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I would only add that I do not think that the ruling in *Bhagvant* v. *Appaji*[1] affects our decision in this case. That was a case where there had been a part performance of the conditions, and the facts are clearly very different from those of this case.

I concur, therefore, with my learned brother that the appeal should be allowed with costs.

Appeal allowed.

R. R.

[1] (1916) 18 Bom. L. R. 803.

APPELLATE CIVIL.

Before Mr. Justice Marten and Mr. Justice Fawcett.

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November 20.

SANDU WALJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* BHIKCHAND SURAJMAL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Indian Registration Act (XVI of 1908), section 17—Registration—Agreement to transfer equity of redemption—Doctrine of part performance.

The plaintiffs owned two fields bearing Survey Nos. 76 and 364. They sold the fields to defendants, and executed a deed of sale for Rs. 1,200. At the same time another document was passed by which the plaintiffs agreed to re-pay the purchase money in ten equal annual payments, and the defendants on receipt of the money were to reconvey the property. The property remained in plaintiffs' possession. Two years later, the parties executed an unregistered document whereby the defendants took into their possession Survey No. 76 free from redemption by the plaintiffs; and the plaintiffs retained Survey No. 364 free from the defendants' claim. The plaintiffs, however, went back on the arrangement and sued to redeem Survey No. 76. The defendants pleaded the unregistered agreement in support of their claim; but the plaintiffs contested that the agreement not having been registered was inadmissible in evidence:—

Held, that, apart from the question of registration, the agreement in question was binding under the equitable rule of part performance.

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Mahomed Musa v. *Aghore Kumar Ganguli*[1]; *Hiralal* v. *Shankar*[2] and *Salamat-uz-zamin Begam* v. *Masha Allah Khan*[3], followed.

Kurri Veeareddi v. *Kurri Bapireddi*[4] and *Ramanathan* v. *Ranganathan*[5], dissented from.

Held, by *Marten J.*, (*Fawcett, J.*, dissenting) that the document was not compulsorily registrable, inasmuch as it did not in fact transfer the equity of redemption, but was only an agreement to transfer.

SECOND appeal from the decision of N. B. Deshmukh, Assistant Judge of Khandesh, confirming the decree passed by K. K. Sunavala, Subordinate Judge at Bhusawal.

Suit to redeem a mortgage.

The plaintiffs owned two fields bearing Survey Nos. 76 and 394. In 1906 they conveyed the two fields to the defendants. This was evidenced by two documents; the first of which was a deed for sale for Rs. 1,200. By the second document, the plaintiffs undertook to repay the amount of Rs. 1,200 in ten annual instalments of Rs. 125 each, and the defendants agreed on such repayment to reconvey the lands to the plaintiffs. The lands, however, remained in plaintiffs' possession. In the first year after the agreement, the plaintiffs paid the first instalment of Rs. 125 in cash; they paid the second one in kind.

No further instalments were paid; but in 1908, the parties executed an unregistered document whereby the defendants agreed to receive Survey No. 76 as free from mortgage claim; and the plaintiffs to keep survey No. 364 as free from any claim of the defendants. Survey No. 76 was transferred into defendants' possession, and they paid assessment for the land.

(1) (1914) L. R. 42 I. A. 1 at p. 6.
(2) (1921) 45 Bom 1170.
(3) (1917) 40 All. 187.
(4) (1906) 29 Mad. 336.
(5) (1917) 40 Mad. 1134.

In 1919, the plaintiffs sued to redeem Survey No. 76 from the defendants under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The defendants contended that under the agreement of 1908 they had the land sold to them. The plaintiffs objected that the agreement could not be looked at for want of registration.

The lower Courts were of opinion that the agreement in question was not compulsorily registrable, and dismissed the suit.

The plaintiffs appealed to the High Court.

S. R. Gokhale, for *D. R. Patwardhan*, for the appellants.

K. H. Kelkar, for the respondents.

MARTEN, J. :—The point on this appeal is whether the plaintiff-appellants are entitled to treat Survey No. 76 as still subject to the mortgage of 24th January 1906. The respondents contend that as the result of a contract arrived at in 1908 it was agreed that they should acquire the equity of redemption in Survey No. 76, but should reconvey the other property originally comprised in the mortgage, viz., Survey No. 394.

The controversy has mainly turned on the document of the 23rd of March 1908, Exhibit 34, which is alleged to evidence this agreement. The appellants contend that it is inadmissible in evidence for want of registration, and alternatively, that, on the true construction of it, it only amounted to putting the defendants in possession of one of the plots whereas up to that date they had not obtained possession of either plot.

As to its admissibility in evidence, one main question is whether the document amounts to a transfer of the equity of redemption, or whether on its true construction it only amounts to a contract to transfer the

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equity. The Full Bench decision in *Bapu Apaji* v. *Kashinath Sadoba*[1] establishes that in this Court a contract for sale which is capable of specific performance may be set up in answer to a claim for possession by a vendor. And *Venkatesh Damodar* v. *Mallappa Bhimappa*[2] shows that where a purchaser has obtained possession, it is immaterial that more than three years have elapsed since the date for completion of the original contract. Further, the Indian Registration Act itself draws a clear distinction between what I will call conveyances, which require registration, and mere agreements which do not. Broadly speaking, this may be described as the difference between sub-section (1) (*b*) and sub-section (2) (v) of section 17 of the Indian Registration Act. Accordingly it was decided by Sir Charles Sargent and Mr. Justice Telang in *Shridhar Ballal Kelkar* v. *Chintaman Sadashiv Mehendale*[3] that an agreement to sell an equity of redemption need not be registered.

To understand the document of 1908 one must appreciate what was the then position under the two documents of 24th January 1906, Exhibits 28 and 32. The first of these documents purported to be a sale deed by the plaintiff to the defendants for Rs. 1,200. The other document purported to be an agreement by which the plaintiff was to pay the defendant Rs. 125 per annum for ten years, and on such repayment the defendant was to execute a deed of re-sale, and in default of payment the annual instalments were to carry interest, and if the plaintiff failed to pay off the money he should not have any right left in the property. In my opinion the lower Courts have rightly arrived at the conclusion that these two documents taken together constitute a mortgage and not a sale.

(1) (1916) 41 Bom. 438. (2) (1921) 46 Bom. 722.
(3) (1893) 18 Bom. 396.

Turning next to the document of March 1908 (Exhibit 34) I am of opinion that on its true construction the parties intended that the mortgagee was to take Survey No. 76 free from redemption, and that the mortgagor was to take Survey No. 394 free from the mortgage debt. In effect, therefore, in my opinion, the agreement was that the mortgagor was to sell Survey No. 76 to the defendant for the amount of the mortgage debt.

It will be seen, therefore, that a reconveyance or deed of resale was necessary as regards Survey No. 394. Accordingly Exhibit 34 provided as follows :—" You (the mortgagee) have agreed to effect the re-sale of that at my convenience by a regular registered deed". But as regards Survey No. 76 the parties seem to have thought that it would be sufficient to leave the original deed of sale, Exhibit 28, standing, and merely to cancel the contemporaneous document, Exhibit 32. Accordingly Exhibit 34 provides that—

"Survey No. 76 from out of the properties involved in that mortgage by way of sale has been given this day to you in lieu of the debt of your shop and has been given into your possession this day.....and the possession of Survey No. 76 has accordingly been given to you this day. And the survey number has accordingly been transferred to your ownership itself.....the field of Survey No. 76 is given to you for cultivation and has been given into your possession...the said survey number shall be treated as sold on the basis of that *kararnama* and an endorsement has been made in the said *kararnama* and is cancelled and has been given into your possession."

Now it is common ground that no endorsement has been made on the *kararnama*, Exhibit 32, nor has it been cancelled formally. On the whole I am of opinion that this document, Exhibit 34, did not amount to an actual transfer of the equity of redemption, but only amounted to an agreement to transfer, or alternatively, an agreement to cancel Exhibit 32, and that consequently Exhibit 34 is admissible in evidence as an agreement and can be relied on by the defendants accordingly

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Vani v. *Bani*[1] is, I think, clearly distinguishable, as there the Court construed the particular document before it as creating a charge in the nature of a mortgage. It was not, therefore, a document which *merely* created a right to demand another document. Accordingly, on this point, I disagree with the lower appellate Court, and I agree with the conclusion which I understand the learned trial Judge to have arrived at, at p. 10, lines 20-32, of his judgment, viz., that the document itself did not purport to be the sale deed, but created a right to get formal sale deeds if necessary.

But there is an alternative way of putting the defendants' case. In *Mahomed Musa* v. *Aghore Kumar Ganguli*[2] it has been held by the Privy Council that in effect the English doctrine of part performance as explained in *Maddison* v. *Alderson*[3] applies in India as being a principle of natural justice, viz., to prevent the success of fraud in land transactions. No doubt in *Mahomed Musa* v. *Aghore Kumar*[2], the documents in question were before the date when the Transfer of Property Act came into operation. But their Lordships were fully aware of that fact, (see page 6), and yet in no way qualified the principles which are there laid down. Further, in Bombay that decision has been followed in *Hiralal Ramnarayan* v. *Shankar Hirachand*[4] by Sir Norman Macleod and Mr. Justice Shah in a case arising in 1916 long after the Act came into operation in this Presidency.

No doubt, to establish the application of that principle, it must be shown that the respective parties have so changed their respective positions that the change can only be referable to the contract alleged. A mere payment of purchase money, for instance, is insufficient. (See Halsbury, Vol. XXV, pp. 294-295.)

(1) (1895) 20 Bom. 553.
(2) (1914) L. R. 42 I. A. 1.
(3) (1883) 8 App. Cas. 467.
(4) (1924) 45 Bom. 1170.

In the present case I think the defendants satisfy that test. Since 1908 they have been in exclusive possession of Survey No. 76 : they have paid the assessment : no accounts have ever been demanded by the plaintiffs, nor have the plaintiffs made any payments. On the other hand the plaintiffs have been in exclusive possession of Survey No. 394 and no demand for payment has been made on them. This is exactly in accordance with the views I have expressed as to the intention of the parties under Exhibit 34. But it seems to me a complete variation of the original agreement, Exhibit 32 of 1906, under which the plaintiffs were to pay Rs. 125 every year for ten years, and under which, as we know, the mortgagors remained in possession till 1908 of both plots of land. Further the suit was not brought till 1919 and this length of time strengthens the inference that otherwise I would be prepared to draw.

The plaintiffs relied on *Kurri Veerareddi* v. *Kurri Bapireddi*[1] and *Ramanathan* v. *Ranganathan*[2], but the decision in *Salamat-Uz-zamin Begam* v. *Masha Allah Khan*[3] is to the contrary effect, and under the circumstances I would prefer to adopt what appears to me to be the true effect of *Mahomed Musa* v. *Aghore Kumar Ganguli*[4] followed as it is in this Court by *Hiralal Ramnarayan* v. *Shankar Hirachand*[5]. Accordingly, if necessary, I think that the defendants are also entitled to succeed upon this alternative ground.

In my opinion, therefore, the result arrived at by the lower Courts was correct, and this appeal must be dismissed with costs.

FAWCETT, J. :—The document, Exhibit 34, recites that Survey No. 76 has not only been given into the possession of the defendant mortgagee, but also that

(1) (1906) 29 Mad. 336.
(2) (1917) 40 Mad. 1134.
(3) (1917) 40 All. 187.
(4) (1914) L. R. 42 I. A. 1
(5) (1921) 45 Bom. 1170.

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its ownership has been transferred to him. It also says that Survey No. 76 is to be treated as sold, and the *karar-nama*, Exhibit 32, is cancelled to that extent. In view of these provisions I do not think the document can be treated as falling under clause (v) of sub-section (2) of section 17 of the Indian Registration Act 1908. Even if the document is taken to contemplate a further document cancelling Exhibit 32 to the extent mentioned, this makes no difference : see *Vani* v. *Bani*[1].

The test is whether the document does not itself by its express terms create a certain interest in immoveable property, but expressly contemplates the creation of that interest by a subsequent instrument : *cf.* Birdwood J.'s remarks in *Chunilal Panalal* v. *Bomanji Mancherji Modi*[2], a decision approved in *Shridhar Ballal Kelkar* v. *Chintaman Sadashiv Mehendale*[3]. Otherwise proper effect is not given to the words "not itself creating, declaring, assigning, limiting or extinguishing any right", &c. and "merely creating a right to obtain", &c., in section 17 (2) (v). Here it seems to me the parties clearly intended Exhibit 34 to be the main document evidencing the sale of the equity of redemption, and the endorsement on Exhibit 32 as a subsidiary affair. In my opinion it goes beyond "merely creating a right to obtain another document" to effect the sale, and itself purports to create or declare a transfer of ownership. I regret, therefore, I do not agree with my learned brother's view that the document can be treated as a mere agreement for sale.

Accordingly, I think the lower appellate Court was right in holding that the document required registration, and is, therefore, inadmissible in evidence for the purpose of affecting the Survey Number in question under section 49 of the Indian Registration Act. It can

(1) (1895) 20 Bom. 553. (2) (1883) 7 Bom. 310 at p. 315.
(3) (1893) 18 Bom. 396.

no doubt be looked at for a collateral purpose ; but that must be one other than that of creating or extinguishing a right to the land : see *Bai Gulabbai* v. *Shri Datgarji*[1]. I think this excludes looking at it even for the purpose of evidence as to the nature of defendant's possession, which he obtained under the arrangement of 1908 : *cf. Muthukaruppan* v. *Muthu*[2].

But the mere fact that the lower Court wrongly looked at the document does not necessitate a reversal of its decision : section 167, Indian Evidence Act. There was other clear evidence of a new arrangement in 1908, which has been considered by both the lower Courts who hold that it establishes the arrangement asserted by defendant as against that asserted by plaintiffs. The evidence seems sufficient to justify their conclusion, and no sufficient ground has been shown for our taking a different view of the facts in second appeal.

But it is contended that in law this arrangement is invalid, because it involves a sale of plaintiffs' equity of redemption which (as it is worth more than Rs. 100) can only be effected by a registered instrument under section 54 of the Transfer of Property Act and section 17 of the Indian Registration Act.

The answer to this is suggested in the lower Court's judgment which refers to the two cases at *Mahomed Musa* v. *Aghore Kumar Ganguli*[3] and *Nilkanth Bhimaji* v. *Hanmant Eknath*[4]. In the former case an equity of redemption was held to be extinguished, because, even if a regular conveyance was necessary, or if some other formal defect had occurred, the acts of the parties had been such as to supply all defects, on the equitable doctrine of performance or part-performance

(1) (1907) 9 Bom. L. R. 393 at p. 399.
(2) (1914) 38 Mad. 1158.
(3) (1914) L. R. 42 I. A. 1.
(4) (1920) 44 Bom. 881.

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of an agreement. In this case, on the findings of the lower Court, the agreement to make defendant complete owner of Survey No. 76 and to cancel the mortgage of 1906, had been acted on by the parties for some eleven years prior to the suit; and if the equitable principle in question can be properly applied to this case it gives a clear answer to plaintiffs' contention.

No doubt the Madras High Court has held that this principle has no operation in the case of a sale governed by section 54 of the Transfer of Property Act: see *Kurri Veerareddi* v. *Kurri Bapireddi*[1], and *Ramanathan* v. *Ranganathan*[2]. The latter decision was not, however, unanimous, Wallis C. J. and Abdur Rahim J. dissenting. It has also been dissented from by the Allahabad High Court (*Salamat-Uz-zamin Begam* v. *Masha Allah Khan*[3]) where the equitable principle of part performance was applied to the case of a transfer falling under section 54, Transfer of Property Act. In this Court the Madras view was taken in *Lalchand* v. *Lakshman*[4], but this has been virtually over-ruled by the Full Bench case of *Bapu Apaji* v. *Kashinath Sadoba*[5], where section 54 of Transfer of Property Act is considered, and it is held that, in spite of its provisions, a defendant in possession under an agreement of sale but without a registered conveyance can resist an action in ejectment by the plaintiff, who agreed to sell him the land and put him in possession. In the arguments the Privy Council case of *Mahomed Musa* v. *Aghore Kumar Ganguli*[6] was referred to.

I think it is clear that this ruling, which is binding on us, governs the present case: and personally I have the less hesitation in following it, in that the judgment

(1) (1906) 29 Mad. 336.
(2) (1917) 40 Mad. 1134.
(3) (1917) 40 All. 187.
(4) (1904) 28 Bom. 466.
(5) (1916) 41 Bom. 438.
(6) (1914) 42 Cal. 801; L. R. 42, I. A. 1.

in that case is based on Indian Statutory provisions, which (it is held) qualify section 54 of the Transfer of Property Act. If that is so, the equitable principle in question is one recognised by the Legislature: and the view taken by their Lordships in *Mahomed Musa* v. *Aghore Kumar Ganguli*[1] and *Venkayyamma Rao* v. *Appa Rao*[2] that the law in India is not inconsistent with this equitable principle, is shown to be justified. The case of *Maung Shwe Goh* v. *Maung Inn*[3] does not affect this, for that only concerned the English rule that a contract for sale of real property makes the purchaser the owner in equity of the estate, which is clearly opposed to the express provisions of section 54 regarding a contract for sale.

I was at first inclined to think that *Bapu Apaji* v. *Kashinath Sadoba*[4] would not apply to this case, as it was not a suit for possession but merely for an account. On further consideration, I think the same principle applies, for in both cases a liability to account for profits arises, and defendant is entitled to show that he is not so liable: *cf.* the passage from Story's Equity Jurisprudence cited in *Bapu Apaji* v. *Kashinath Sadoba*[4]. And both, *Mithiram Bhat* v. *Somanatha Naickar*[5] and *Mahomed Musa* v. *Aghore Kumar Ganguli*[6], where the principle in question was held applicable, were suits for redemption of a mortgage and not for possession.

I also think that the fact that defendants' right to a decree for specific performance may now be barred is immaterial. In *Mithiram Bhat* v. *Somanatha Naickar*[5], the defendants' claim was similarly barred

(1) (1914) 42 Cal. 801; L. R. 42, I. A. 1.
(2) (1916) 39 Mad. 509 at p. 525.
(3) (1916) 44 Cal. 542.
(4) (1916) 41 Bom. 438 at pp. 451, 452.
(5) (1901) 24 Mad. 397.
(6) (1914) 42 Cal. 801; L. R. 42, I. A. 1.

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as pointed out in *Ramanathan* v. *Ranganathan*[1]. And a similar view has also been taken in *Venkatesh Damodar* v. *Mallappa Bhimappa*[2].

The provisions of section 92, proviso (*4*), Indian Evidence Act, were also relied on; but it is not a mere case of setting up an oral agreement in modification of a registered instrument, and in *Mahomed Musa* v. *Aghore Kumar Ganguli*[3] a similar contention was unsuccessful (see at pp. 811 and 812).

I agree, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

R. R.

(1) (1917) 40 Mad. 1134 at pp. 1137, 1153. (2) (1921) 46 Bom. 722.
(3) (1914) 42 Cal. 801 ; L. R. 42 I. A. 1.

APPELLATE CIVIL.

1922.

December 22.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

GANESH NARHAR JOSHI (ORIGINAL PLAINTIFF), APPELLANT *v.* DATTATRAYA PANDURANG JOSHI (ORIGINAL DEFENDANT), RESPONDENT*.

Indian Limitation Act (IX of 1908), section 19—Acknowledgment—Endorsement on a promissory note.

An endorsement on a promissory note by the promisor is an acknowledgment of liability, which will start a fresh period of limitation from the date on which it was made, and it makes no difference that such endorsement is below an account showing what has already been paid on the promissory note.

Venkatakrishniah v. *Subbarayudu*(1), followed.

SECOND appeal against the decision of W. Baker, District Judge at Satara, reversing the decree passed by V. V. Bapat, Subordinate Judge at Karad.

*Second Appeal No. 111 of 1922.
(1) (1916) 40 Mad. 698.