APPELLATE CIVIL.

Before Mr. Justice Fawcett and Mr. Justice Madgavkar.

RACHAPPA CHANBASAPPA KARVIRSHETTI (ORIGINAL DEFENDANT No. 5), APPELLANT *v.* NINGAPPA BIN BASAPPA LAKHANNAVAR AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 2, 3, 4, 6 AND 7), RESPONDENTS*.

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Land Revenue Code (Bom. Act V of 1879), section 74—Rajinama and Kabulayat—Transfer of property—Indian Evidence Act (I of 1872), section 114.

The fact of the execution of a Rajinama and a Kabulayat under section 74 of the Bombay Land Revenue Code cannot by itself have the effect of transferring the ownership of the property. It is documentary evidence the effect of which must be weighed in each case on the merits and no legal presumption arises from the mere fact of such execution, that a transfer of ownership is intended to be effected.

Chandanmal v. *Bhaskar*[1], followed.

SECOND appeal against the decision of V. M. Ferrers, District Judge of Dharwar, reversing the decree passed by R. Baindur, Subordinate Judge at Hubli.

Suit to recover possession.

The plaint land Survey No. 165 of the village of Amergol belonged to one Basappa Lakhannavar (father of the plaintiff). He mortgaged it with possession in the year 1871 to one Basappa Gurappa (grandfather of defendants Nos. 1 and 2) for a sum of Rs. 300. Under the terms of the mortgage, the property was to be enjoyed by the mortgagee for a period of twenty-one years in full satisfaction of the debt and after the completion of the said period possession of the property was to be restored to the mortgagor free of the mortgage charge.

In 1873 the mortgagor Basappa again mortgaged the same property for an additional sum of Rs. 100 to the same mortgagee.

On September 5, 1877, a Rajinama was passed by the mortgagor Basappa to the mortgagee and a corresponding Kabulayat to Government was passed by the mortgagee.

*Second Appeal No. 350 of 1924.

(1) (1919) 22 Bom. L. R. 140.

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The mortgagor Basappa died in 1877. In 1909 the plaintiff had brought a suit against the mortgagee's representatives to redeem and to recover possession of the land alleging that it had been agreed that the defendants were to retain possession of the land for four years after the term of twenty-one years had expired and would surrender it to plaintiff's father but had not carried out the agreement. The main issue that then arose was whether the document of 1873 was a usufructuary mortgage or a lease and it was ultimately held by the High Court that the document was a mortgage and the case was sent back for trial on the merits. The suit, however, was not further prosecuted by the plaintiff and it was dismissed for non-appearance.

In 1921 the plaintiff sued for a declaration that the defendant's mortgage right over the plaint property had been fully discharged and for possession of the property.

The defendants Nos. 1 and 2 the grandsons of the original mortgagee, and defendant No. 5, who was a purchaser of a portion of the plaint property from defendant No. 1, all set up that the Rajinama and the Kabulayat of 1877 had the effect of extinguishing the mortgage.

The Subordinate Judge, relying mainly on the ruling in *Imam valad Ibrahim* v. *Bhau Appaji*[1], held that the intention of the parties by passing the Rajinama and the Kabulayat was to transfer the ownership in the property to the mortgagee. He, therefore, dismissed the plaintiff's suit.

On appeal the District Judge, relying on the ruling in *Chandanmal* v. *Bhaskar*[2], held that the Rajinama and Kabulayat had not the effect of passing the right,

[1] (1917) 41 Bom. 510. [2] (1919) 22 Bom. L. R. 140.

title and interest of the mortgagor to the mortgagee, and a decree for possession was passed in favour of the plaintiff.

The defendant No. 5 appealed to the High Court.

S. B. Jathar, for the appellant.

G. N. Thakor, with *S. V. Palekar*, for respondent No. 1.

H. B. Gumaste, for respondent No. 3.

FAWCETT, J.:—In this case the plaintiff's father mortgaged certain land to defendant No. 1's grandfather in the year 1871 with possession. Two years after that the plaintiff's father again mortgaged the same property for an additional sum of Rs. 100 to the same mortgagee. This document contains a term that the property should be enjoyed by the mortgagee for a period of twenty-one years in full satisfaction of the debt and after the completion of the said period, possession of the property should be restored to the mortgagor free of the mortgage charge. The plaintiff's father died in 1877. Under the term that I have just mentioned the property should have been given back to the mortgagor about 1894. But that was not done. In 1909 the plaintiff brought a suit against the mortgagee's representatives to redeem and recover possession of the land, alleging that it had been agreed the defendants should retain possession of the land for four years more after the term of twenty-one years had expired, and would then surrender it to his father, but that they had not carried out the agreement. In that litigation the main question that arose and was decided was whether the document of 1873 was a usufructuary mortgage or a lease, and it was held that it was a usufructuary mortgage. The trial Judge had found the deed to be a lease and dismissed the plaintiff's suit, but the two appellate Courts held that it was really a mortgage and the case was sent

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back for trial on the merits. Apparently that suit was not further prosecuted by the plaintiff and it was dismissed for non-appearance. The plaintiff's present suit was brought in 1921 to recover possession and mesne profits on the ground that defendants' mortgage-right had been fully discharged. The Subordinate Judge dismissed the plaintiff's suit with costs holding that the equity of redemption under the mortgage had been extinguished by a subsequent passing of a Rajinama and a Kabulayat. The Rajinama was passed by the plaintiff's father to the mortgagee in 1877 and a corresponding Kabulayat to Government was passed by the mortgagee. Defendants Nos. 1 and 2, who are the grandsons of the original mortgagee, and defendant No. 5, who is the purchaser of a portion of the plaint property from defendant No. 1, all set up this Rajinama and Kabulayat as having extinguished this mortgage.

The District Judge in appeal from this decision held that there was no transfer of ownership by the Rajinama and Kabulayat and that the equity of redemption still subsisted. No other question, he says, was proposed, and he, therefore, granted the plaintiff a decree for possession with costs and an order as to future mesne profits.

Defendant No. 5 has appealed from this decision on the ground that the Rajinama and Kabulayat have in law extinguished the equity of redemption. Mr. Jathar in support of this contention has drawn our attention to various rulings of this Court in regard to the effect of a Rajinama and a Kabulayat, such as have been passed in the present case, viz., *Tarachand Pirchand* v. *Lakshman Bhavani*[1]; *Vishnu Sakharam Phatak* v. *Kashinath Bapu Shankar*[2]; *Venkaji Narayan* v. *Gopal Ramchandra*[3]; *Narso Ramaji* v. *Nagava*[4];

(1) (1875) 1 Bom. 91.
(2) (1886) 11 Bom. 174.
(3) (1914) 39 Bom. 55.
(4) (1918) 42 Bom. 359.

Chandanmal v. *Bhaskar*[1]; and *Imam valad Ibrahim* v. *Bhau Appaji*[2]. He contends that the effect of all these cases but the last is that a legal presumption arises from the passing of the Rajinama and Kabulayat, that a transfer of ownership is intended to be effected, and that accordingly it operates, just as if it was a sale, to extinguish the equity of redemption. Now, no doubt, the earlier cases did rather go that way and in particular the case of *Venkaji Narayan* v. *Gopal Ramchandra*[3] is very similar to the present case. Also in *Narso Ramaji* v. *Nagava*[4] Beaman J. in his judgment takes the view that the passing of the Rajinama and Kabulayat is fairly conclusive evidence that a transfer of ownership has in fact been made. But in the last named case of *Chandanmal* v. *Bhaskar*[1] Sir Norman Macleod, Chief Justice, and Heaton J., who was a party to some of the previous cases, held that it does not necessarily by itself amount to a transfer of the property, and that each case must depend upon its own facts. Speaking for myself, I think that this is certainly a more reasonable view to take than the view that the Court should at once presume that a transfer of ownership is intended, if a Rajinama and a Kabulayat have been passed. I do not think that there is any current of authority in this Court which would justify our holding that a legal presumption arises under section 114 of the Indian Evidence Act, such as the appellant's pleader contends for. That section only says that the Court "may presume", and the last ruling to which our attention has been called is distinctly against its presuming that the Rajinama and Kabulayat have the effect of transferring the ownership of the property. Heaton J., in his judgment in this case, says (p. 143): "A Rajinama

(1) (1919) 22 Bom. L. R. 140.
(2) (1917) 41 Bom. 510.
(3) (1914) 39 Bom. 55.
(4) (1918) 42 Bom. 359.

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and Kabulayat do not by any means completely take the place of a sale-deed. They only serve as documentary evidence of transfer, if that transfer can properly be inferred from the totality of facts proved: and these must usually at any rate comprise a good deal more than the Rajinama and Kabulayat themselves". As I have already said, he was a party to some of the previous decisions, and considerable weight attaches to these remarks. He certainly does not take the view that there is any presumption of the kind I have mentioned, because he says that the totality of facts proved must usually comprise a good deal more than the Rajinama and Kabulayat. In the present case the District Judge has considered the circumstances and has come to the conclusion that the passing of the Rajinama and Kabulayat was probably due to the inconvenience that would arise in regard to the payment of assessment, which the mortgagee had undertaken to make, if the mortgagor Basappa continued to hold the Khata of the land, and that there was no indication that they were intended to have any other effect. That is a conclusion which, on the view of law that I have mentioned, he was entitled to take, and it seems to me an entirely reasonable one. Therefore, I do not think that there is any error of law which would justify our interference with his conclusion in second appeal.

It has, however, been urged that in any case the suit is barred by limitation, because the mortgagee had given up possession in 1894, and even allowing for the extra period during which the plaintiff in the previous suit of 1909 said it was agreed that the mortgagee should remain in possession, there had been over twelve years before the present suit was brought, in which the representatives of the mortgagee had adverse possession. But this is a point which I do not think

we can now go into. It is not a point that has been taken in the memorandum of appeal, and therefore it cannot now be urged without the leave of the Court under Order XLI, Rule 2, read with Order XLII, Civil Procedure Code, 1908. If the point of limitation had arisen on the face of the plaint, then no doubt there is authority for saying that leave should be given as a matter of course. But in the present case it appears to me that the point of limitation cannot properly be decided without some evidence as to the circumstances in which the mortgagee continued to have possession of the land subsequent to 1894. No such evidence appears to have been given, and although the point of limitation was taken in the written statement of defendants Nos. 1, 2 and 5 no issue relating to it was raised in the trial Court. In the appellate Court also the District Judge said "no other question was proposed". So that it seems to me clearly a case where we should not give leave for this point to be taken, and, in any case, as it cannot be decided without the case being remanded for additional evidence, it cannot succeed in second appeal. I would therefore dismiss the appeal with costs.

MADGAVKAR, J. :—In the previous litigation between the parties this Court had disallowed the contention of the present appellant that the transaction was a lease and had upheld the contention of the respondents that it was a mortgage. The appellant's possession therefore remains as mortgagee; and it was for him from the outset, if he relies on his possession having become adverse, clearly to plead the facts and the date when it so became. Having failed to do so, it is hardly open to him in second appeal to set up a contention of adverse possession and limitation.

As regards the Rajinama and Kabulayat, I would respectfully agree with the decision in *Chandanmal* v. *Bhaskar*[1]. They are evidence, the effect of which

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must be weighed in each case on the merits. In the present case the only other circumstance in favour of the appellant is the long possession. That is largely nullified by the death of the original mortgagor in 1877 within four years of the second mortgage. In the absence of evidence as to age or knowledge of the possession in the plaintiff's son by the mortgagor, that circumstance coupled with the Rajinama and Kabulayat is not enough to show that the parties intended to convert a mortgage into a sale. I agree, therefore, that the appeal fails and must be dismissed with costs.

Decree confirmed.

J. G. R.

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

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June 10.

BURJOR F. R. JOSHI *v.* ELLERMAN CITY LINES, LIMITED *.

Indian Arbitration Act (IX of 1899), section 4—Submission to arbitration—Clause in bill of lading giving option to one of the parties to have disputes settled by Courts in United Kingdom—Application for stay of suit in Bombay.

A submission to arbitration according to section 4 of the Indian Arbitration Act is a submission which provides that either party in case of a dispute arising on the contract is at liberty to take the necessary steps to get the dispute decided by arbitration.

Held, therefore, that a clause in a bill of lading which provided "that all claims arising under the said bill of lading shall be determined at the port of destination of the goods according to British law, or at the shipowner's option determined in the United Kingdom and to the exclusion of the jurisdiction of any other country" was not a submission to arbitration within the meaning of section 4 of the Indian Arbitration Act, and that the definition of "submission" cannot be extended so as to include an agreement of the kind mentioned in the said clause.

* O. C. J. Appeal No. 30 of 1925 : Suit No. 3550 of 1923.