1896.

GANGADHAR v. DAMODAR.

when he entered into the agreement, accepted as sufficient, namely, the amount to be paid by the Executive Engineer less 10 per cent., and we see no reason why he should recover more. In this view Rs. 276-10-9 must be deducted from the Rs. 431-14-5 decreed by the District Judge, and the plaintiff will have a decree for the balance Rs. 155-3-8.

We allow the appeal, and, disallowing the cross-objections, set aside the decree of the District Judge and restore that of the Subordinate Judge with costs of the appeals both in the lower appellate Court and in this Court on the plaintiff.

Decree reversed.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

1896. *January* 16.

VASUDEO BHIKAJI JOSHI (ORIGINAL DEFENDANT No. 11), APPELLANT, *v.* BHAU LAKSHMAN RAVUT AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS: BHAU LAKSHMAN RAVUT AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* RAMCHANDRA BHIKAJI JOSHI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Sale—Conditions for repurchase.

The plaintiffs sued to redeem an alleged mortgage made in 1823 by their ancestor to the ancestor of the defendant. The alleged mortgage recited a previous mortgage under which the mortgagee Gopal Gokhale was in possession, and it stated that a sale had been contemplated, but the parties could not agree as to price, but that they had now settled it at Rs. 125 and the amount due on the mortgage at Rs. 200, and that the following arrangement was come to, *viz.*, that if within four years the mortgagor paid Rs. 125 with interest, he should get back the land; if not, that the land should be the absolute property of Gokhale.

Held, that this was not a mortgage but a sale. It was an agreement which put an end to the previously existing mortgage. A mere stipulation for repurchase does not make a transaction a mortgage. To make a mortgage there must be a debt, and here there was no debt, nor was the property here conveyed as security.

Cross second appeals from the decision of Ráo Bahádur V. V. Wagle, First Class Subordinate Judge of Ratnágiri with appellate powers, reversing the decree of Ráo Sáheb V. K. Sovani, Joint Subordinate Judge of Rájápur.

* Cross Second Appeals, Nos. 103 and 253 of 1895.

Suit for redemption. The plaintiff alleged that in 1823 the lands in question were mortgaged by their ancestors Krishnaji and Arjun to the first defendant's father Gopal Gokhale and that the mortgage-debt was now paid off.

At the trial the original of the alleged mortgage was not produced by the mortgagee, and the plaintiff was allowed to put in a certified copy. The following is a translation :—

" (Sale-deed)

" Shri (*i. e.* Prosperity, &c.).

" Peace—the lunar date the 7th of Shrávan Sh udh of the Shake year 1745 in the cyclical year named Subhánu (13th August, 1823). On that day (this) deed of sale, *i. e.*, miráspatra, is given in writing to Rájeshri Gopal Anant Gokhale Murukar Mahájan (of) majre Holivdale Karyat Mithgavne, by Krishnaji Naik and Arjunji Naik bin Harji Naik Ravut of majre Mádkhán Karyat aforesaid. I give this deed of sale, *i. e.*, miráspatra, in writing as follows :—There are my thikáns at the above-mentioned majre (*i. e.*, village) which have continued uninterruptedly. Out of them my own mirási field, Kagur field, together with salt batty ground, and together with 'Temba field' situate at majre Kuveshi were formerly given (in mortgage) in the Shake year 1739 (1817-18 A. D.) by a mortgage-deed for Rs. (170) one hundred and seventy given in writing in the names of yourself and Lakshman Narayan Desai, according to which you have been carrying on the vahivát (*i. e.*, management) thereof, and as mentioned in the former deed a miráspatra (*i. e.*, a title-deed of mirás) was to have been given in writing ; but as you and myself could not come to an agreement as to the price, the same was not given in writing. Now by your and my consent the price has been settled, and I give (a letter is missing) in writing, the particulars whereof are as follows :—

"1. The above amount due to you (letters missing) and the balance settled on account of interest up to this day is (Rs.) 30, making together Rs. 200, which is the amount payable (to you). Out of them the price (letters missing) (made) payable on the (mortgage) deed is (125) one hundred and twenty-five rupees. If I pay the same within five years, I will pay your amount with interest at the rate of three-quarters of a rupee (per cent. per month), and redeem the field. Therein (that is, in the account) you are to give me credit for whatever produce the field may yield ; you are to give me credit (for the produce) after deducting the Government (assessment). If I fail to pay the amount within five years, then as mentioned above the fields have (will) become your mirás (*i. e.*, property by mirási rights).

" 75. The remaining seventy-five rupees due to you are made payable on personal security. I will pay these within one year as moneys carrying no interest, or I will give you my own (field called) 'Khavletil shet' itself.

" Such is the agreement given in writing according to which I will act. I will not fail to do so. The handwriting of Atmaram Bahirav Karkare."

1896.

VASUDEO v. BHAU.

The Subordinate Judge dismissed the suit, holding that the property in dispute was not mortgaged and that the claim was time-barred.

On appeal by the plaintiffs, the Judge reversed the decree and passed a decree directing the plaintiffs to redeem the lands on payment of Rs. 200 to defendants within six calendar months and in default to be foreclosed for ever.

Defendant No. 11 and the plaintiffs preferred cross second appeals.

Manekshah J. Taleyarkhan, for appellant (defendant) in Second Appeal No. 103 and respondent in Second Appeal No. 253 :—The certified copy is the only evidence of the alleged mortgage, and it cannot prove the transaction under section 90 of the Indian Evidence Act (I of 1872). A certified copy cannot prove the genuineness of the original document, though it would be a very good evidence of the contents thereof.

[FARRAN, C. J., referred to *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno*(1).]

We contend, however, that the transaction in dispute is a sale and not a mortgage, and that the plaintiff is not entitled to redeem —*Subhabhat* v. *Vasudevbhat*(2) and *Bapuji* v. *Senavaraji*(3).

Narayan V. Gokhale for respondents (plaintiffs) in Second Appeal No. 103 and appellants in Second Appeal No. 253 :—The defendant will not produce the original of the mortgage, and we are compelled to put in the certified copy which we obtained in the year 1882.

The construction put on the document by the Judge is correct. The transaction is a *gahán-lahán* mortgage. The document clearly mentions that, if the money be not paid in time, the transaction is to become mirás. This is a *gahán-lahán* condition, which cannot be given effect to. Further, the document stipulates that, after the expiration of the period of five years, the mortgage is to keep account of the profits. The transaction in *Subhabhat* v. *Vasudeobhat*(2) was a sale liable to be converted into a mortgage.

(1) I. L. R., 5 Cal., 886. (2) I. L. R., 2 Bom., 113.

(3) I. L. R., 2 Bom., 231.

The transaction in *Bapuji* v. *Senavaraji*[1] was an out-and-out sale. The clause in *Ramji* v. *Chinto*[2] was similar to the clause in the present document.

PARSONS, J.:—This suit was brought by plaintiffs to redeem an alleged mortgage of the year 1823 passed by an ancestor of the Ravuts (plaintiffs) to one Gokhale, whose rights were purchased in 1833 by the Maráthes through whom the appellant (defendant No. 11) claims.

It appears that the defendant No. 1 (a member of the Gokhale family) produced in the course of some criminal proceedings in 1882 the original deed of 1823, and the plaintiffs obtained a certified copy of it. This they now have filed as secondary evidence of the deed itself. They are entitled to do this, as the defendant No. 1 does not and will not produce the original.

It was, however, contended on behalf of the defendant No. 11 that the presumption to be drawn, under section 90 of the Evidence Act, as regards the genuineness of ancient documents should not be drawn in the case of this copy. The decision of Wilson, J., in the case of *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno*[3] is opposed to the argument, as also are some remarks in section 621 of Taylor on Evidence (8th Ed.) It is, however, unnecessary in the present case to elaborate the point. We have only to determine whether the plaintiffs have a right to redeem. They can only have that right if there is a mortgage still subsisting. The document is put forward by them as the mortgage and they are bound by its terms. It does not purport to be a mortgage at all but a sale-deed. It recites the fact of a previous mortgage in 1817-18 for Rs. 170 under which Gokhale was in possession, and it states that although a sale had been contemplated, it had not been effected, because the parties could not agree as to the price of the lands mortgaged. It goes on to say that now the price of the lands has been settled at Rs. 125 and the amount due under the mortgage at Rs. 200, and the following arrangement is come to. If within five years Ravut paid Rs. 125 with interest, he should have back the lands, Gokhale accounting

(1) I. L. R., 2 Bom., 231. (2) 1 Bom. H. C. Rep., 199.

(3) I. L. R., 5 Cal., 886.

1896.

VASUDEO v. BHAU.

for the profits; if he did not so pay, the lands should be the absolute property of Gokhale. The Rs. 75 balance were to be paid in one year; in default, another field was to be given to Gokhale.

It seems to us that by this agreement the parties put an end to the mortgage that was subsisting at its date and substituted for it the agreement in question. This latter agreement is not a mortgage. It extinguished the mortgage-debt, so that after its execution Gokhale could no longer have enforced payment of what was due to him. A mere stipulation for repurchase will not make a case one of mortgage. To make a mortgage there must be a debt, and here there was no debt. Moreover, the property was not conveyed to Gokhale as security for the payment of the Rs. 125, but it was to be his, unless that sum with interest was paid within five years. The sum of Rs. 125 was the actual value of the lands; it was a fair price for the absolute purchase, and we find that the parties carried out their agreement, for the money was not paid, and in 1888 the lands were transferred to Gokhale's name in the revenue books. We are unable to distinguish this case from the case of *Bhau* v. *Sidu*[1], which follows *Bapuji* v. *Senavaraji*[2].

We, therefore, reverse the decree of the lower appellate Court, and restore that of the Court of first instance, with costs on plaintiffs throughout.

Decree reversed.

(1) P. J., 1883, p. 258. (2) I. L. R., 2 Bom., 231.