APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

1896. *February* 17.

PATEL RANCHOD MORAR (ORIGINAL DEFENDANT), APPELLANT, *v.* BHIKABHAI DEVIDAS (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Change of name in Government records—Mortgage or sale—Subsequent agreement to retransfer land in Government records on payment of debt—Document creating a right in land—Registration—Registration Act III of 1877, *Sec.* 17.

In 1877 the plaintiff being indebted to the defendant transferred certain land to the defendant's name in the Government records. In July, 1879, the defendant executed the following document to the plaintiff reciting the previous transfer and agreeing to retransfer the land to the plaintiff's name on the 12th July, 1880, if the debt which would then be due should be paid off:—

"In the village of Behrampur is your (plaintiff's) field, Survey No. 146, measuring 5 acres 3 gunthas, bearing assessment Rs. 16. You (plaintiff) have got it transferred to our name. That field, therefore, stands in our (defendant's) name in the Government records. You owe a debt to us. On account of that debt you have transferred it to our name. * * * *. The field shall be retransferred to your name when you repay the said debt to me. You have cultivated the field for the produce of Samvat 1936, and a lease in respect thereof you have this day passed to me. And a stamp paper was purchased at the time of the transfer for the execution of this agreement, but no agreement was then passed. This agreement is, therefore, this day passed to you when the lease is executed. And you owe me (a) debt bearing interest. I will pay out of my pocket the expenses to be incurred at present in cultivating the field. The debt due to me would in all amount to Rs. 100. If you repay all these rupees due to me till the Vaishákh Shudh 6th, Samvat 1936, I will take them and retransfer the field to your name. And if you fail to pay (them) till Vaishákh Shudh 4th, youwill have no claim whatever to the said field. I shall not take the rupees after the 4th (chauth), nor shall I give (or transfer) the field to you ..... I shall lease the field to any one I like without keeping any claim of you as regards cultivation, manure and hedge. You have no claim or right whatever....."

This document was not registered. The plaintiff brought this suit to redeem the land, alleging that it had been mortgaged to the defendant and that the debt had been paid off. The defendant contended that the transaction in 1877 was not a mortgage but a sale of the land to him, and that the document of July, 1879, was an agreement to resell it to the plaintiff, which was not admissible in evidence as it was not registered.

Held, upon the evidence, that the transaction in 1877 was a mortgage to the defendant and not a sale.

Held, also, that the document of the 11th July, 1879, did not require registration. It created no rights in land, but only amounted to a personal covenant to effect a mutation of names in the Government books when the debt due by the plaintiff was satisfied.

* Second Appeal, No. 313 of 1895.

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SECOND appeal from the decision of M. P. Khareghat, Joint Judge of Ahmedadad.

Suit for redemption and possession.

The plaintiff alleged that being indebted to the defendant, he mortgaged his field to the defendant and transferred it to his name in the Government records in July, 1877.

On the 11th July, 1879, the debt being then still due by the plaintiff, the defendant executed a document agreeing to retransfer the land to the plaintiff's name in Vaishákh Shudh 6th, Samvat 1936 (12th July, 1880) if the debt should be then paid off. The document was in the following terms and was not registered :—

"In the village of Behrámpur is your (plaintiff's) field, Survey No. 146, measuring 5 acres 3 gunthas, bearing assessment Rs. 16. You (plaintiff) have got it transferred to our name. That field, therefore, stands in our (defendant's) name in the Government records. You owe a debt to us. On account of that debt you have transferred it to our name * * * * * *. The field shall be retransferred to your name when you repay the said debt to me. You have cultivated the field for the produce of Samvat 1936, and a lease in respect thereof you have this day passed to me. And a stamp paper was purchased at the time of the transfer for the execution of this agreement, but no agreement was then passed. This agreement is, therefore, this day passed to you when the lease is executed. And you owe me (a) debt bearing interest. I will pay out of my own pocket the expenses to be incurred at present in cultivating the field. The debt due to me would in all amount to Rs. 100. If you repay all these rupees due to me till the Vaishákh Shudh 6th, Samvat 1936, I will take them and retransfer the field to your name. And if you fail to pay (them) till Vaishakh Shudh 4th, you will have no claim whatever to the said field. I shall not take the rupees after the 4th (chauth), nor shall I give (or transfer) the field to you ..... I shall lease the field to any one I like, without keeping any claim of you as regards cultivation, manure and hedge. You have no claim or right whatever ....."

The plaintiff complained that the debt had been paid, but that the defendant had not retransferred the land.

The defendant contended that the transaction in July, 1877, was not a mortgage but a sale, and he denied the execution of the above document of 11th July, 1879, and objected to its admission in evidence as it was not registered.

The Subordinate Judge of Ahmedabad dismissed the plaintiff's suit.

In appeal, the Joint Judge of Ahmedabad reversed the decree and ordered that plaintiff should recover the land on paying Rs. 100 within six months to the defendant. He held that the

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above document was a personal covenant to retransfer the land to the plaintiff's name and did not require registration.

The defendant appealed to the High Court.

Goverdhanram Madhavram for the appellant (defendant):—We contend that in 1877 the land in question was not mortgaged, but sold by the plaintiff to the defendant, and that the document (Exhibit 44) of the 11th July, 1879, is an agreement to sell it back again to the plaintiff. There is no document showing a mortgage in 1877, and this document does not recite any. The fact of the sale in 1877 is corroborated by the change of names in the Government records. By that sale the original debt due to the defendant was extinguished. A suit on the document of 1879 is now in any case barred by limitation, and, moreover, this document is not registered and is not admissible in evidence.

He cited the following cases:—*Ranu* v. *Ramabai*(1); *Tillakchand* v. *Jitamal*(2); *Tarachand* v. *Lakshman*(3); *Subhabhat* v. *Vasudevbhat*(4); *Bapuji* v. *Senavaraji*(5); *Ayyavayyar* v. *Rahimansa*(6); *Bhagwan Sahai* v. *Bhagwan Din*(7); *Vani* v. *Bani*(8); *Baksu* v. *Govinda*(9); *Gopal* v. *Ganpatrav*(10); *Lakshmamma* v. *Kameswara*(11).

M. K. Mehta for the respondent:—It is clear that there was a mortgage in 1877. The document of 1879 does not need registration. It does not create or modify any right in the property.

He cited *Burjorji* v. *Muncherji*(12); *Rama* v. *Baburao*(13).

RANADE, J.:—There are only two points raised in this appeal: one of these relates to the construction to be placed on Exhibit 44, and the other relates to the necessity or otherwise of its registration. Taking the latter point first, we find that the Court of first instance was of opinion that Exhibit 44 was an agreement to reconvey property valued at more than Rs. 100, and as such was compulsorily registrable under sections 17 and

(1) 6 Bom. H. C. Rep., 265, A. C. J.
(2) 10 Bom. H. C. Rep., 206.
(3) I. L. R., 1 Bom., 91.
(4) I. L. R., 2 Bom., 113.
(5) I. L. R., 2 Bom., 231.
(6) I. L. R., 14 Mad., 170.
(7) I. L. R., 12 All., 387.
(8) I. L. R., 20 Bom., 553.
(9) I. L. R., 4 Bom., 594.
(10) P. J., 1893, p. 95.
(11) I. L. R., 13 Mad., 281.
(12) I. L. R., 5 Bom., 143.
(13) P. J., 1874, p. 18.

49 of Act III of 1877. The Joint Judge in appeal held that it created no rights in land, but only amounted to a personal covenant to effect a mutation of names in the Government books when the debt was satisfied, and as such did not require registration. We are inclined to accept this latter view as correct.

The object of the instrument was evidently not to create or extinguish or modify rights in immoveable property. As will be seen from the translation of the document in the judgments of the lower Courts, the transfer of the kháta in appellant's name had been effected two years before. It was at that time arranged between the parties that the appellant should pass an agreement recognizing the true nature of this transfer of kháta, namely, that it was not intended to be an absolute transfer. As no such agreement was then executed, the appellant agreed on certain conditions to effect the change of the kháta into the plaintiff's name after the debt was satisfied. The instrument was intended to serve as evidence, in the respondent's hand, of this agreement of the appellant. The debt itself was not Rs. 100 at the time. It was expected with interest and further advances to amount to Rs. 100. By itself Exhibit 44 created no rights in land; it only recited the original understanding, and it was not produced in this case to prove any such right. The lower Court of appeal has, therefore, very properly held that Exhibit 44 was admissible in evidence without registration—*Raju* v. *Krishnarav*[1]; *Vani* v. *Bani*[2]; *Burjorji* v. *Muncherji*[3]; *Sakharam* v. *Madan*[4]; *Chunilal* v. *Bomanji*[5].

The next point for consideration is what was the true character of the transaction which was recited in this agreement. Both the lower Courts have held that when the kháta of the land was transferred, the parties intended not to effect a sale of the property, but only a mortgage for the security of debts due by the transferror to the transferree. The fact that a debt was due by the one to the other is admitted by the appellant. It was contended, however, that this debt was the consideration for

(1) I. L. R., 2 Bom., 273.
(2) I. L. R., 20 Bom., 553.
(3) I. L. R., 5 Bom., 143.
(4) *Ibid.*, 232.
(5) I. L. R., 7 Bom., 310.

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a sale out and out of the transferror's interest. There seems, however, in that case to have been no occasion for the subsequent personal covenant to reconvey on satisfaction of the debt at a given time. The translation furnished in the judgment of the first Court clearly sets forth the most important recital in the agreement, namely, that the debt was to carry interest till the time fixed for repayment. This condition clearly shows that the transfer of kháta was not intended to be in satisfaction of the pre-existing debt, which still continued to be a debt, and to carry interest also. The sum of Rs. 100 was fixed as the expected total of principal and interest and further advances. If the transfer of kháta in the first instance did not thus operate to extinguish the debt, it is clear that the subsequent default of the transferror in making payment at the time fixed could not have that effect—*Baksu* v. *Govinda*(1). All the indications which have been recognized as distinguishing a mortgage from a sale transaction are present here. The existence of the debt, the agreement to pay interest on it, the continuance of the former owner in possession as tenant, the agreement to repay the debt with interest at a given time, and the agreement to reconvey, all go to show that both the lower Courts have properly construed the instrument and the transaction recited therein—*Abdulbhai* v. *Kashi*(2). The cases of *Subhabhat* v. *Vasudevbhat*(3); *Bapuji* v. *Senavaraji*(4), *Bhagwan Sahai* v. *Bhagwan Din*(5), *Ayyavayyar* v. *Rahimansa* (6) are clearly distinguishable because there were sale-deeds of absolute conveyance in all these cases coupled with a covenant for re-purchase. There was no reservation of any liability for debt, no agreement to pay interest, and to repay the debt as in this case. We, accordingly, dismiss the appeal, and confirm the decree. Costs on appellant.

Decree confirmed.

(1) I. L. R., 4 Bom., 594.
(2) I. L. R., 11 Bom., 462.
(3) I. L. R., 2 Bom., 113.
(4) I. L. R., 2 Bom., 231.
(5) I. L. R., 12 All., 387.
(6) I. L. R., 14 Mad., 170.