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severance. He had under the contract a right to enter on the land and within the space of two years cut such trees as within that period attained a certain size. The intention was that the trees should remain in the land for the benefit of the purchaser, and derive benefit from so remaining. Thus part of the subject-matter of the contract was an interest in land.

But though possibly there was here a contract for the sale of an interest in land within the meaning of section 4 of the Statute of Frauds, and though the subject-matter of the agreement may be within the definition of immoveable property in section 2 (5) of the General Clauses Act, 1868, it does not follow that the document in question is a "conveyance" or anything more than an agreement for sale. Under section 3 of the Transfer of Property Act, immoveable property does not include standing timber; and by section 4 the chapters and sections of the Act, which relate to contracts, shall be taken as part of the Indian Contract Act, 1872.

Here there was no sale of ascertained moveable property. There was a contract or agreement by which the purchaser was to be at liberty to cut and take such trees as might within two years attain a certain size. Such trees as he did not cut before the expiration of the period, remained the property of the vendor. In my opinion, the document was not a "conveyance," but an agreement for sale, and it is sufficiently stamped. I concur in answering the second question in the affirmative.

Order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

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MAHADEV (ORIGINAL PLAINTIFF), APPELLANT, v. MAHADU (ORIGINAL DEFENDANT), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), *Secs.* 44 *and* 56—*Agreement executed before a village conciliator—Agreement evidencing an intention to create a mortgage—Admissibility and validity of such agreement—Evidence.*

On the 1st December, 1891, defendant executed before a village conciliator a *kabuláyat* to the following effect:—

* Second Appeal, No. 57 of 1897.

"I admit Rs. 460 are due from me to the plaintiff (under a mortgage.) I also owe him Rs. 485 under a consent decree and Rs. 489 as a fresh advance, in all Rs. 1,434. I agree to pay on this sum interest at 13 annas per cent. per mensem. For the same I give in mortgage the property mentioned in the said decree, and also my house at Junnar. I will repay the said money in four years. If I fail, the property should be sold, and the money should be recovered therefrom; should the sale-proceeds fall short, I will personally pay the deficiency. I have already put the plaintiff in possession of the property herein mentioned . . . ."

The village conciliator forwarded this *kabuláyat* to the Subordinate Judge under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), but the Subordinate Judge refused to file it.

Thereupon the plaintiff brought the present suit for recovery of the mortgage-debt by sale of the property, or, in the alternative, for an order directing the defendant to execute a mortgage in terms of the *kabulayat*, and for a personal decree against the defendant for the amount due.

Held, that the *kabuláyat* did not of itself create a mortgage, but only evidenced the intention of the parties to create one. It did not, therefore, fall under section 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and was admissible in evidence to prove the contract entered into.

Held, also, that the plaintiff was entitled to a decree directing the defendant to execute a mortgage in terms of the *kabuláyat*.

SECOND appeal from the decision of Ráo Bahádur N. G. Phadake, Joint First Class Subordinate Judge, A. P., of Poona.

The plaintiff and defendant had money dealings with each other.

On the 1st December, 1891, the parties appeared before the village conciliator of Junnar, and a *kabuláyat* was passed by the defendant as follows:—

"I admit Rs. 460 are due from me to the plaintiff (under a mortgage). I also owe to the plaintiff Rs. 485 under a consent decree No. 103 of 1890, and Rs. 489 as a fresh advance, in all Rs. 1,434. On this sum I agree to pay 13 annas per cent. per mensem as interest. For the same I give in mortgage the property mentioned in the said decree and also my own house, which is situate in the town of Junnar. I will repay the said money in four years. Should I fail to repay the money in time, the undermentioned property should be sold, and this money together with interest thereon should be recovered therefrom. Should the sale-

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proceeds fall short, I will personally pay the deficit amicably

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"The said house and lands together with their appurtenances, being the property mentioned in the previous decree, are in the possession of the plaintiff with whom they are to continue. Moreover, I have given into the possession of the plaintiff the house which is newly given in mortgage now. As to the aforesaid money in cash which I ask for, the plaintiff has this day paid the same in cash to me. I have taken and received the same. To this the plaintiff has agreed."

The village conciliator, before whom the above *kabuláyat* was executed, forwarded it to the Subordinate Judge under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). But the Subordinate Judge under the orders of the Special Judge refused to file it.

Thereupon the plaintiff brought the present suit, praying for a declaration that the property was mortgaged to him and to recover the debt due with interest by sale of the property, or from the defendant personally, or, in the alternative, for the execution by the defendant of a proper mortgage-deed in terms of the *kabuláyat*.

The Subordinate Judge awarded the plaintiff's claim against the defendant personally, holding that the plaintiff was not entitled to the other reliefs, as the agreement sued upon was a mortgage, or an agreement to mortgage, which not being registered under section 56 of Act XVII of 1879 could not be enforced.

This decision was upheld, on appeal, by the District Court.

The plaintiff thereupon preferred a second appeal to the High Court.

N. G. Chandavarkar for appellant:—The *kabuláyat* sued upon is not a mortgage. It only evidences an intention to create a mortgage. It does not, therefore, fall under section 56 of Act XVII of 1879. It is admissible to show the contract entered into by the parties. The plaintiff is, therefore, entitled to the relief he seeks, namely, that the defendant should execute a mortgage in terms of the *kabuláyat*.

There was no appearance for the respondent.

PARSONS, J. :—The appellant sued for one of three reliefs : (1) for a declaration that certain property was held by him in mortgage and for recovery of the mortgage-debt, Rs. 949, by sale of that property ; or (2) for an order directing the defendant to execute in his favour a mortgage of the property for the sum of Rs. 949 ; or (3) for a personal decree against defendant for Rs. 949. Both the lower Courts concurred in granting the third relief only. They considered the document on which the appellant rested his claim valueless either as a mortgage or as an agreement to mortgage. Inasmuch as the document was not executed in the manner required by section 56 of the Dekkhan Agriculturists' Relief Act, the Judge of the Court below was right in holding that the relationship of mortgagor and mortgagee had not been proved to exist between the parties. The ground, however, for holding that the claim to specific relief could not be granted, is not sound.

The facts are these. In 1891 the parties went before a conciliator and came to an agreement finally disposing of the dispute between them. The defendant admitted that he owed the plaintiff 460 rupees on a mortgage and 485 rupees on a decree, and he took a further present advance of Rs. 489 in cash, making Rs. 1,434 in all due by him to the plaintiff. On this he agreed to pay interest at 13 annas per cent. per month. He then goes on to say thus :—" For the same I give in mortgage the property mentioned in the said decree and also my own house which is situate in the town of Junnar. (His Lordship read the rest of the *kabuláyat* as above set forth and continued :—)

He signed this agreement and so did the plaintiff.' The conciliator duly forwarded it to the Subordinate Judge, but that Judge acting, it appears, under the orders of the Special Judge, refused to file it. Hence the present suit. It seems to us to be clear that the plaintiff has the right to the relief which he asks for. Had the Subordinate Judge done what he should have done, *viz.*, filed the agreement, there would have been then a proper mortgage-deed drawn up. The fact that he did not, and that the plaintiff has had to bring a suit, cannot deprive the plaintiff

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of the right he has under the agreement. The document which the parties signed before the conciliator when properly considered does not of itself create a mortgage. It merely evidences the intention of the parties to create one. It does not, therefore, fall within the terms of section 56 of the Dekkhan Agriculturists' Relief Act, and it is admissible in evidence to prove the intention of the parties and the contract they had agreed to. The agreement is a perfectly valid and a legitimate one, and, as such, can be enforced. Even if the document be considered as intended of itself to create the mortgage, and if owing to its not being executed in the manner required by law it did not create the intended interest, then apparently under the ruling in ***Burjorji* v. *Muncherji***[1] the document would still be admissible to show the contract entered into for the mortgage, though not as the mortgage itself. In whichever way, therefore, the document is viewed, the plaintiff's right is clear to obtain the relief he asks.

We vary the decree of the lower appellate Court by substituting for the relief granted an order directing the defendant to execute the mortgage as asked in the plaint, and we order the defendant to pay the plaintiff's costs throughout.

RANADE, J.:—In this case both parties effected a *kabuláyat* agreement, through the agency of a conciliator, on 1st December, 1891. This settlement provided for a mortgage charge on certain lands in consideration of former debts due to, and fresh advances made by, the appellant-plaintiff to the respondent-defendant. The Junnar Court refused to file this *kabuláyat* on the ground that it contravened the objects of the Dekkhan Agriculturists' Relief Act and the rules framed under it. The present suit was accordingly brought to secure a declaration of appellant's right as mortgagee, and to recover the debt due with interest from the property charged and from the respondent personally, or, in the alternative, to secure the execution, by defendant, of a proper mortgage-bond in the terms of the *kabuláyat*.

Both the Courts below agreed in awarding appellant's claim against respondent personally, but they held that appellant was

(1) I. L. R., 5 Bom., 143.

not entitled to the other two reliefs claimed by him, namely, an order directing the recovery of the money by the sale of the property charged, or requiring the respondent to execute a new mortgage-bond. The only point for consideration is thus: Whether the appellant can properly claim either or both the reliefs mentioned above.

It is quite clear that under section 70 of the Dekkhan Agriculturists' Relief Act, no mortgage, lien, or charge can be validly created in respect of the immoveable property of an agriculturist unless it is created by an instrument in writing, and no such instrument can be received in evidence unless it is registered under section 56 of the Act. Under the terms of the last section, the agreement or *kabuláyat* of 1st December, 1891, is not admissible in evidence, and it may also be doubted if the said agreement can even be regarded as an instrument in writing. It is thus plain that the appellant had no right to have it declared that he was a mortgagee of the property, and, as such, to recover his debt by the sale of the said property.

The third relief claimed by him stands, however, on a different footing. If the oral agreement between the parties, which was sought to be given effect to by the agreement, could be proved otherwise than by the evidence of that agreement, there appears to be no reason why this oral agreement should not be enforced by requiring the respondent to act up to it, and pass a mortgage-bond in appellant's favour. Such an oral agreement does not fall within the prohibition of either section 70 or 56 of that Act. It does not itself create a mortgage, lien, or charge, but only confers a right to obtain such a mortgage instrument in due form.

If the present case were only one of an executory contract, it might be open to question if specific performance should be permitted. The fact appears to be, however, that the appellant advanced a fresh loan of 480 rupees on the day of the *kabuláyat*, and respondent admits the receipt of the same. The evidence of the conciliator proves the oral contract quite independently of respondent's admission. Such a case clearly falls within the scope of section 12 of the Specific Relief Act, and there was

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thus a discretion in the Court which was not properly exercised when it refused to interfere on more or less technical grounds. In the present case, the mortgaged property was also made over into appellant's possession at the time that he advanced the fresh loan. We accordingly think that this portion of the relief prayed for may be very properly awarded in the present case.

We reverse the decree of the lower Court, and direct that respondent do pass a mortgage-bond in terms of the *kabuláyat*, Exhibit 15, to the appellant. Respondent should pay appellant's costs throughout.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

1897. *July* 20.

SAMBHU (ORIGINAL PLAINTIFF), APPELLANT, *v.* KAMALRAO VITHALRAO DESHMUKH (ORIGINAL DEFENDANT), RESPONDENT.*

Land Revenue Code (Bom. Act V of 1879), *Sec.* 3, *Cls.* (16), (17); *Secs.* 71, 79, 85, 86 *and* 87—*Deshmukhi vatan—Alienated land—Registered occupant—Superior holder.*

In 1892, Vithalrao, a deshmukhi vatandár, died leaving five sons—four by one wife, of whom Kamalrao was the eldest, and one son, Bhavanrao, by another wife. Kamalrao and Bhavanrao each claimed to be the eldest son of Vithalrao. On the 16th June, 1893, the Collector of Sátára in proceedings under section 71 of the Land Revenue Code (Bombay Act V of 1879) ordered Kamalrao's name to be registered in the revenue books in place of Vithalrao's. Prior to this, however, the plaintiff and other tenants paid Bhavanrao rents for 1892—94. Kamalrao then applied for and obtained from the Collector an order, under section 86 of the Code, rendering him assistance in recovering these rents. The plaintiff in August, 1894, brought this suit to restrain Kamalrao from recovering the rents and to avoid the order for assistance. The Subordinate Judge granted the injunction, but the District Judge reversed that decision and dismissed the suit on the ground that Kamalrao was the registered occupant of the land and that the order for assistance was valid, and that payment of rent to Bhavanrao did not discharge the tenants. On appeal to the High Court,

Held, reversing the decree of the District Judge and restoring that of the Subordinate Judge, that the lands in question being alienated land, section 71 of the Land Revenue Code (Bom. Act V of 1879) did not apply, and Kamalrao was not a registered occupant under the Code. The lands passed on Vithalrao's

* Second Appeal, No. 26 of 1897.