Cape v. *Scott*[1] quoted in *Virjivandás* v. *Mahomed Ali Khán*[2]. The conviction on the view of the evidence taken by the Magistrate is good. I would so inform the Session Judge.

(1) L. R., 9 Q. B., 269 at p. 277. (2) I. L. R., 5 Bom. at p. 215.

1884

QUEEN EMPRESS v. GANGARÁM SANTRÁM.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

RA'MCHANDRA APA'JI (ORIGINAL DEFENDANT), APPELLANT, *v.* BA'LA'JI BHAURA'V (ORIGINAL PLAINTIFF, RESPONDENT.)*

1884 *October* 8.

Possession—Mortgage—Redemption—Evidence Act I of 1872, Sec. 110—Burden of proof.

The plaintiff sued to redeem certain land, alleging that it had been mortgaged by his father to the defendant in 1854-55. The defendant denied the mortgage, and alleged that he purchased it under a deed of sale from the plaintiff's father in 1849, and had ever since been in his possession as owner. The deed of conveyance was not forthcoming, nor was the alleged mortgage deed. The Court of first instance rejected the plaintiff's claim on the ground that the mortgage was not proved. The lower Appellate Court reversed the decree of the Court of first instance. The defendant appealed.

Held, that the defendant's possession was *primâ facie* evidence of a complete title, and that the plaintiff, who alleged that the defendant was merely a mortgagee, was bound to prove his own right as mortgagor clearly and indefeasibly. Mere statements that the property had been mortgaged, which failed to establish any particular mortgage, did not shift the burden of proof, or require the mortgagee to show what were the terms of such mortgage, or his right to retain possession under it.

THIS was a second appeal from the decision of M. N. Nánávati, First Class Subordinate Judge with appellate powers at Thána.

The plaintiff sued to redeem certain property from the defendant. He alleged that the property was mortgaged in 1853-54 by his father to the defendant for Rs. 60; that by the terms of the mortgage the debt was to be satisfied out of the rents and profits, and that it had been fully paid off in 1863 or 1864; that the plaintiff's father had died thirteen years before the institution of the plaintiff's present suit, the plaintiff being then a minor. He

* Second Appeal, No. 435 of 1883.

1884

RÁMCHANDRA APÁJI v. BÁLÁJI BHAURÁV.

further alleged that he and his mother had requested the defendant to produce his accounts, and had offered to pay what might be found due, but that the defendant had refused to do so.

The defendant denied the mortgage, and alleged that he had purchased the property in 1849 or 1850 from the plaintiff's father and had been in possession ever since; that the sale deed had been destroyed by fire along with other papers when his house was burned; that he had expended two hundred rupees in improving the property, which he would not have done if the property had not been his own; that the plaintiff's father survived for seventeen or eighteen years after the defendant had got possession, and had never alleged a mortgage.

The Subordinate Judge of Murbád rejected the plaintiff's claim, holding that the burden of proof was on the plaintiff, and that he had failed to prove the alleged mortgage.

The plaintiff appealed, and the Subordinate Judge with appellate powers at Thána reversed the decree of the Court of first instance, and held the plaintiff entitled to redeem on payment of Rs. 60 to the defendant within six months from the date of his decision. The defendant appealed to the High Court.

Hon. Ráv Sáheb *V. N. Mandlik* for the appellant.—The alleged mortgage was not proved—*Govindráv* v. *Rágho*(1). The statements of two witnesses, on whom the lower Court relied, of an oral admission of a mortgage were not admissible in evidence. A person who alleges against one in actual possession of property that the possessor thereof holds it under a mortgage, must prove his allegation. He cannot call upon the person in possession to prove his title—*Shiváji* v. *Chinnayanu Chetty* (2); Taylor on Evidence, para. 383.

Shivrám Vithal Bhandárkar for the respondent.—The lower Appellate Court has found the *factum* of mortgage proved, and its decision is conclusive. Under section 17 of the Evidence Act the evidence of the witnesses as to the oral admission by the appellant of a mortgage is admissible in a transaction like the present. A very slight *primâ-facie* proof of mortgage is sufficient to shift the burden of proof from the plaintiff to the defendant:

(1) I. L. R., 8 Bom., 543. (2) 10 Moo. Ind. Ap. at p. 160.

1884

RÁM HANUMA APÁM v. BÁLÁJI BHAUNÁV.

See *Bálájí* v. *Bábu* [1] followed in *Ráma* v. *Báburáv* [2]; see also *Sambhubhái* v. *Shivlálbhái* [3]; *Shiváji* v. *Chinnayanu Chetty* [4].

WEST, J.—The defendant Rámchandra holds the property in dispute. He says he purchased it from the plaintiff's father in 1849, and has held it as owner ever since. It was transferred to his name as possessor in the Government accounts under the Revenue Survey in 1854-55 (Exhibit 30), and has stood against his name ever since.

The plaintiff says that the land was, in fact, mortgaged for Rs. 60 by his father to the defendant in 1854-55. This he asserts on the authority of his father, now deceased, whose information, however, when the plaintiff was cross-examined, turned out to be no more than "some land is mortgaged" to (Rámchandra) defendant No. 1. This, of course, was not in itself admissible evidence; but, having been admitted, it afforded no basis for a claim to redeem any specific land on any specific terms. But the plaintiff says he paid a visit to the defendant Rámchandra a couple of years or so before the institution of the suit, and at the interview Rámchandra, he says, admitted that he held land of the plaintiff on mortgage. Witnesses Nos. 24 and 25, who accompanied the plaintiff, confirm his account of the interview, and the Subordinate Judge in appeal has believed their story in opposition to the denial of the defendant Rámchandra. But their statements are but little less vague than the one reported by the plaintiff to have been made by his late father. They do not, taking them as true, establish an admission of the particular mortgage set forth by the plaintiff, nor of any specific incumbrance on any particular piece of land, which can even in a general way be identified by the description given of it, or the reference made to it.

The defendant Rámchandra has not produced a conveyance from the plaintiff's father. Nor is it clear that a *rázináma* was passed in his favour in 1854-55, so as to make the case of *Tárachand Pirchand* v. *Lakshman Bhavani* [5] applicable. His house was burned down some years ago, and he says the deed

(1) 5 Bom. H. C. Rep., 159, A. C. J. (3) I. L. R., 4 Bom., 89.
(2) Printed Judgments for 1874, p. 18. (4) 10 Moo. Ind. Ap. at p. 160.
(5) I. L. R., 1 Bom., 91.

1884

RÁMCHANDRA APÁJI v. BÁLÁJI BHAURÁV.

perished along with other papers. We are thus left to the facts that Rámchandra has been in possession since 1854-55, apparently as owner, that he says he is owner, and that the plaintiff, on the contrary, says he is but a mortgagee, and has admitted that he is so. According to section 110 of the Evidence Act possession is *primâ-facie* evidence of a complete title; any one who would oust the possessor must establish a right to do so; and possession unexplained, held for twelve years, would, according to *Sambhubhái Karsandás* v. *Shivláldás Sadáshivdás Desái*[1], itself constitute a complete title not qualified by an assertion of the holder that he purchased from this or that person. The assertion of ownership at all implies some lawful acquisition of title, and the effect of possession as owner cannot be impaired by the surplus statement that the holder acquired by the mode of acquisition most serviceable to a holder for a shorter period. Here the defendant Rámchandra has held undoubtedly for about thirty years, and in such a case any one who after the lapse of so long a time comes forward seeking to make him a mere mortgagee must, according to *Seváji Vijaya Raghunadha Valoji Kristnan Gopalar* v. *Chinna Nayana Chetti* [2], prove his own right as mortgagor clearly and indefeasibly. Such statements as have been made in this case fall far short of satisfying this test. They fail to establish any particular mortgage at all, and are not of such a kind that, showing a definable or distinguishable mortgage to have been executed, they throw on the mortgagee the *onus* of proving what the terms of it were and his right under it to retain the property until he is paid off. No doubt a mortgagor, who has no document of acknowledgment from a mortgagee, may suffer from the difficulty of proving his title of fifty years ago; but, on the other hand, the owner of property is not to be deprived of it on mere vague intangible statements about a mortgage for which no one could be effectively brought to book in the event of their being proved false. In such cases the law leans in favour of possession and an apparent right exercised for many years. It requires the person, who comes in to redeem on his own terms, to make out a clear case, to succeed by the strength of the title he sets up. It cannot be said that any such case has

[1] I. L. R., 4 Bom., 89. [2] 10 Moo. I. A., 160.

been made out by the plaintiff in the present instance, and we must, in consequence, reverse the decree of the Subordinate Judge in appeal, and restore that of the Court of first instance, with costs throughout on the respondent.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

RA'MCHANDRA KOLATKAR (ORIGINAL DEFENDANT), APPELLANT, *v.* MA'HA'DA'JI KOLATKAR (ORIGINAL PLAINTIFF), RESPONDENT.* 1884 *September* 22.

Mortgage—Sale by mortgagor of part of mortgaged property pending redemption suit—Sale by mortgagor of rest of mortgaged property after decree for redemption—Application by purchasers for execution of decree—Subsequent suit for redemption by one purchaser—Sale pendente lite.

One Moro sued the defendant Rámchandra for partition. The defendant pleaded a prior partition, and alleged that the property, which Moro now sued to recover, had been mortgaged by Moro to him (the defendant).

Pending the suit, Moro sold to the plaintiff a portion of the property claimed from the defendant. Subsequently to this sale a decree was passed in the suit, by which it was declared that the mortgage alleged by the defendant had been proved, and that Moro should redeem within six months from the date of the decree. Subsequently to this decree, *viz.*, on 25th November, 1879, Moro sold the remainder of the mortgaged property to one Hari Sakhárám.

The two purchasers (*viz.*, the plaintiff and Hari Sakhárám) then made a joint application for execution of the decree for redemption. The Subordinate Judge held as to the plaintiff, that the plaintiff, having purchased *pendente lite*, and having become Moro's assignee prior to the decree, was not entitled to come in under section 232 of the Civil Procedure Code (Act X of 1877) to get the decree enforced, and on 6th March, 1880, an order was made that Hari Sakhárám should redeem the whole property on payment of Rs. 100 and costs.

Hari Sakhárám subsequently sold his interest to the mortgagee Rámchandra.

In 1880 the plaintiff brought the present suit for redemption against Moro (the mortgagor) and the defendant Rámchandra (the mortgagee), alleging *(inter alia)* that Moro having sold the property had not sought to execute the former decree for redemption.

The defendant Rámchandra in his written statement alleged that the sale by Moro to the plaintiff was fraudulent; that the plaintiff as purchaser from Moro had not applied to be made a party to the former suit; that Moro having failed to redeem as ordered by the said decree within the period specified, neither he nor the plaintiff was now entitled to sue.

* Second Appeal, No. 89 of 1883.