1888.

ANUPCHAND HEMCHAND v. CHAMPSI UGERCHAND.

void for want of registration under Act 53, Geo. III, c. 141. In *Grizewood* v. *Blane*(1), where two contracts in form for the sale and purchase of shares in certain railway companies to be delivered by a certain date were declared on, evidence was admitted in order to prove that the transaction amounted to gambling; that at the time of entering into the contracts neither party meant to sell or purchase the shares; and in *Thacker* v. *Hardy*(2), where the case was much discussed, no doubt was thrown on the admissibility of such evidence, although the Court thought that the jury were probably wrong in their conclusion. Lastly, in *Magan lál Hemchand* v. *Manchhábái Kalliánchand*(3), where the contract was in force for the sale of a share in the Mazagon Company, the case was remanded by the Court of appeal for trial on the issue "whether the contract was a wagering, with liberty to both parties to produce evidence." The effect of proviso I to section 92 does not appear to have been considered, at any rate from the above point of view, in *Juggernauth Sew Bux* v. *Rám Dyál*(4). We must, therefore, answer the first question in the affirmative, and remand the case to the Small Cause Court for the purpose of taking evidence.

Attorney for the defendant—Mr. *E. Wilkin.*

(1) 11 C. B., 526.
(2) 4 Q. B. Div., 685.
(3) 3 Bom. H., C. Rep., 79, O. C. J.
(4) I. L. R., 9 Calc., 791.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

KHUSHA'L PA'NA'CHAND, (ORIGINAL DEFENDANT), APPELLANT, *v.* BHIMA'BA'I, (ORIGINAL PLAINTIFF), RESPONDENT.*

1886. *August* 9.

Decree—Execution—Sale in execution—Certificate of sale—Confirmation of sale, effect of—Title of auction-purchaser without certificate of sale.

The plaintiff as an agriculturist sued the defendant, to redeem certain land mortgaged to him with possession by her deceased husband. The defendant (the mortgagee) pleaded that he had bought the mortgagor's interest in the property at an auction-sale held in execution of a decree obtained against the mortgagor (the plaintiff's husband), and that, therefore, the right to redeem was gone. The defendant was, however, unable to produce a certificate of sale, and the Subordinate Judge held, therefore, that he had failed to prove his title, and ac-

* Appeal, No. 5 of 1886, from order.

1886.

KHUSHÁL PÁNÁCHAND v. BHIMÁBÁI.

ordingly directed that the mortgage account should be taken under the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant afterwards found his sale-certificate, and obtained a review of the above order, but on review the Subordinate Judge confirmed his decision, holding that as the sale-certificate was unregistered it could not be received in evidence. The defendant then obtained a fresh certificate, registered it, and renewed his application to the Subordinate Judge, who reversed his previous order, and rejected the plaintiff's claim. The plaintiff appealed to the District Judge, who reversed the lower Court's order and remanded the case. On appeal by the defendant to the High Court,

Held, that the order of the District Judge should be discharged. A sale certificate was not necessary for the purpose of establishing the defendant's title to the property as against the plaintiff. Where property has been sold in execution of a decree, a party to the suit in which the decree has been passed, or his representative, cannot, after the sale has been confirmed, dispute the title of the purchaser at the sale. The order confirming the sale completes the title of the latter as against the former.

APPEAL from an order by E. T. Candy, Acting District Judge of Poona.

The plaintiff in this case sued as an agriculturist to redeem certain property mortgaged, with possession, by her deceased husband to the defendant Khushál.

The defendant, (the mortgagee), pleaded that he had bought the interest of the mortgagor, (*i. e.* the plaintiff's husband), in the property at an auction-sale held in execution of a decree passed against him, and that, therefore, the right to redeem was gone. The defendant was, however, unable to produce a certificate of sale, and the Subordinate Judge held, therefore, that he had failed to prove his title, and accordingly directed that the mortgage account should be taken.

The defendant having subsequently found his sale-certificate, applied on the 24th June, 1884, for a review of the Subordinate Judge's decision. His application for review was granted on the 2nd July, 1884. On review, however, the Subordinate Judge confirmed his decision, holding that as the defendant's sale certificate was not registered, it could not be admitted in evidence.

On the 7th October following, the defendant made another application for review, on the ground that since the last order he had obtained a fresh certificate, and got it registered. The Subordinate Judge granted the application, and on production of the

1886.

KHUSHÁL PÁNÁCHAND v. BHIMÁBÁI.

certificate reversed his former order, and rejected the plaintiff's claim.

The plaintiff appealed to the District Judge, who reversed the lower Court's decision, and remanded the case to be tried on the merits.

From this order of remand the defendant preferred an appeal to the High Court.

Inverarity (*Ganesh Rámchandra Kirloskar* with him) for the appellants:—The defendant, as a purchaser at a Court-sale, had a good title without the certificate. Independently of the certificate, the sale can be proved. As soon as the sale is confirmed, the purchaser gets a good title—*Ráj Kishen Mookerjee* v. *Rádhá Madhub*(1); *Shivrám Náráyan* v. *Rávji Sakhárám*(2). The defendant has already been in possession, and his title is good as against the plaintiff, who has a mere equitable right.

By section 316 of the Civil Procedure Code (Act XIV of 1882) the vesting of the title is quite independent of the certificate. The confirmation of the sale completes the title. As against the plaintiff the title of the defendant vested in 1876. The plaintiff cannot now redeem. The Subordinate Judge's decision rejecting the plaintiff's suit was right.

Mahádev Bháskar Chaubal for the respondent:—The question before the District Judge was not whether a title had vested in the defendant, or the production of certificate was necessary. He had to determine whether the plaintiff could redeem, the lower Court having disallowed the right. The order of the Subordinate Judge was treated as an order for review, and the District Judge had merely to decide whether such an order could be made. If it was regarded as one for review, the plaintiff ought to have been allowed to give evidence, or to dispute the evidence given in by the defendant. There being negligence on the part of the defendant to register his first certificate, the Court should not grant him another: see *Lálbhái Lakhmidás* v. *Navál Kamáludin*(3). No other evidence but the certificate is admissible—*Harkisandás Nárandás* v. *Bái Ichha*(4); *Padu Malhári* v. *Rakhmáji*(5).

(1) 21 Calc. W. R. Civ. Rul., 349.
(2) I. L. R., 7 Bom., 254.
(3) 12 Bom. H. C. Rep., 247.
(4) I. L. R., 4 Bom., 155.
(5) 10 Bom. H. C. Rep., 435.

1886.

KHUSHÁL PÁNÁCHAND v. BHIMÁBÁI.

SARGENT, C. J.:—The plaintiff in this case sued to redeem certain property mortgaged by her deceased husband, Annáji, to one Khushál. The defendant pleaded that the plaintiff was not an agriculturist, and that she had no right to redeem the mortgage, as her husband's interest had been bought by him at an auction-sale, in execution of a decree obtained by one Ladháji against her husband. The Subordinate Judge found the plaintiff was an agriculturist, and that the defendant, not having a certificate of sale, had failed to prove his title, and directed a commission to take the mortgage accounts.

On the 24th June, 1884, the defendant applied for a review of the judgment on the second issue, on the ground that he had since discovered his certificate. This was granted by the Subordinate Judge on the 2nd July, 1884; but, on review, judgment on the issue was confirmed, the Court holding that as the certificate produced was unregistered, it could not be given in evidence.

On the 7th October the defendant made another application for review of the judgment passed on the second issue, on the ground that he had since, on the 19th September, 1884, obtained a fresh certificate of sale and had it registered. The Subordinate Judge admitted the application; and, on review, reversed the former order, and rejected the plaintiff's claim.

On appeal, the District Judge reversed the decree and remanded the case for a decision on the merits. The grounds of his decision are that the review ought not to have been admitted by the Subordinate Judge, and that he ought not to have reversed his former order on the ground urged for the defendant, that since that order was passed, the title to the equity of redemption had become vested in him by purchase.

It was contended by Mr. Inverarity for the defendant that the proceedings before the Subordinate Judge, regarded as proceedings in review, were irregular in form and should be disregarded, and that the application of 7th October should be treated as one simply for the admission of fresh evidence before the final decree was passed. The objection to the form of those proceedings is, in our opinion, of far too technical a character to be allowed. It is true that the applications of 24th June, 1884, and 7th

October, 1884, were, in terms, for a review of the judgment passed on the second issue; but in substance they sought a review of the order which admittedly was made by the Subordinate Judge (although it is said no formal order was drawn up) for a commission to take the mortgage accounts, which indeed was the necessary consequence of the Subordinate Judge's finding on the second issue. Moreover, as long as the order remained in force the fresh evidence would be irrelevant.

As to the remand order now under appeal, we agree with the ruling of the Calcutta Court in *Noimollah Pramanick* v. *Grish Náráin Moonshee* (1) that all this Court can do is to take the facts as found by the District Judge and to say whether, upon those facts, he was wrong in point of law in remanding the case.

In the present case, no error of law has been suggested in the decision of the District Judge rejecting the application for review. If, therefore, the production of a registered certificate was necessary, in point of law, to establish the defendat's plea to the plaintiff's right to redeem, the lower Appellate Court was right in remanding the case.

In *Padu Malhári* v. *Rakhmái* (2), where the plaintiff sought to recover possession, it was held, under the Code of Civil Procedure of 1859, that the transfer of property to the auction-purchaser was not complete until the certificate was granted; secondly, that, unless it was registered, it could not be given in evidence; and thirdly, that no other evidence was admissible to prove the plaintiff's title. That decision has since been followed in this Court in all cases in which the plaintiff is suing in ejectment to obtain possession from a third person who was not a party to the suit. However, in *Krishnáji Rávji* v. *Ganesh Bápuji* (3), where the plaintiff, who had purchased from a purchaser at an auction-sale, sought to redeem, Westropp, C. J., said: "This suit for redemption is of an equitable nature. Equitably the plaintiff and, before the conveyance to him, Yashwant Lingshet, were entitled to redeem. They had successively purchased and paid for the equity of redemption, although the certificate of

(1) I. L. R., 8 Calc., 674. (2) 10 Bom. H. C. Rep., 435.
(3) I. L. R., 6 Bom., 139, at p. 142.

1885.

KHUSHÁL PÁNÁCHAND v. BHIMÁBÁI.

sale was not issued until after this suit had begun. It is quite true that a purchaser at a judicial sale is not, strictly speaking, entitled to possession until a certificate of sale has been granted to him; but, as a matter of fact, he not unfrequently is put into possession after the confirmation of the sale and before the issuing of the certificate; and, as will be seen by the observations in *Tukárám* v. *Satváji* (1), it is exceedingly doubtful that he could be ousted merely for want of the certificate. Sir R. Couch, C. J., was satisfied with proof of the order confirming a sale where the certificate of sale was unregistered, and, therefore, inadmissible in evidence—*Ráj Kishen Mookerjee* v. *Radha Madhub Holdar* (2)."

These remarks show that the late Chief Justice considered that, under the Civil Procedure Code of 1859, the purchaser at a judicial sale, after confirmation of the sale, acquired an equitable title, which, although not completed by the grant of a certificate, was one which the Court, at any rate, would not allow to be disturbed. In *Raj Kishen Mookerjee* v. *Radha Madhub Holdar* (3), Sir R. Couch says: "There was an order confirming the sale, which order would relate back to the time of the sale; the sale would be confirmed as from the date when it was made. And although the certificate of the sale might be necessary for the purchaser, if he was seeking to establish his title against other persons, yet without any certificate the defendant, the mortgagor in that suit, (in which the property was purchased), and the plaintiff in the present suit, (who had acquired the title of the mortgagor), would be bound by the proceedings, and there would be a good title against them." In other words, where the question is between a party to the suit under execution and the purchaser at the auction-sale, the former cannot, after confirmation of the sale, dispute the latter's title. The order confirming the sale would complete the title as against him. The plaintiff here represents the interest of her husband, who was the defendant in the suit in execution of which the present defendant acquired his title. The defendant is, moreover, lawfully in possession (having been so originally as mortgagee), and is resisting an equitable right. The circumstances are thus on

(1) I. L. R., 5 Bom., 207. (2) 21 Calc. W. R. Civ. Rul., 349.
(3) 21 Calc. W. R Civ. Rul., at p. 351.

all fours with those of *Shivrám Nárayan* v. *Rávji Sakhárám* [1] where this Court, following the decision of Couch, C. J., held that the defendant had a good title against the plaintiff without the aid of a certificate.

1888.

KHUSHÁL PÁNÁCHÁND v. BHIMÁBHÁI.

We must, therefore, discharge the order of the District Judge, and send back the case for a fresh decision, having regard to the above remarks. Costs of this appeal to follow the result.

[1] I. L. R., 7 Bom., 254.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

FAKI ISMÁIL VALAD FAKI ALI SHILOTRI, (ORIGINAL DEFENDANT), APPELLANT, *v.* MAHOMED ISMÁIL VALAD MAHOMED IBRA'HIM MAKBA, (ORIGINAL PLAINTIFF), RESPONDENT.*

1887. *September* 6.

Khot—Managing khot's right to create tenancies—Maphi istáva lands—Suti lands—Sanad—Construction—Fraud.

A managing *khot* is entitled, without any express authorization, to create tenancies in land even though the reversionary interest in it is vested in the person whose lessee he is. If such a *khot* himself takes up land, he can do so consistently with the conditions of the *khoti* tenure; for a *khot*, as regards lands in his private occupation, may be a tenant to himself *quâ khot*.

In 1832 the British Government granted to the plaintiff's father, Mahomed Ibráhim Makba, the village of Ransai on *khoti* tenure by a *sanad* which provided *(inter alia)* as follows:—

1. That the whole of the land lying waste in the village in the year 1830-31 was granted as *inám*.

2. That, exclusive of this *inám* land, all the rest of the village was granted on *khoti* tenure on certain conditions and stipulations set forth in twelve clauses, the chief of which were the following:—

Clause 1st provided that the *khot* should annually pay to Government a fixed sum of Rs. 249 2as. 35rs.

Clause 7th provided that the *khot* should allow the lands, which had been granted on *máphi istáva* tenure to certain *kowldárs* before the date of the *sanad*, to continue in their possession; that he should every year recover from them the Government dues and pay the same over to Government in addition to the amount stipulated with him on account of the *khotship*.

Clause 9th provided that the holders of the *suti* lands in the village were the owners of those lands. Should a new survey be made and a new assessment

* Appeal No. 87 of 1884.