remand the appeal for trial of the remaining issues. Costs of the appeal will be costs in the cause.

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KIKABHAI v. KALU.

Decree reversed and case remanded.

APPELLATE CIVIL.

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

BAPU (ORIGINAL DEFENDANT No. 5), APPELLANT, *v.* BHAVANI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 AND 2).*

1896. *June* 16.

Mortgage—Mortgage or sale—Test of mortgage—Practice—Procedure—Finding on unnecessary issue between co-defendants—Res judicata.

In an instrument dated the 30th June, 1886, styled a sale-deed, it was recited that in consideration of Rs. 2,500 certain specified properties (already mortgaged to the so-called vendees and in their possession) were "given in sale" to them and were to be enjoyed by them for ten years in any manner they liked. At the expiration of that time the vendors were to pay the Rs. 2,500 and take back the property. In 1893 the plaintiff (a son of the so-called vendor) brought this suit treating the above instrument as a mortgage and praying for redemption. The main question in the suit was whether the instrument sued on was a mortgage or a deed of sale with the option of repurchase after ten years.

Held, that the instrument was a mortgage. The test was whether after the execution of the deed there continued to be a debt from the so-called vendors to the vendee, or whether the pre-existing debt became extinguished on the execution of the deed.

A finding between co-defendants unnecessary for the determination of the suit, or the rights of the parties involved in the suit, is not *res judicata*.

SECOND appeal from the decree of G. Jacob, District Judge of Sholápur-Bijápur, reversing the decree of the Subordinate Judge of Bársi.

Suit for redemption. The land in question was the property of one Gunaji and his two sons, *viz.*, the plaintiff Bhavani and Raoji (defendant No. 4). This land had been mortgaged to members of the Mundhe family, and the mortgagee's interest had become vested in one Nani, who was in possession.

On the 21st October, 1885, Gunaji mortgaged this same land to Pandurang and Nana (defendants Nos. 1 and 2) for Rs. 2,000,

* Second Appeal, No. 646 of 1895.

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and subsequently, *viz.*, on the 30th June, 1886, he executed a further deed (called a sale-deed) to them for Rs. 2,500 made up of the previous Rs. 2,000 and a further sum of Rs. 500. The material part of this deed was as follows :—

"In consideration of this amount (Rs. 2,500) there have been given in sale the undermentioned properties (describing them). The abovementioned properties have been in your enjoyment up to this day since the aforesaid date the 7th, on which day the properties were given in writing in mortgage to you and delivered into your possession. The said properties have been sold to you for the abovementioned amount, and they have been by virtue of the previous mortgage-deed in your possession, and they have also been given into your possession by this sale-deed. You are, therefore, to enjoy the properties for ten years in any manner you like. After the expiration of the ten years I (Gunaji) will redeem my properties on payment of Rs. 2,500 (*or* more literally 'having made payment of Rs. 2,500 I will take back my properties'). Consent to this is given by us, Raoji, aged 40 years, and Bhavani, aged 35 years * * * who state in writing that our said father will, on payment of the amount as aforesaid, redeem the properties which have been as aforesaid given to you in writing. Should he fail to do so, we, having paid the amount, will redeem them without pleading the excuse of each other's absence."

On the 8th January, 1887, Gunaji and Raoji (the plaintiff Bhavani did not join) again sold it to one Bapu Ambadas (defendant No. 5) for Rs. 3,000. About the same time Bapu (defendant No. 5) purchased Nani's interest in the land and obtained possession from her.

In 1888 Pandurang and Nana (defendants Nos. 1 and 2) sued (Suit No. 125 of 1888) to redeem Nani's mortgage and to recover possession. Bapu Ambadas (defendant No. 5) was then in possession, and he was, therefore, made a party defendant to that suit, as were also Gunaji and his two sons, Bhavani (present plaintiff) and Raoji (defendant No. 4).

Bapu Ambadas filed a written statement in that suit in which he alleged that by the sale to him he had also acquired the interest of the plaintiff Bhavani. Bhavani denied this and an issue being raised on the point, it was decided in Bhavani's favour. The suit itself, however, was decided in favour of Pandurang and Nana (defendants Nos. 1 and 2), who recovered possession of the land from Nani and Bapu.

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In 1893 the present plaintiff Bhavani brought this suit against Pandurang and Nana (defendants Nos. 1 and 2) for redemption, alleging that the deed of the 30th June, 1886, was a mortgage and not a sale.

Pandurang and Nana (defendants Nos. 1 and 2) contended that the plaintiff had no right to sue, he as well as his brother Raoji being bound by the sale to Bapu Ambadas in January, 1887; that in any case he could not sue before the expiration of the ten years mentioned in their sale-deed; and that as they had purchased the land, no account could be ordered against them. Bapu Ambadas (defendant No. 5) pleaded that he had bought the land from Gunaji as head of his (Gunaji's) family, and that, if plaintiff had any right to sue, he (Bapu) should be made a co-plaintiff.

The Subordinate Judge passed a decree for redemption in favour of plaintiff and defendant No. 5 (Bapu).

On appeal the Judge reversed the decree and dismissed the suit. He held that the deed of 30th June, 1886, was not a mortgage, but that the transaction was a sale with a right of repurchase; but that the land could not be recovered from defendants Nos. 1 and 2 before the expiration of ten years. He held, however, that the plaintiff had a right to sue, being of opinion that that question had been decided in Suit No. 125 of 1888 and was *res judicata*.

Bapu Ambadas (defendant No. 5) filed a second appeal.

Shivram V. Bhandarkar, for the appellant (defendant No. 5):—The first question is whether the document executed by Gunaji to defendants Nos. 1 and 2 on the 30th June, 1886, shows a mortgage or a sale. If the transaction is a mortgage, then under the provisions of the Dekkhan Agriculturists' Relief Act we can redeem before the expiration of the term mentioned therein. In order to determine whether a transaction is a mortgage or not, the test is whether there is still a subsisting debt. The document clearly shows that there was a subsisting debt. The creditors deposed that on the day the document was executed, they debited the amount to the debtor Gunaji. It is, therefore, manifest that the parties themselves treated the transaction as a mortgage. The document, no doubt, begins

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with the expression *Mudatiche* sale-deed. But the name given to a document does not determine its character. Other circumstances in connection with it must be considered. In the present case, looking to the conditions in the document, the creditors could have sued for the recovery of the debt and, therefore, the transaction is a mortgage—*Subhabhat* v. *Vasudevbhat*(1); *Bapuji Apaji* v. *Senavaraji*(2); *Govinda* v. *Jesha Premaji*(3); *Ram Saran Lal* v. *Amirta Kuar*(4); *Mahipatrav* v. *Gambhirmal*(5); *Lakhmichand* v. *Chatur Dewchandshet*(6); *Rama* v. *Yesu*(7). The inclination of the Courts is always in favour of holding a transaction to be a mortgage rather than a sale.

The next point is as to whether Bhavani's interest passed to us under our sale-deed. It is contended that this question was decided in the previous suit of 1888. We submit that we are not bound by that decision. The issue raised on the point in that suit was superfluous and was not necessary for the decision of that suit. The High Court in second appeal held that the determination of those questions was unnecessary. Therefore, the finding in the former suit that Bhavani was not barred by the sale-deed passed to us by his father and brother is not *res judicata*—*Ghela Ichharam* v. *Sankalchand Jetha*(8).

Manekshah J. Taleyarkhan, for respondents (defendants Nos. 1 and 2):—We contend that the transaction in dispute is a sale with a right of repurchase. In order to determine the nature of the transaction in dispute the previous transaction of the 21st October, 1885, has to be taken into consideration. The transaction in dispute recites the previous debt and states that for the additional sum of Rs. 500 the property was sold for a term of years. Another test is that we could not have sued for the recovery of the money, because in the document there is no promise to pay. Under the document we had no right to call back the money. Only the option is given to the vendor to pay us the money and to recover the property—*Alderson* v. *White*(9); *Bhagwan Sahai*

(1) I. L. R., 2 Bom., 113.
(2) I. L. R., 2 Bom., 231.
(3) I. L. R., 7 Bom., 73.
(4) I. L. R., 3 All., 369.
(5) P. J., 1886, p. 141.
(6) P. J., 1884, p. 162.
(7) P. J., 1896, p. 284.
(8) I. L. R., 18 Bom., 597.
(9) 2 De G. and J., 105.

v. *Bhagwan Din*[1]; *Manchester, Sheffield and Lincolnshire Railway Co.* v. *North Central Waggon Co.*[2].

FARRAN, C. J:—We think that in this case the District Judge ought to have inquired into the title of the plaintiff upon the merits, and was wrong in holding that his right to sue was *res judicata* as having been established by the finding upon the issues in Suit No. 125 of 1888. We must remand the case for a further finding upon the first issue. The question arises under the following circumstances:—

Before the dealings between the parties to this suit in respect of the land which the plaintiff seeks to redeem, the land was subject to a mortgage or mortgages in favour of certain members of the Mundhe family whose interests eventually became centred in one Nani. It is unnecessary to refer to these mortgages in detail. The equity of redemption in the mortgaged property, which was ancestral, was vested in the defendant Gunaji and his two sons, the plaintiff Bhavani and the defendant Raoji.

On the 30th June, 1886, Gunaji and his two sons executed the instrument (Exhibit 50) in favour of the defendants Pandurang and Nana, which, treating it as a mortgage, the plaintiff seeks to redeem. One of the questions in the suit—the main question—is whether it is a mortgage or a sale with the option of repurchase. Subsequently the defendants Gunaji and Raoji, on the 8th January, 1887, sold the land to the fifth defendant Bapu for Rs. 3,000. The plaintiff Bhavani was not a party to that deed, and claims that it is not binding upon him.

In 1888 the present defendants Nos. 1 and 2, Pandurang and Nana, filed a redemption suit against Nani to recover possession of the lands, alleging that the mortgage, which she held, had been paid off. The present defendant Bapu had then acquired the interest of Nani in the lands and was in possession of them. Accordingly he was made a defendant to the suit, as were also the present defendants Gunaji and Raoji and the present plaintiff Bhavani.

The defendant Bapu in his written statement in that suit alleged that under the sale-deed executed in his favour by Gunaji and Raoji he had also acquired the interest of the plaintiff

(1) I. L. R., 12 All., 387. (2) 13 App. Ca., 554 at p. 568.

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Bhavani. This the plaintiff Bhavani denied. An issue was raised upon that question in the Court of first instance, which was decided in favour of the plaintiff Bhavani. The suit itself was decided in favour of the present defendants Pandurang and Nana, who recovered possession of the lands from Nani and her assignee, the present defendant Bapu. There was an appeal against that decision, but it was confirmed both in the District Court and on second appeal in the High Court. The defendant Bapu did not appeal in respect of the finding on the issue in favour of the plaintiff Bhavani.

Now it will be observed that the finding upon the issue in favour of the plaintiff Bhavani was a finding upon an issue which did not properly arise in the suit. The title of the plaintiffs in that suit (the present defendants Pandurang and Nana) to represent *pro tem.* the interests of Gunaji and his sons Bhavani and Raoji under the terms of the document, Exhibit 50, was clear and undisputed. The only question, which properly arose in the suit, was whether they were entitled to redeem Nani and her assignee Bapu and upon what terms. The determination of the issue between Bhavani and Bapu was not connected with the suit. It does not appear why the Subordinate Judge allowed it to be raised, or why he found upon it; but as we have said, there was no appeal from the finding. Had there been, the District Judge must have refused to consider it beyond declaring that the issue was improper and ought not to have been raised or decided. However, there having been no appeal, the finding on the issue remained, and the District Judge in this case has treated that finding as decisive of the respective rights of the plaintiff Bhavani and the defendant Bapu in the suit. The question is whether he was correct in so treating it. We are of opinion that he was not. It was a finding between co-defendants unnecessary for the determination of the suit or the rights of the parties involved in the suit. It cannot, therefore, operate as a *res judicata*—*Ramchandra Narayan* v. *Narayan*[1]; *Ghela* v. *Sankalchand*[2]; *Ahmad Ali* v. *Najabat Khan*[3].

(1) I. L. R., 11 Bom., 216. (2) I. L. R., 18 Bom., 697.
(3) I. L. R., 18 All., 65.

We have next to consider whether the instrument sued upon is a mortgage or a deed of sale with an option or right on the part of the vendors to repurchase the land after ten years. The solution of that question depends upon the terms of the instrument and the intention of the parties. The Subordinate Judge considered it to be a mortgage by way of conditional sale, and under the provisions of the Dekkhan Agriculturists' Relief Act allowed redemption, though the mortgage term had not expired. The District Judge held it to be a sale outright, with a right of repurchase reserved. He, therefore, dismissed the suit.

The transaction is in the body of the instrument styled a sale; but that, though a circumstance to be taken into consideration, is not conclusive. The test is whether after its execution there continued to be a debt from the so-called vendors to the vendee, or whether the pre-existing debt became extinguished on the execution of the instrument—*Govinda* v. *Jesha*[1]. The material portions of the instrument are these:

"In consideration of this amount (Rs. 2,500) there have been given in sale the undermentioned properties (describing them). The abovementioned properties have been in your enjoyment up to this day since the aforesaid date the 7th, on which day the properties were given in writing in mortgage to you and delivered into your possession. The said properties have been sold to you for the abovementioned amount and they have been by virtue of the previous mortgage-deed in your possession and they have also been given into your possession by this sale-deed. You are, therefore, to enjoy the properties for ten years in any manner you may like. After the expiration of the ten years I (Gunaji) will redeem my properties on payment of Rs. 2,500 (*or* more literally 'having made payment of Rs. 2,500 I will take back my properties'). Consent to this is given by us, Raoji, aged 40 years, and Bhavani, aged 35 years * * * who state in writing that our said father will, on payment of the amount as aforesaid, redeem the properties which have been as aforesaid given to you in writing. Should he fail to do so, we, having paid the amount, will redeem them without pleading the excuse of each other's absence."

The effect of that instrument appears to us to be that the creditors are to hold the property for ten years and are not to be answerable for what they do with it, nor have they any claim to interest. At the end of ten years, however, or at any time thereafter the vendor Gunaji undertakes that he having paid the money (Rs. 2,500) "will take back the land," which

(1) I. L. R., 7 Bom., 73.

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amounts, we think, to a covenant on his part to repay the money and redeem the land. This is made still more clear by what the sons are to do if the father fails to redeem. It is not, it appears to us, an option which the sons are given of repurchasing, but an express covenant on their part, which it is intended that the creditors can enforce, and in answer to which the sons are not to plead the non-joinder of one another. They are to repay the Rs. 2,500 and take back the land.

Mr. Manekshah in support of the opposite view relied on *Bhagwan Sahai* v. *Bhagwan Din* (1), where the Lords of the Privy Council held (citing the cases of *Alderson* v. *White* (2) approved in *The Manchester, Sheffield and Lincolnshire Railway Co.* v. *The North Central Waggon Co.* (3)) that the instrument before them was one of conditional sale and not of mortgage, but there the only agreement was one on the part of the vendee to accept the purchase-money and cancel the sale. Here the undertaking is on the part of the so-called vendors to pay the debt and redeem. The words can bear no other meaning. The debt is recognised as an existing debt, payment of which is postponed for ten years. If we were doubtful as to the true effect of the instrument, the conduct of the creditors would, we think, make the matter clear. In their books they entered the Rs. 2,500 as a debt due from the so-called vendors, and Pandurang in his evidence in the former suit stated that the vendees enjoyed the profits in lieu of interest.

We set aside the decree and remand the appeal for retrial having regard to this judgment. The respondent to pay the costs in this Court. All other costs will be dealt with by the Judge who hears the appeal.

Decree set aside and case remanded.

(1) I. L. R., 12 All., 387. (2) 2 DeG. and J., 105.
(3) 13 App. Ca., 568.