1895.

HARISING v. BHA'USING.

The applicant preferred an appeal.

Mánekshán J. Taleyárkhán, for the appellant (applicant):—Our application should not have been dismissed without any inquiry. A widow is not bound to adopt till she chooses to do so. Under sections 3 and 4 of Regulation VIII of 1827 the Judge could not dismiss our application without inquiry.

There was no appearance for the opponent.

PARSONS, J.:—The District Judge had no authority to dismiss the application with costs and refer the applicant to a regular suit to establish the validity of the adoption. He was bound to investigate the case, following the procedure laid down in section 4 of Regulation VIII of 1827. We, therefore, reverse his order and remand the case for a legal inquiry. Costs to abide the result.

Order reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Parsons.

1895. *June* 19.

PADGAYA BIN NAGAYA, DECEASED, BY HIS SON AND HEIR, NAGAYA (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* BA'JI BA'BA'JI MOHOLKAR, DECEASED, BY HIS SON AND HEIR, GOVIND (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Sub-mortgage—Redemption—Suit by original mortgagor against mortgagee and sub-mortgagee—Death of mortgagee pending suit—Abatement—Parties—Civil Procedure Code (Act XIV of 1882), *Sec.* 368—*Practice—Procedure.*

Plaintiff sued to redeem a mortgage passed by his deceased father to defendant No. 1 and joined defendant No. 2 as being the sub-mortgagee of defendant No. 1 and in possession of the property. After suit defendant No. 1 died, and no steps were taken by the plaintiff within time to make his legal representatives parties. The suit was, however, allowed to be continued against defendant No. 2 and a redemption decree was passed in plaintiff's favour.

Held, on second appeal, that defendant No. 2 being the sub-mortgagee and not the assignee of defendant No. 1 on the death of the latter no cause of action survived to the plaintiff against defendant No. 2, and the suit abated under section 368 of the Civil Procedure Code (Act XIV of 1882).

* Second Appeal, No. 380 of 1893.

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PADGAYA v. BA'JI.

SECOND appeal from the decision of S. Tágore, District Judge of Sholápur, confirming the decree of Ráo Sáheb R. D. Páranjpe, Subordinate Judge of Sholápur.

Suit for redemption. The plaintiff's father (Báji Bábáji Moholkar) mortgaged certain property to the first defendant on the 21st October, 1828.

On the 21st January, 1856, the first defendant (the mortgagee) sub-mortgaged the property to defendant No. 2 for Rs. 1,600. The mortgage was in the following terms :—

"In all Rs. 1,600 of the Beláپur currency are due to you by me. In security for the whole amount due to you the very shop mentioned above in respect of Moholkars, situate at peth Mangalvar, kasba Sholápur, which has been in mortgage with me and which we had formerly mortgaged to you * * is mortgaged to you and now given into your *vahivat* in the very same manner in which it has been in your *vahivat* from former times. The terms in respect thereof are as follows :— Out of the Rs. 1,600 due to you as mentioned above, Rs. 1,300 are to bear no interest and the shop is to pay no rent. As to the remaining Rs. 300 I will continue to pay you interest thereon at the rate of one (1) per cent. per month. The time for the repayment of this (amount) is this :—Within five years from this day I will pay you the said (amount of) Rs. 1,600 and redeem the shop. If the amount remains (unpaid) after that time, then Rs. 800 out of the above-mentioned Rs. 1,600, that is, a moiety of that amount, is to bear no interest and the shop to pay no rent from that time. The interest on Rs. 800 is settled to be equal to the rent of the shop. As to the remaining amount made up of Rs. 800 and the interest on the Rs. 300 accrued due for the above-mentioned five years, I am to pay interest on the whole amount thus formed at the rate of 1 per cent. per month. A further term of five years is the time fixed for the payment thereof. In this manner I will pay off the said amount as agreed within ten years from this day and redeem the shop * * * After the lapse of the said fixed period I will pay you your amount in full when you may demand the same after making an account as agreed. If at the time of making the account it is found that the amount exceeds *dam-dupat*, even then I will not bring any objection in respect thereof, but will pay off as agreed above the amount including the interest accrued due and the expenses of repairs, &c., without raising any objection, and redeem the shop. Should I fail to pay the amount after the fixed period, I will pay you the amount by selling the above-mentioned shop. If the proceeds of the sale do not suffice to pay off your amount, you should take the proceeds of the sale of the shop, and as to the balance remaining due I will pay off the same. I will not plead *gahán tahán* until your amount is paid off. Neither I nor anybody else has any right to the shop. You should carry on the *vahivat* thereof in any manner you like with absolute authority by virtue of your right as mortgagee.

*

"In the same shop Krishnaráo Moholkar has a third share and Báji Bábáji Moholkar has two shares. Of these Krishnaráo Moholkar is represented here by nobody. Báji Bábáji Moholkar is here. As to this when the said persons pay the whole of

the said amount according to their respective shares on making an account thereof according to the agreement, you should receive the same and give to each his respective share with absolute authority without pleading the excuse of my absence. As to the rest of the agreement written above the same is confirmed."

In 1882 the plaintiff brought this suit to redeem the mortgage of 1828. In his plaint he stated that defendant No. 2 was in possession of the property as sub-mortgagee of defendant No. 1.

While this suit was pending defendant No. 1 died.

On the 20th June, 1891, the Subordinate Judge passed a decree for the plaintiff for redemption on payment of Rs. 1,448-10-8 to the second defendant within six months.

The second defendant appealed, and in appeal contended that the first defendant having died, and his legal representatives not having been entered on the record in time, the suit had abated.

The Judge over-ruled the defendant's contention and confirmed the decree. With reference to the question of abatement he said:—

"There is nothing to shew when Lakshman Mádhav, defendant No. 1, died, and oint was not taken in the Court below. Defendant No. 1 was merely joined as a formal party and did not appear to defend the suit. His mortgage might have been assigned to defendant No. 2, and the suit was allowed to proceed against him alone as the party in possession and solely interested. It is too late now to contend that the suit should be ordered to abate by reason of plaintiff's failure to revive it against the representatives of the deceased Lakshman."

The second defendant preferred a second appeal.

Inverarity (with *Náráyan G. Chandávarkar*) for the appellant (defendant No. 2):—The original mortgagee having died, the plaintiff has no cause of action against us. There is no privity between us and the plaintiff. He ought to have made the heirs of the original mortgagee parties to the suit. Not having done so, the suit must abate under section 368 of the Civil Procedure Code (XIV of 1882).

Macpherson (Acting Advocate General, with *Gangárám B. Rele*) for the respondent (plaintiff):—The heirs of the original mortgagees would have been necessary parties if the transaction of the 20th May, 1856, had been a sub-mortgage. We contend that it is not a sub-mortgage. The last clause in the document clearly shows that we are entitled to redeem the property direct from the

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second defendant. The transaction is, therefore, an assignment of mortgage and not a sub-mortgage. The heirs of the original mortgagee are, therefore, not necessary parties to the suit. See Coote on Mortgage, (5th Ed.), pp. 1086, 1161 and 1206.

PARSONS, J.:—The respondent (original plaintiff) brought this suit to redeem a mortgage passed by him to the defendant No. 1. He joined the appellant (original defendant No. 2) because he was a sub-mortgagee of the defendant No. 1 and in possession. After suit defendant No. 1 died, and as the respondent took no steps to join his legal representatives within the time allowed by law, the suit abated as against him; it was, however, allowed to be continued against the appellant notwithstanding his objection that the right to sue did not survive against him. The District Judge says on this point: "Defendant No. 1 was merely joined as a formal party; he did not appear to defend the suit. His mortgage might have been assigned to defendant No. 2, and the suit was allowed to proceed against him alone as the party in possession and solely interested. It is too late now to contend that the suit should be ordered to abate by reason of plaintiff's failure to revive it against the representative of the deceased Lakshman."

The same objection has been taken in this Court, and we are of opinion that it must prevail if the appellant (defendant No. 2) was the sub-mortgagee of the defendant No. 1, for in that case there would be no privity between him and the respondent, and the respondent would have no cause of action against him. On the death of the defendant No. 1 the right to sue the appellant (defendant No. 2) would not survive. The learned counsel for the respondent has admitted that this is so, and has sought to support the decree on the ground hinted at by the District Judge, *viz.*, that the appellant was the assignee of the defendant No. 1. We should be glad if we could adopt this view. In the face, however, of the deed itself (Exhibit 40) the contention is untenable. It is stated in several places in that deed that it is a mortgage, and that the shop is mortgaged. The amount for which it was passed is Rs. 1,600, the mortgage to the defendant No. 1 having been Rs. 301 only. It provides for payment of interest by the appellant to the defendant No. 1. It gives defendant No. 1 the

right of redemption and puts the appellant into possession "by virtue of his right as mortgagee." In every essential it is a deed of mortgage and not of assignment, and it is quite clear that by it defendant No. 1 did not make over his whole interest to the appellant.

We must, therefore, hold that the appellant was not the assignee, but the sub-mortgagee of defendant No. 1, and this being so on the death of defendant No. 1 no cause of action survived to the respondent as against the appellant, and the suit abated under section 368 of the Civil Procedure Code (Act XIV of 1882). We reverse the decree of the lower appellate Court, and order that the respondent's suit do abate and that he pay the appellant's costs throughout.

Decree reversed. Suit ordered to abate.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

VA'NI AND OTHERS (ORIGINAL DEFENDANTS NOS. 1—3), APPELLANTS, *v.* BA'NI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Registration Act (III of 1877), Sec. 17, Cls. (b) and (h)—Instrument creating a charge in the nature of a mortgage—Admissibility of documents compulsorily registrable—Evidence.

A *karárnáma* (agreement), dated 11th day of June, 1885, was passed by A. to B. to the following effect:—

"As my father Shivrám valad Keshav is dead, it has been arranged that I should succeed to his estate. . . . . Part of this estate at Vágoda, consisting of a house, fields, cattle and a cart, has been given into your possession for use and enjoyment. The reason thereof is that you have undertaken to pay Rs. 450 found due on an adjustment of *khátu* from my father to Ganpatdás Khusháldás. I am unable to pay off this debt; and so you have been put into possession of this property. I shall pass to you a sale-deed in respect of this property, and shall transfer the fields to your name from the year 1888-89."

Held, that the *karárnáma* required registration. It did not fall within the exception provided for by clause (*h*) of section 17 of the Registration Act (III of 1877). It was not a document which merely created a right to demand another document. It created as between the parties to it a charge in the nature of a mortgage. The document of itself declared a right, and the mention of an intention to execute a deed of sale made no difference.

* Second Appeal, No. 774 of 1893.