments were untrue, and further pleaded that, having been in adverse possession of the land for more than twelve years, the plaintiff's suit was barred by the law of limitation. To show that the defendant's possession was not adverse, the plaintiff produced a document set forth below in the judgment of the Court.

The Court of first instance held this document proved, and on the strength of it awarded to the plaintiff the possession of the land in the plaint mentioned, and the produce of three years.

The Assistant Judge did not consider it necessary to decide on the genuineness of this document, being of opinion that it was inadmissible in evidence, as being insufficiently stamped and as being unregistered. In his judgment he said :—

"But if this document did create or declare any title in the plaintiff, then, so far as it did so, so far as it purported to affect the immoveable property in question, which is clearly above rupees one hundred in value, it ought, under sections 17 and 49 of the Registration Act (XX of 1866), to have been registered, and cannot now be received in evidence. *Ráju Bálu* v. *Krishnaráv Rámchandra* [1]. Again, so far as it is an agreement, it ought to have been stamped, under Act X of 1862, with a stamp of greater value than one anna. The document must, on these grounds or any one of them, be excluded from the case, for there is no other evidence to bring the plaintiff's case within the period of limitation."

The Assistant Judge, accordingly, reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim. The plaintiff appealed.

(1) 1 I. L. R., 2 Bom. 273.

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Shámráv Vithal for the appellant.—The only question for decision here is, whether the document produced by the plaintiff, requires registration. The defendant speaks of the plaintiff as the proprietor of the land, and mentions the fact of his having come into possession. It is, therefore, an acknowledgment, on the defendant's part, of the plaintiff's title. But the main object, with which it was executed, is to show that the mutual claim of the parties had been satisfied. It, therefore, does not require registration.

Pándurang Bálibhadra for the respondent.—Section 17 of Act XX of 1866 makes documents, which declare title, compulsorily registrable. This document is only useful to the plaintiff as a declaration of his title, and is sought to be so used. It must, therefore, be registered. It is, besides, an agreement to do an act, and requires a stamp of eight annas. The Assistant Judge was, therefore, right in holding it as invalid and inadmissible.

The judgment of the Court was delivered by

M. MELVILL, J.—The plaintiff, in the year 1860, obtained two decrees against the defendant, awarding to him possession of certain lands. The plaintiff alleges that he obtained possession under these decrees, but the truth of this allegation is doubtful. What is certain is, that the lands have never been transferred to the plaintiff's name, and that the defendant, (whether or not he was ever dispossessed under the decrees,) has been in actual possession for more than twelve years previously to the institution of this suit. It follows that the suit is barred by limitation, unless the plaintiff can prove that the defendant's possession has not been adverse to him.

In order to establish this, the plaintiff has tendered in evidence the document exhibit No. 3. This document purports to be a "receipt" passed by the defendant to the plaintiff in 1868,—that is, within the twelve years preceding the suit. The substance of the document is as follows:—

"The reasons for giving this receipt are these. Your fields" [here follow the names and descriptions of the fields] "are entered in my name. Ever since they came into your possession,

I have received from you the assessment due upon them. I have now no claim upon you for any balance of assessment. You have, out of kindness, remitted the costs which were due to you under the decrees which you obtained in respect of these fields. I will cause the aforesaid two fields to be entered in your name. Nothing remains due by, or to either of, us in respect of the produce of these fields."

The document is stamped as a receipt, and, (assuming it to be genuine), it is clear that it was intended to be a receipt, or acquittance, and nothing more. For the purpose for which it was intended,—that is, for the purpose of establishing satisfaction of all claims which the parties had upon one another,—it is, of course, admissible in evidence. But the plaintiff wishes to use it as an admission or acknowledgment of his title to the lands, and as proof that, at the date of the document, the defendant's possession was not adverse to him. The document undoubtedly contains such an acknowledgment; and, if it be genuine and relevant, a Court, which had to determine the question of fact, would probably consider that acknowledgment sufficient proof that the defendant's possession was really the plaintiff's possession. On the other hand, there is no other evidence which can save the bar of limitation. The suit, therefore, must succeed or fail, according as exhibit No. 5 is, or is not, admitted in evidence.

The Assistant Judge has held that the document is inadmissible in evidence, because it is not registered; and we are of opinion that this decision is right. The plaintiff wishes to use the document as an acknowledgment of a right, title and interest in immoveable property, which is admittedly of a higher value than one hundred rupees. If admitted, it will "operate to declare" such a right, title and interest, and it thus appears to come within the terms of section 17 of Act XX of 1866. It also seems to us to come within the mischief contemplated by the Act. Used as evidence of title, (and this is the only use which can be made of it under the old Limitation Acts,) such a document indirectly prevents the extinction of that title through the operation of the law of limitation. Under the new Limitation Act (No. XV of 1877) it would directly produce the same effect; for by section

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20 of that Act it would create a new period of limitation from the date of the acknowledgment. If an instrument, having this effect, could be kept secret, it is clear that the intention of the registration laws would be liable to be defeated. A purchaser or encumbrancer, dealing with a person who had, apparently, acquired a good title by twenty-years' possession, would have no security that there might not be in existence a written acknowledgment, by such person, containing a declaration of the title of some previous owner, and thus effectually preventing the acquisition of any title by himself.

We are, therefore, of opinion that the document exhibit No. 3, if used as evidence of title, comes within the letter and the spirit of those provisions of the Registration Acts which require declarations of title to be registered; and we, accordingly, confirm the decree of the Assistant Judge with costs.

Decree affirmed.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

August 3.

BAKSU LAKSHMAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* GOVINDA' KA'NJI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Sale—Evidence—Oral evidence, when admissible, to prove that an apparent sale is a mortgage—The Indian Evidence Act (I of 1872), *Sections* 91, 92 *and* 115.

A party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement as showing that an apparent sale was really a mortgage, should not be permitted to start his case by offering direct parol evidence of such oral agreement; but if it appear clearly and unmistakeably, from the conduct of the parties, that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage, and not as a sale, and, therefore, if it be necessary to ascertain what were the terms of the mortgage, the Court will for that purpose allow parol evidence to be given of the original oral agreement.

Damoddee Paik v. *Kaim Taridar* (1) dissented from.

Although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties, and

* Second Appeal, No. 95 of 1880.

(1 I. L. R., 5 Calc. 300.