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Dhonendro,[1] which was a case of a purchase under an attachment upon a decree, has no application to this case, for there the attachment under which the sale took place was anterior to the mortgage upon which the mortgage suit was founded.

There remains, lastly, the contention that appellant should have been allowed to prove that the mortgage on which the decree was passed against Sitabai in the *lis pendens* (No. 612 of 1897) was without consideration. This was a plea which, if true in fact, Sitabai could have and ought (see section 13, Civil Procedure Code) to have set up in the *lis pendens* as a ground of defence. The appellant claims through Sitabai and is bound by the decree passed in the mortgage suit No. 612 of 1897 (the *lis pendens*) against her: see the decisions of the Privy Council in *Radhamadhub* v. *Monohur*[2] and *Moti Lal* v. *Karrabuldin*[3] already cited, and appellant bought the plaint house subject to such decree as might be passed in the *lis pendens*. The contention now set up is, therefore, barred as *res judicata* (see section 13, Civil Procedure Code, and *Chenvirappa* v. *Puttappa*[4]) and it is not open to the appellant to raise it in this suit.

For the above reasons the decree of the lower Appellate Court is confirmed with costs on the appellant.

Decree confirmed.

(1) (1871) 14 M. I. A. 101.
(2) (1888) L. R. 15 I. A. 97.
(3) (1897) 25 Cal. 179.
(4) (1887) 11 Bom. 703.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

BALA (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHIVA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1902. *December* 10.

Mortgage—Suit for redemption—Burden of proof on plaintiff—Evidence—Proof of specific mortgage.

The plaintiff sued for redemption and to recover possession of certain lands, alleging that they had been mortgaged to the ancestors of the defendants about

* Second Appeal No. 428 of 1901.

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forty-five years before suit. The defendants, who were in possession, denied the mortgage. The Subordinate Judge found the mortgage proved and passed a decree for redemption. On appeal the Judge reversed the decree and dismissed the suit. He was of opinion that the plaintiff was bound to prove a specific mortgage made forty-five years ago as alleged in the plaint and that he had failed to do so. On second appeal,

Held (remanding the appeal), that the real question was whether the defendants were mortgagees of the property in question. The plaintiff did not tie himself down to a specific mortgage made at a particular time. He was entitled to succeed if he proved that the land was held by the defendants as mortgagees.

SECOND appeal from the decision of Ráo Bahádur Mahadev Shridhar Kulkarni, First Class Subordinate Judge of Ratnágiri, reversing the decree of Ráo Sáheb K. D. Bodas, Subordinate Judge of Chiplun.

Suit for redemption. On the 26th May, 1897, Govind Narayan Surve and Sadashiv Narayan Surve sold the land in suit to the plaintiff subject to a mortgage which their grandfather Rama had executed to one Govind Lakshman.

In 1898 the plaintiff filed this suit to redeem the said mortgage. In his plaint he stated that the land had been mortgaged about forty-five years before suit, that he did not know the exact date of it or the terms of the mortgage, and that the defendants and their predecessors in title had admitted the mortgage from time to time.

The defendants were the descendants of Govind Lakshman (original mortgagee) and of his brothers.

Defendant 1 (son of Govind) and defendants 2 and 3 (grandsons of Govind) and defendants 5 and 6 (sons of Govind's brother) did not appear.

Defendant 4 (brother of Govind) and defendants 7, 8 and 9 (sons of a brother of Govind) denied the mortgage and alleged that they were and always had been in possession. They denied that they had ever admitted the alleged mortgage or that they were bound by any acknowledgment made by the other defendants.

Defendant 12 alleged that defendant 1 (Govind's son) and Govind had mortgaged a part of the land to him with possession on the 25th January, 1888.

None of the other defendants appeared.

The Court of first instance found that Rama had mortgaged the land to Govind Lakshman about forty-five years before suit for Rs. 100 and held that the plaintiff was entitled to redeem and to recover possession from the defendants on payment of Rs. 100 to them.

On appeal this decree was reversed and the plaintiff's suit was dismissed. The Judge was of opinion that the alleged mortgage was not proved. In his judgment he said:

The plaintiff alleges that the lands in dispute were mortgaged by Rama bin Mahadu to Govind Lakshman, and he must prove his allegation. The only direct evidence on the point is that of witness No. 34.... I cannot bring myself to act on the uncorroborated testimony of this single and solitary witness and hold it proved that a mortgage of the lands in dispute was executed by Rama Surve to Govind Lakshman Bhosle about fifty years ago.

Plaintiff's witness No. 57 says that at the time of the surveys, when the lands were being measured, Govind Lakshman told the kárkun Rambhau that the lands belonged to Rama Mahadu and were held by him in mortgage and should be entered in Rama's name.... Such evidence cannot be believed.

Defendant No. 11, as plaintiff's witness No. 54, has produced Exhibit 56, a mortgage-deed, executed to him by Govind bin Lakshman on Shake 1801, Paush Vadya 13th (8th February, 1880). The land comprised in this mortgage is Survey No. 128, Pot No. 4, in suit, and is described as 'आह्माकडे राम बिन माहादू सुर्वे याचा धारा गहाण चालत आहे त्यांतील' (out of the *dhára* of Rama bin Mahadu Surve held by us in mortgage). In 1895, defendant No. 1 made a similar statement in reference to Survey No. 139, Pot No. 5. I think that these statements were made by defendant 1 and his father with the object of describing the lands rather than as specification of title.....

I agree with the learned Subordinate Judge's remarks about the difficulties in the plaintiff's way, but I do not think that absolves the plaintiff from the duty of making out a *primâ facie* case by sufficient and satisfactory evidence. There must be some evidence, however slight, which can be relied on as satisfactorily proving that the lands sought to be redeemed were mortgaged by Rama bin Mahadu Surve to Govind Lakshman Bhosle about forty-five years ago for Rs. 100. The Subordinate Judge has held that the lands were mortgaged in 1846. The plaintiff in 1898 alleged that they were mortgaged forty-five years ago, *i.e.*, in 1853. The plaintiff's witness No. 34, whose evidence is the only evidence on the point, said in 1900 that the lands were mortgaged about fifty years ago, that is, in 1850. I cannot believe the evidence of witnesses Nos. 34 and 57. The so-called admissions of defendant No. 1 and his father furnish no evidence of the mortgage of the lands within sixty years (*vide Chotiram Lalchand* v. *Bhau bin Ramji*, Bom. Law Reporter, Vol. I, page 2). There is nothing to show that the defendants are wilfully keeping the evidence of the mortgage and there is no reason to discredit them when they say they do not know and have no muniments of title in their possession or power.

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The plaintiff appealed to the High Court.

D. A. Khare for the appellant (plaintiff).

S. R. Bakhale for the respondents (defendants).

CHANDAVARKAR, J. :—The plaintiff, Bala bin Pandu Devkar, brought this suit to redeem the lands in dispute, alleging that their owner, Rama Mahadu Surve, had mortgaged them to Govind Lakshman Bhosle, father of defendant No. 1 and grandfather of defendants 2 and 3, about forty-five years ago, for Rs. 100; that the period fixed for redemption was ten years; and that the mortgagor Rama's heirs had sold the equity of redemption to the plaintiff.

There were twelve defendants brought on the record. Of them defendants 4, 7, 8 and 9 contended that the property had come into the possession of their ancestor Dhonda Balkoji for Rs. 500 in A.D. 1788 and that since then their family had been in possession. They denied the mortgage sued upon and pleaded limitation. Defendant No. 12 claimed two of the lands in suit under a mortgage from defendant No. 1 and his father. The other defendants raised no defence.

Defendants Nos. 1 to 10 and defendant No. 13 are descended from one ancestor. The Subordinate Judge, following the principle laid down in *Balaji* v. *Babu*,[1] *Ramchandra* v. *Balaji*,[2] and *Parmanand* v. *Sahib Ali*,[3] held the mortgage alleged by the plaintiff proved. He based his finding, *firstly*, on an admission made by Govind, father of defendant No. 1, contained in Exhibit 56, that the *dhára* of Rama bin Mahadu Surve was in the possession of his family under a mortgage; *secondly*, on an admission of defendant No. 1 in Exhibit 30 that one of the lands in suit was in his possession under a mortgage; *thirdly*, on oral testimony; and, *fourthly*, on the fact that the lands still stood in the revenue records in the name of Rama Mahadu Surve's heir. Accordingly, the Subordinate Judge passed the usual decree for redemption. In appeal, the First Class Subordinate Judge, A. P., has reversed that decree, holding that the mortgage sued on is not proved.

(1) (1868) 5 Bom. H. C. R. (A. C. J.) 159. (2) (1884) 9 Bom. 137.
( ) (1889) 11 All. 438.

It is quite clear from the appellate judgment that the Subordinate Judge, A. P., was of opinion that the plaintiff must fail unless he proves that the mortgage transaction was entered into in 1853, because in the plaint it was stated that the lands had been mortgaged forty-five years ago. Criticising the judgment of the Subordinate Judge in the Court of first instance, the Subordinate Judge, A. P., says, referring to the admission of a mortgage made in Exhibit 56 by Govind, father of defendant No. 1, and that made by defendant No. 1 in Exhibit 30, that these admissions "undoubtedly do not refer to the mortgage on the basis of which the plaintiff's suit is founded and are no evidence of any particular mortgage." Then the Subordinate Judge, A. P., says at the end of his judgment: "The Subordinate Judge has held that the lands were mortgaged in 1846. The plaintiff in 1898 alleged that they were mortgaged forty-five years ago, *i.e.*, in 1853. The plaintiff's witness No. 34, whose evidence is the only evidence on the point, said in 1900 that the lands were mortgaged about fifty years ago, *i.e.*, in 1850." In the plaint the mortgage set up was stated to have been made *about* forty-five years ago; and it is taking too literal and technical a view of the plaint to take it to mean that the mortgage transaction was entered into in 1853 and that unless that was proved the plaintiff must fail. The plaintiff has been careful to state the date of the mortgage approximately, and it was open to him on the pleadings to show that the lands were mortgaged, if not in 1853, at any rate at some time about that period. On this point we would draw the attention of the Court below to the observation of this Court in *Lakshman* v. *Hari Dinkar*.[1]

It is true that when a plaintiff sues to redeem, and the defendant denies the mortgage, the plaintiff must in the first instance "prove" his title. "A plaintiff, who alleges that his ancestor forty-four years ago made a mortgage to the ancestor of the present possessor of a property and by virtue thereof seeks to dispossess the present possessor must prove his case clearly and indefeasibly": *Sevvaji Vijaya Raghunadha Valoji Kristnan Gopalar* v. *Chinna Nayana Chetti*.[2] In the present case the Subordinate Judge, A. P., was right in throwing the *onus* on

(1) (1880) 4 Bom. 534. (2) (1864) 10 Moore I. A. 105.

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the plaintiff of proving his case, and of requiring him to "make out a *primâ facie* case by sufficient and satisfactory evidence." But in dealing with the evidence the Subordinate Judge, A. P., as pointed out above, acted under the erroneous impression that what the plaintiff had to prove was some specific mortgage alleged to have been made in 1853. No doubt the plaintiff has stated in the plaint that the lands were mortgaged about forty-five years ago, but the real question between the parties is sufficiently apparent on the record, and that is whether the defendants are mortgagees. The plaintiff did not tie himself down to any specific mortgage made in that year and no other, and would be entitled to succeed if he proves that the lands were still held by the defendants as mortgagees.

Then we come to the evidence adduced by the plaintiff. The Subordinate Judge, A. P., has declined to accept the oral evidence, and, under ordinary circumstances, his appreciation of it would be binding upon this Court in second appeal. But where such appreciation is influenced by an erroneous view of the plaintiff's cause of action as stated in the plaint, it is open to this Court in second appeal to interfere. Assuming that the oral testimony of the witnesses of the plaintiff is fairly open to the unfavourable comments to which the Subordinate Judge, A. P., has subjected it, we have in this case certain admissions by defendant No. 1's father and by defendant No. 1 himself contained in Exhibit 56 and in Exhibit 30 respectively. Exhibit 56 is a mortgage of one of the lands in dispute in 1880 by defendant No. 1's father to defendant No. 11. There defendant No. 1's father speaks of that land as one of the *dhára* lands of Rama bin Mahadu Surve held by his (defendant 1's father's) family in mortgage. Similarly, defendant No. 1 made an admission in Exhibit 30 as to Survey No. 139, Pot No. 6. The *factum* of these admissions is admitted, nor is it disputed that all the lands in dispute are known as the *dhára* of Rama bin Mahadu Surve. They have stood as such in the revenue records in the name of Rama and his heir. The Subordinate Judge, A. P., does not hold that the admissions were not made; nor does he reject them on the ground that as they were made by defendant No. 1's father and defendant No. 1 respectively they cannot have any probative force against

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the other defendants. The ground on which he declines to draw a presumption from them in favour of the plaintiff's case is that "these statements were made by defendant No. 1 and his father with the object of describing the lands rather than as specification of title." So far as this remark of the Subordinate Judge, A. P., applied to Exhibit 56, it is not borne out by the wording of the document itself. The words used there are that the *dhára* of Rama bin Mahadu Surve "*continued with us in mortgage*"—expressions which can bear no other construction than that the *dhára* was held at the date of Exhibit 56 in mortgage by the family of defendant No. 1's father. In other words, the father of defendant No. 1 speaks of the title of his family to the *dhára* as one not only originally founded upon but still continuing on a mortgage to the family. There is no warrant, therefore, for the remark of the Subordinate Judge, A. P., that the admission was more a description of the property than a specification of title. It is true that in Exhibit 56 defendant No. 1's father also speaks of the land mortgaged thereby to defendant No. 11 as his property. But that recital is not necessarily inconsistent with the recital as to the property continuing with him as a mortgagee. The second ground assigned by the Subordinate Judge, A. P., for rejecting the admissions in Exhibits 56 and 30 is that they "do not refer to the mortgage on the basis of which the plaintiff's suit is founded and are no evidence of any particular mortgage." They may be no evidence of any particular mortgage, but they are certainly evidence so far that the defendants came into possession as mortgagees, and as such they have a bearing on the main question at issue in the case—whether the defendants are mortgagees or owners of the property? The Subordinate Judge, A. P., seems to have been under the impression that nothing short of proof that the lands were mortgaged in 1853 could be treated as evidence in law in favour of the plaintiff's case. As already pointed out above, that way of treating the plaintiff's claim is opposed to the ruling of this Court in *Lakshman* v. *Hari Dinkar*,[1] which is followed in *Raghunath Annaji* v. *Babaji bin Rama*.[2]

The proper and legal mode of dealing with a case of this kind

(1) (1880) 4 Bom. 584.

(2) (1890) P.J. p. 297.

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has been pointed out in a number of decisions of this Court beginning with *Balaji Narji* v. *Babu Devli*.[1] There it was said by this Court: "It being the ordinary custom in this part of India that deeds creating mortgages should remain in the custody of the mortgagee alone, no counterpart being taken by the mortgagor, very slight *primâ facie* proof that a mortgage had been originally made would serve to shift the entire burden of proof on the defendant in cases of this character; but this *primâ facie* proof must be forthcoming, and in its absence a plaintiff seeking redemption cannot be relieved of the burden which is imposed on all plaintiffs of establishing the fact or facts out of which their claim to relief arises." This does not mean that the moment the plaintiff adduces any slight evidence, the burden is shifted. As with all evidence, the Court must appreciate it, and the burden is shifted only when the Court regards the evidence as trustworthy where it is a question of its trustworthiness. Where, as in the present case, there are admissions of a mortgage, the Court ought to deal with them as evidence, for admissions are only evidence and not conclusive proof, and if it finds that the admissions are trustworthy and may be legally used against all the defendants, then the burden would be shifted. That is the principle on which the decision in *Balaji* v. *Babu*[1] was followed in *Vishram* v. *Devkaran*[2] and *Rama* v. *Baburao*.[3] If the lower Appellate Court find that the defendants' ancestors came into possession as mortgagees and that the plaintiff's allegation as to a mortgage is proved, it will be for the defendants to meet that case. On this point we would draw the attention of the lower Court to *Rajah Kishen* v. *Narendar*[4] and *Parmanand* v. *Sahib Ali*.[5]

We must, for these reasons, reverse the decree and remand the appeal for a fresh hearing. At such fresh hearing the lower Appellate Court should dispose of the case on all the issues, including the issue as to the alleged mortgage which the plaintiff seeks to redeem. In this judgment we have dealt only with the mode in which the Subordinate Judge, A. P., should consider

(1) (1868) 5 Bom. H. C. Rep. (A. C. J.) 159.
(2) (1886) P. J. 248.
(3) (1874) P. J. 19.
(4) (1875) 3 I. A. 85.
(5) (1889) 11 All. 438.

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the case, and in reversing his decree and remanding we do not by any means express any opinion on the evidence which it is for the lower Appellate, and not for this, Court to appreciate. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar, Mr. Justice Batty and Mr. Justice Aston.

SAKHARAM SHANKAR AND OTHERS (PLAINTIFFS) *v.* RAMCHANDRA BABU MOHIRE (DEFENDANT).*

1903. *December* 22.

Stamp—Bill of Exchange—Sufficiency of stamp—Construction of instrument.

In determining the question whether a particular instrument is sufficiently stamped, the Court should only look at the instrument as it stands.

Ramen Chetty v. *Mahomed Ghouse*(1) and *Royal Bank of Scotland* v. *Tottenham*,(2) followed.

REFERENCE made by R. M. Kennedy, Commissioner, Southern Division, under section 57 of the Indian Stamp Act (II of 1899).

At the hearing of a suit in the Court of the Joint Subordinate Judge at Vengurla, a document was put in evidence, dated 26th October, 1896, purporting to be a *hundi* for Rs. 1,000 payable at sight and stamped with a one-anna stamp. In the course of the evidence in the case it appeared that there was a practice in the district for borrowers of money to give the lenders a document in this form in order to evade higher stamp duty. In giving judgment the Subordinate Judge said:

The evidence and argument in this case has shown that there is a practice in this táluka of giving *hundis* payable on demand when one man borrows, that these *hundis* are not presented for payment, and that the drawer himself repays the amount. It is the very essence of a bill of exchange that not the drawer but some other person on his behalf pays the money and that it should also be presented for payment as soon as possible. If all these implied and oral conditions will be mentioned in a bill of exchange, then it will not be considered a bill of

* Civil Reference No. 18 of 1902.

(1) (1889) 16 Cal. 432. (2) (1894) 2 Q. B. 715.