that he meant the appellants to take the estate after the death of Saraswati precisely as though no son had been born to her. In our opinion, therefore, it would clearly defeat the intention of the testator were we to adopt the view that in the events which have happened there has been an intestacy and so give the whole estate to Saraswati. As between her and appellants it is clear beyond all possibility of argument that the testator preferred the appellants, and desired that they should take the whole estate after having provided a suitable maintenance for Saraswati during her life-time, nor can we find anything upon a reasonable construction of the will as it stands, in the events which have happened, to preclude us from giving effect to that intention. In our opinion, therefore, the decree of the lower appellate Court must be reversed, and it must now be declared that Saraswati is entitled to the life estate reserved to her upon the condition stated in the will, and that thereafter the appellants are entitled to take the whole estate. All costs to come out of the estate.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

SAYAD MIR GAZI VALAD SAYAD KUTBUDIN (ORIGINAL PLAINTIFF), APPELLANT, *v.* MIYA ALI VALAD MAULVI ABDUL KADIR (ORIGINAL DEFENDANT), RESPONDENT.*

1914.

June 30.

Registration Act (III of 1877), section 17, clauses (a), (b) and (h)—Registration Act (XVI of 1908), section 17, exception (v)*—Registered conveyance—Simultaneous unregistered document to re-convey—An ordinary agreement to sell—Exemption from registration.*

The plaintiff and the defendant agreed that plaintiff should nominally sell the property in suit out and out to the defendant and thereafter to attorn to

* Second Appeal No. 548 of 1912.

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him for an amount of rent which would represent reasonable interest. A conveyance to this effect was executed and duly registered. Contemporaneously the defendant executed an agreement to the plaintiff to re-convey the property for the same consideration, namely Rs. 1,499, when called upon to do so. This agreement was not registered. The plaintiff having brought a suit against the defendant for the specific performance of the unregistered agreement to re-convey, the lower Courts dismissed the suit on the ground that the agreement was compulsorily registrable under section 17, clauses (*a*) and (*b*) of the Registration Act (III of 1877).

On second appeal by the plaintiff,

Held, reversing the decree, that the agreement did not require registration.

Separated entirely from the defendant's registered conveyance, plaintiff's unregistered document was nothing more than an ordinary agreement to sell and such agreements were expressly exempted from the operation of section 17, clauses (*a*) and (*b*) of the Registration Act (III of 1877) by clause (*h*) and of section 17 of the Registration Act (XVI of 1908) by exception (v). Having regard to the form of the document as a whole, it was no more than an ordinary agreement to re-convey.

SECOND appeal against the decision of Motiram S. Advani, District Judge of Surat, confirming the decree of N. R. Majmundar, First Class Subordinate Judge of Surat.

The facts were as follows :—

On the 9th September 1903 the plaintiff passed a deed of absolute sale to the defendant in respect of two properties for Rs. 1,499. The deed was duly registered. On the same date the defendant executed an agreement by which he promised to re-convey the said properties to the plaintiff, when called upon to do so, on repayment of the purchase money. The actual possession of the properties sold remained with the plaintiff who passed a rent note agreeing to pay Rs. 15 per month as rent. The material portion of the said agreement was as follows :—

On the 9th September in the year 1903 this agreement is passed to Syed Mir Gazi son of Syed Kutubudin *alias* Mir Saheb by Mia Ali son of Moulvi Abdul Kadir Baakja Saheb. To wit. . . . I have purchased your two

properties situate at Surat . . . . for Rs. 1,499, namely fourteen hundred and ninety-nine. The following are the particulars of the agreement which has been entered into between you and me with respect thereto;

To wit . . . . . As to the abovementioned two properties which have been sold by you to me on the 9th day of September 1903, whenever you may pay to me Rs. 1,499, namely fourteen hundred and ninety-nine, the amount of the sale price in respect of the said properties, I having accepted the said amount and having immediately given over the abovementioned properties in whatever state they may be, into your possession, am to duly pass a sale deed in favour of you or any other person as you direct. . . . . In case when you tender the abovementioned amount to me, I raise any objection to the acceptance of that amount and do not accept the same, and you are displeased (at it) and are obliged to take further steps, I am responsible for the expenses (you may incur) in connection therewith.

On the 25th July 1910 the plaintiff brought the present redemption suit alleging that as the registered sale deed and the agreement were simultaneously executed, they must be read together and the transaction amounted to a mortgage by conditional sale and that Rs. 1,799 were due to the defendant at the foot of the mortgage. The plaintiff further averred that if the Court did not hold the transaction to be a mortgage, then an order might be passed directing the plaintiff according to the terms of the agreement to pay to the defendant Rs. 1,499, the amount of the sale price, and Rs. 300 as the amount of the rent, with a direction to the defendant to pass a re-conveyance and return the old documents.

The defendant contended *inter alia* that the registered sale deed and the agreement were not executed simultaneously and that the two transactions were independent of each other.

The Subordinate Judge found that the sale deed and the agreement were passed simultaneously, that for want of registration the agreement was inadmissible to prove that it and the sale deed constituted a mortgage by conditional sale and that the sale deed and the

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agreement read together did not constitute a mortgage by conditional sale. He, therefore, dismissed the suit.

The plaintiff having appealed, the District Judge remanded the case on the following ground :—

The plaint asked for specific performance of the contract of resale if the transaction was held not to be a mortgage, but through some oversight of parties an issue to this effect was not framed and the point was ignored. Looking to the facts of the case, I think it would only prolong litigation and cause needless expense if the parties are allowed to fight out separately the question of specific performance. There is another suit between the parties regarding this very property and it is pending now. The parties have agreed to have all the disputes between them decided by one suit, and the plaintiff-appellant has accepted some of the conditions proposed by the respondent in his purshish exhibit 9. He is not willing to deposit Rs. 384 in Court, as he will have to borrow this money at interest, but he is willing to give security for the due payment of the "rent" and also to arrange that the sub-tenants pay the rent due to the respondent. This condition is quite reasonable.

The plaintiff having undertaken to abide by the conditions mentioned above, I remand the suit to the lower Court and direct the Court to frame issues to determine the questions whether the plaintiff can treat the agreement as a contract and sue for specific performance. Parties are at liberty to produce evidence on the new issues.

On the remand the Subordinate Judge found that (1) the plaintiff could not treat the agreement as a separate contract and sue for specific performance of that contract and (2) the suit for the specific performance of the contract was within time.

After the receipt of the said findings the District Judge dismissed the appeal.

The plaintiff preferred a second appeal.

Coyaji with *P. B. Shingne* for the appellant (plaintiff) :—In the plaint we had clearly made a prayer in the alternative. If the apparent sale deed cannot be held to be a mortgage, then we can very well claim to have the agreement to re-convey enforced according to law. If so, then the prayer for the specific performance

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of the contract is sufficient to dislodge the respondent-defendant from his position. The agreement to re-convey is in writing and does not require registration. The right created by the writing is merely a right *in personam*: *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji*[1], *Chunilal Panalal* v. *Bomanji Mancherji Modi*[2], *Shridhar Ballal Kelkar* v. *Chintaman Sadashiv Mehendale*[3].

D. A. Khare, *T. R. Desai* and *M. P. Mehta* for the respondent (defendant):—The agreement to re-convey cannot be treated as an independent contract. It requires registration: *Mutha Venkatachelapati* v. *Pyanda Venkatachelapati*[4]. The sale deed and the agreement to re-convey disclose one transaction, as is clear from the fact that the plaintiff wanted to have the two documents read together as creating a mortgage. Hence the agreement is inadmissible as evidence of a personal obligation and the whole transaction should not be divided into two. Section 17 of the Registration Act is applicable.

BEAMAN, J.:—On the 9th of September 1903 the plaintiff and the defendant undoubtedly intended to mortgage the property now in suit. The defendant being a good Musalman scrupled to take interest. It was accordingly agreed that the plaintiff should nominally sell the property out and out to the defendant and thereafter attorn to him for an amount of rent which would represent reasonable interest. This conveyance was executed and duly registered. Contemporaneously the defendant executed an agreement to the plaintiff to reconvey the property for the same consideration, namely Rs. 1,499, when called upon to do so. If we look at the true intention of the parties we should have no doubt

(1) (1880) 5 Bom. 143.
(2) (1883) 7 Bom. 310.
(3) (1893) 18 Bom. 396.
(4) (1903) 27 Mad. 348.

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but that this was really, though in form a sale, a mortgage. Inasmuch, however, as the plaintiff very naturally did not register his part, that is to say, the agreement given to him by the defendant at the time, the Court below refused to treat the whole transaction together as a mortgage. So far defeated, the plaintiff fell back upon the alternative and claimed to have his agreement of the 9th of September 1903 specifically enforced against the defendant. The lower appellate Court refused to give effect to the agreement to re-convey on the ground that it was a document compulsorily registrable under section 17, clause (*b*) of the Registration Act. In our opinion, the learned Judge was wrong. Separated entirely from the conveyance of the defendant we can see in this document nothing more than an ordinary agreement to sell, and such agreements are expressly exempted from the operation of section 17, clauses (*a*) and (*b*) of Act III of 1877 by clause (*h*) as it stood in that section and now exception (v). It has been strenuously contended on behalf of the defendant-respondent here, that inasmuch as this agreement to re-convey contains words to the effect that on payment of the consideration the defendant is to give up the land and re-convey, there is a direct interest created by the instrument itself in the land. We think, however, having regard to its form as a whole that it is no more than an ordinary agreement to re-convey when called upon to do so, and we are the more disposed to adopt this view since there can be no doubt whatever but that the whole justice of the case is on the side of the plaintiff. We, therefore, think that the decree of the Court below must be reversed and that the plaintiff must now be decreed specific performance of the agreement of the 9th of September 1903, that is to say, that on the plaintiff paying to the defendant Rs. 1,499 within three months of the date of this decree, the defend-

ant be ordered to re-convey the property in suit to the plaintiff and put him in possession thereof. The plaintiff must have all his costs after the remand. Up to remand the parties must bear their own costs.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

SHRIDHAR BALKRISHNA (ORIGINAL PLAINTIFF), APPELLANT, *v.* BABAJI MULA (ORIGINAL DEFENDANT), RESPONDENT.[*]

1914. *July* 2.

Khoti Settlement Act (Bom. Act I of 1880), sections 9 and 10[1]*—Khoti Takshim —Resignation of occupancy rights—Transfer—Lease for a term of years—Expiration of the lease—Suit to recover possession—Impeachment of plaintiff's title—Consent of khots necessary for transfer—Resignation accompanied by consideration—Parties* in pari delicto*—Estoppel.*

The defendant resigned his occupancy rights in a khoti takshim to the plaintiff, who was one of the Khots, in the year 1905. Synchronously with

[*] Second Appeal No. 706 of 1913.

[1] Sections 9 and 10 of the Khoti Settlement Act (Bom. Act I of 1880) are as follows :—

9. The rights of khots, dharekaris and quasi-dharekaris shall be heritable and transferable.

Occupancy-tenants' rights shall be heritable, but shall not be otherwise transferable, unless in any case the tenant proves that such right of transfer has been exercised in respect of the land in his occupancy, independently of the consent of the khot, at some time within the period of thirty years next previous to the commencement of the revenue year 1865-66, or unless in the case of an occupancy-right conferred by the khot under section 11, the khot grants such right of transfer of the same.

10. If a privileged occupant resign the land or any portion of the land in his holding, or if any such occupant's land lapse for failure of heirs, or other persons entitled thereto, or is forfeited on the occupant's failing to pay the rent due in respect thereof, the land so resigned, lapsed, or forfeited, shall be at the disposal of the khot as khoti land free of all encumbrances, other than liens or charges created or existing in favour of Government.