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VINA'YAK GOVIND AND NA'RA'YAN v. BA'BA'JI.

On 1st *Jyest vadya, Shake* 1787 (July 1865) the account in plaintiff's book was made up, interest being credited to him, and the balance due to plaintiff was struck as Rs. 1,159-2-0. At the foot of the account so made up, the second defendant, in the name of the first defendant, signed an endorsement certifying the amount found due, and that interest was to run on the balance.

Whether, therefore, the entry in exhibit 24, on which plaintiff sues, is an ordinary native account current, as I hold it to be, or whether either of the promises, one at the head and the other at the foot of the entry, converts the document into a promissory note, it appears to me clear that Act XIV of 1859 applies to the case, and I agree with the Subordinate Judge in considering that "the three years' period of limitation must be counted, either from the date of the deposit (12th December 1864), or from the date on which the balance of Rs. 1,159-2-0 was struck in July 1865; and that the suit is barred by the law of limitation."

Decree reversed.

Note.—See *Hingun Lall* v. *Debee Parsád*, 24 Calc. W. Rep. Civ. Rul. 42.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Officiating Chief Justice, and Mr. Justice M. Melvill.

SHIDLINGA'PA' AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* CHENBA SA'PA' (ORIGINAL PLAINTIFF), RESPONDENT.*

December 19

Registration—Act No. III of 1877, *Sec.* 17, *Cls. (b) and (c)—Receipts by mortgagee.*

Receipts passed by a mortgagee for sums paid on account of the mortgage-debt, and exceeding Rs. 100 each, are not inadmissible in evidence for want of registration under Act III of 1877, sec. 17.

The technical term "consideration" implies that the person to whom the money is paid, himself limits or extinguishes his interest in the land in consideration of such payment. Such limitation or extinction (if there can be said to be any) as results from the payment on account of the mortgage-debt, is the legal consequence of such payment, and not the act of the mortgagee.

The payment reduces the sum due at the time on the mortgage, and thus modifies the account between the mortgagor and mortgagee. But it does not operate

* Second Appeal, No. 288 of 1879.

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to limit or confine within narrower limits the right or interest of the mortgagee in the land, which is simply to have the payment of the principal and interest secured on the mortgaged premises by some one or other of the remedies available for that purpose.

Money paid on account of a mortgage-debt is not the consideration for the limitation or extinction of so much of the interest in the land created by the mortgage, and a receipt for such a payment need not, therefore, be registered under section 17, clause (*b*) of the Registration Act III of 1877.

Dalip Sing v. *Durgá Prasád*(1) not followed,

THIS was a second appeal from the decision of M. H. Scott, Acting Judge of the District Court of Dhárwár, in appeal No. 111 of 1878, affirming the decree of G. V. Bhánap, Subordinate Judge (Second Class) at Gadag, in Original Suit No. 769 of 1877.

The plaintiff brought this suit against Shidlingápá and four others to recover Rs. 3,344, being principal and interest due on a mortgage bond executed to him on the 9th December 1877 by Mudibasápá, deceased, father of defendants 1, 2, 3, and 4, and grandfather of defendant No. 5. The plaintiff prayed that his claim might be decreed to be satisfied by the sale of the mortgaged property.

Shidlingápá and Andanápá (defendants 2 and 5) answered that the debt for which the property had been mortgaged by Mudibasápá was not contracted for a family necessity; that the property, therefore, being ancestral, was not liable after his death; that he (Mudibasápá) had paid Rs. 2,700 to the plaintiff on account of the mortgage-debt, and obtained receipts from him for the money (exhibits 24, 25 and 26). The other defendants did not appear.

The Subordinate Judge held, on the authority of *Dalip Sing* v *Durgá Prasád* (2), that the receipts (24, 25 and 26) were inadmissible in evidence for want of registration. On the merits he held that the plaintiff had proved the mortgage on which he sued, and that the defendants were all liable for it. He, accordingly, on the 4th October 1878, passed a decree in favour of the plaintiff for Rs. 3,200, and dismissed his claim to the rest, on the principle of *dám-dupat*. He directed this amount to be satisfied from the mortgaged property and from the estate of the deceased Mudibasápá in the hands of the defendants, and awarded interest at 9 per cent. from date of suit to date of payment.

(1) I. L. R., 1 All. 442.

(2) I. L. R., 1 All. 442.

Defendants 2 and 5 appealed, and contended, among other things, that the Subordinate Judge ought to have admitted the receipts (exhibits 24, 25 and 26) in evidence, although they were not registered. The District Judge affirmed the decree of the first Court, 31st March 1879.

The defendants filed a second appeal in the High Court on the 17th July 1879.

The only question argued in the High Court was whether or not the receipts were admissible in evidence.

Macpherson (with him *Ghanashám Nilkanth Nádkarni*), for the appellants, relied upon *Basáwá* v. *Kalkápá*[1]. The learned counsel also referred to *Tukárám Vithoji* v. *Khandoji Malharji* [2] and *Sangáppá* v. *Basáppá*[3].

Farran (with him *Mánekshán Jehángirshán*) appeared for the respondent, and relied upon *Dalip Sing* v. *Durgá Prasád* [4] in support of the decision of the lower Court.

The following is the judgment of the High Court delivered by

SARGENT, C.J. (Officiating).—The respondent in this case sued upon a mortgage-bond, which was found to be proved and binding on all the defendants. The only question of law raised on second appeal is whether the District Judge was right in holding that three receipts passed by the mortgagee for the several sums of Rs. 1,000, 1,200 and 500, respectively, paid on account of the mortgage-debt, being exhibits 24, 25 and 26 in the case, were inadmissible in evidence for want of registration. As the suit was filed in December 1877, the Registration Act (III of 1877) applies. The question would appear to have been determined by the High Court of Allahabad against their admissibility under Act VIII of 1871 (which, for the purposes of this question, is identical with Act III of 1877) in the case of *Dalip Sing* v. *Durgá Prasád*[5]. No reasons, however, are given by the Court for the conclusion arrived at. It was contended before us that the exhibits were inadmissible, as being documents requiring to

(1) I. L. R., 2 Bom. 489.
(2) 6 Bom. H. C. Rep., O.C.J. 134.
(3) 7 Bom. H. C. Rep., A.C.J. 1.
(4) I. L. R., 1 All. 442
(5) I. L. R., 1 All. 442.

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be registered under both clauses (*b*) and (*c*) of section 17 of the Act of 1877. With respect to clause (*b*), we think it would be impossible, without straining language, to say that the sum paid on account of a mortgage-debt is the consideration for the limitation or extinction of so much of the interest in the land created by the mortgage-bond. The use of the technical term "consideration" implies that the person himself to whom the money is paid, limits or extinguishes his interest in the land in consideration of such payment, whereas such limitation or extinction, (if there can be said to be any,) as results from the payment on account of the mortgage-debt is the legal consequence of such payment, and not the act of the mortgagee. It was said, however, that, at any rate, a receipt operates to limit the mortgagee's interest in the land, as contemplated by clause (*b*). Undoubtedly the payment reduces the sum due at the time on the mortgage, and thus modifies the account between the mortgagor and mortgagee; but it does not operate to limit or confine within narrower limits the right or interest of the mortgagee in the land, which is simply to have the payment of the principal and interest secured on the mortgaged premises by some one or other of the remedies available for that purpose.

The question has never, as far as we know, been directly raised in this Court. However in the case of *Basawa* v. *Kalkápá*[1] it would appear to have been assumed that a simple receipt for a payment in respect of a mortgage-debt, would not require registration. The Court says: "On that point it has been urged by Mr. Mandlik that the document No. 45 is, *primâ facie*, a receipt; that his client Kalkápá wishes to employ it in no other character; and that as a receipt it did not need registration. But as a mere receipt for so much money, if it were, in truth, limited to that, it could not prove the release or extinguishment of any particular right over the property in dispute vested in Parápá by the mortgage. It could not, therefore, show that, in subsequently admitting Parápá's claim under that mortgage, Sidoji wilfully failed to assert his own rights. It was only if his mortgage was released that Parápá's claim to possession could be unfounded, or Sidoji's admission of it could be a fraud on Kalkápá. To prove that it had

(1) L. I. R., 2 Bom. 489.

been released, the document No. 45, which is express to that effect, was put in, and that is exactly the use that was made of the document by the Subordinate Judge."

The Court, therefore, remands the case for a finding by the District Judge on the third and fourth issues raised by the Subordinate Judge. The District Judge will exercise his discretion as to the admission of fresh evidence as respects the said issues.

Decree reversed and case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Pinhey and Mr. Justice F. D. Melvill.

IMPERATRIX *v.* RA'MA' PREMA'.*

1880
January 7.

The Code of Criminal Procedure (Act X of 1872), *Sec.* 18—*Sentence*—'*Modify*'—'*Enhance*'—*Session Judge*—*Assistant Session Judge.*

The word 'modify' in section 18, clause 2 of the Code of Criminal Procedure (Act X of 1872) does not include the power to *enhance* a sentence: consequently, when an Assistant Sessions Judge passes a sentence of more than three years' imprisonment, the Sessions Judge cannot enhance it.

THE accused Rámá Premá was tried by G. Druitt, Assistant Sessions Judge of Surat, on a charge of criminal breach of trust as a public servant, and, being convicted on his own plea of guilty, was sentenced to four years' rigorous imprisonment, subject to confirmation by the Sessions Judge, H. M. Birdwood, who enhanced the sentence to five years.

On review of the criminal return containing the above case, one of the Judges of the High Court (Pinhey, J.) called for the record and proceedings to consider the question whether a Sessions Judge can, under clause 2 of section 18 of the Code of Criminal Procedure (Act X of 1872), enhance a sentence passed by an Assistant Sessions Judge, subject to the Sessions Judge's confirmation under that section.

There was no appearance for the accused or the Crown.

Per Curiam.—The Court is of opinion that a Sessions Judge has no such power. The words used in the last sentence of clause 2 of section 18 of the Code of Criminal Procedure are: "The

* Criminal Review, No. 247 of 1879.