

# MADRAS HIGH COURT REPORTS.

## Appellate Jurisdiction. (a)

*Referred Case No. 14 of 1870.*

VENKATARA'MA NAIK and another,

*against*

CHINNATHAMBU REDDI.

The plaintiff hypothecated certain land to the defendant by a duly registered instrument, and subsequently paid off the debt and received back the instrument. At the time of payment the defendant made an endorsement on the bond to the following effect—"25th Kartiké of Sukla. Rupees two hundred and sixty-three, principal including interest, was received on account of this bond, and there is, therefore, no lien whatever." Some time afterwards plaintiff discovered that what he had paid in redemption of the mortgage claim was in excess of what was due, and he brought a Small Cause suit to recover the amount overpaid, tendering in evidence the endorsement on the bond. The objection was taken that the endorsement not being registered was not receivable in evidence, under Section 49 of the Registration Act of 1866. The District Munsif dismissed the suit upon the ground that the endorsement was not signed by the defendant and was, therefore, not admissible in evidence, but referred to the High Court the question whether the evidence was rightly excluded.

*Held*, by SCOTLAND, C. J. and INNES, J., that the fact of there being no signature to the endorsement was no objection to its reception as confirmatory evidence of the sum received by the defendant.

By SCOTLAND, C. J.—That the endorsement was admissible evidence for the purpose for which it was offered, although not registered, the endorsement not being used as evidence of the creation or discharge of an obligation, but merely as confirmatory proof of a fact provable by oral evidence although stated in writing.

By INNES, J.—That the endorsement was admissible evidence, its reception not being precluded by the provisions of the Registration Act.

THE following case was stated under Section 22, Act XI of 1865, by T. Appiah Chettiar, District Munsif of Cuddalore, in Suit No. 1,102 of 1869.

1871.  
*November 10.*  
*R. C. No. 14*  
*of 1870.*

"The plaintiffs sue the defendant for the recovery of Rupees 10-10-0, said to have been overpaid to the defendant.

The plaint sets forth that the plaintiffs and 1st plaintiff's wife Venghi, and his son Chinnaya Naik (who are under the maintenance of plaintiffs) mortgaged their 5½ kánis of land to defendant on the 9th Tai of Atchaya (20th January 1867) for Rupees 186-10-0: that on the 25th Kartiké of

(a) Present: Scotland, C. J. and Innes, J.

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Sukla (8th December 1869) the plaintiffs asked defendant to receive the principal and interest and to return the bond, when the defendant told them that the principal and interest due on the bond amounted to Rupees 263, which sum the plaintiffs paid to the defendant, and he endorsed its receipt on the back of the bond and returned it to plaintiffs: that the plaintiffs, not knowing how to read and write, referred to men who could read, when they found that the defendant received from them Rupees 10-10-0 more than was actually due; which sum the plaintiffs claim to recover from the defendant.

The defendant denies having received the Rupees 10-10-0, and states that on the day previous to the 25th Kartiké (8th December 1869) the plaintiffs asked him what amount was due on the bond, in reply to which he wrote on a piece of cadjan that the amount due to him under the bond was Rupees 252-3-0: that on the 25th Kartiké aforesaid the plaintiffs paid him only Rupees 252, and said that they had not brought the 3 annas: that the defendant received the Rupees 252 and simply returned the bond to plaintiffs, without endorsing the receipt of the money on the back of the bond as alleged by plaintiffs: and the defendant states that the endorsement is not his handwriting.

The mortgage bond in question was regularly registered under the Indian Registration Act XX of 1866, and by its terms  $5\frac{1}{2}$  kánis of land were mortgaged to the defendant for Rupees 187-10-0.

The following is the translation of the endorsement on the back of the bond—" 25th Kartiké of Sukla, Rupees two hundred and sixty-three, principal including interest, was received on account of this bond, and there is therefore no mortgage lien whatever." This endorsement is not signed by the defendant but is attested by four persons.

The defendant's Vakíl pleads that the original document, which purports to be a mortgage of immovable property, has been duly registered, and that, therefore, the endorsement discharging that liability must also be registered under Clause 3, Section 17 of the Act, but that it is not registered and,

under Section 49, cannot be received in evidence.....  
 and the last objection is that the document not being signed  
 by the defendant, it cannot be received in evidence.....  
 As the endorsement is not signed by the defendant, I am of  
 opinion that it cannot be received in evidence. I have dis-  
 missed the suit, subject, however, to the orders of the Honor-  
 able Court as to the correctness of my views.”

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No counsel were instructed.

The Court delivered the following judgments :—

SCOTLAND, C. J.—I am of opinion that the endorsement was admissible evidence for the purpose for which it was offered, although not registered.

The parties were not, it appears, at issue as to the discharge of the defendant's mortgage lien. The sole question between them was whether Rupees 263, or the smaller sum really due on the bond, was received by the defendant on the 8th December 1869 ; and the endorsement, therefore, was put forward simply as confirmatory evidence of the defendant's receipt of the former sum on account of the bond, a fact provable by oral evidence although stated in the endorsement.

Then, as to there being no signature to the endorsement. That was, clearly, no objection to its reception as confirmatory evidence of the sum received by the defendant. I think the present case may be distinguished from the case of *Achoo Bayamah v. Dhany Ram and another* (IV, M. H. C. Rep., 378) on the ground that it is not sought to use the endorsement as evidence of the creation or discharge of an obligation, but merely as confirmatory proof of a fact provable by oral evidence although stated in writing.

INNES, J.—In the case referred to us, the plaintiff had hypothecated certain land to the defendant by a duly registered instrument, and subsequently paid off the debt and received back the instrument. At the time of payment the defendant made an endorsement on the bond to the following effect :—“ 25th Kartiké of Sukla. Rupees two hundred and sixty-three, principal including interest, was received on account of this bond and there is therefore no lien whatever.”

1871.  
November 10.  
R. C. No. 14  
of 1870.

Some time afterwards plaintiff discovered that what he had paid in redemption of the mortgage claim was in excess of what was due, and he brought a Small Cause Suit to recover the amount overpaid, tendering in evidence the endorsement on the bond. The objection was taken that the endorsement required registration, and, not being registered, was irreceivable in evidence under Section 49 of the Registration Act of 1866.

The District Munsif dismissed the suit upon the ground that the endorsement was not signed by the defendant and was, therefore, not admissible in evidence, but referred to the High Court the question whether the evidence was rightly excluded.

The ground upon which the District Munsif excluded the evidence is clearly untenable, but there remains the question upon which the Chief Justice and Mr. Justice Holloway differ, as to whether Section 49 of the Registration Act precludes the admission of the endorsement as evidence for the purpose for which it is tendered, viz., to prove the amount paid.

In the case at IV, M. H. C. Rep., 378, in which I took part, the majority of the Court came to the opinion that an instrument requiring registration by Section 17 of the Registration Act, if unregistered, is by Section 49 inadmissible in evidence *for any purpose whatever*, and the sole question now open for our consideration seems to me to be whether the endorsement is such an instrument as under Section 17 *requires* registration. Now, what does the endorsement amount to? Is it in the words of Clause 3, Section 17 "an instrument which acknowledges the receipt or payment of a consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title or interest," *i. e.* of a right, title, or interest in immovable property of a value of one hundred Rupees and upwards.

The instrument is, as it seems to me, nothing more than an acknowledgment of the payment of a debt and of the fact of certain legal incidents attaching by the act of pay-

ment, which does not operate as a consideration, for any-  
 thing to be done by the person receiving it. No act on  
 the part of the defendant, the person receiving payment,  
 was necessary to replace the plaintiff in possession of the  
 entire interest in the property charged with the debt, for to  
 the act of payment itself the law immediately attaches the  
 incident of extinction of the hypothecation lien.

The clause appears to me to apply to instruments of  
 acknowledgment of payment made on account of some such  
 act of the party receiving payment, as is necessary to effect  
 the change desired in the rights of the respective parties ;  
 as an instrument acknowledging re-payment of the amount  
 due on a mortgage in which the legal estate having been  
 conveyed a reconveyance has become necessary ; or an  
 instrument acknowledging the payment of a sum of money on  
 account of the extinction of a right of easement, in which  
 some act of the party receiving the money is necessary to  
 effect the extinction of the right residing in him. When no  
 act of the party receiving the payment is necessary to effect  
 the change of rights aimed at, the payment, I conceive, does  
 not properly come within the term " consideration." I think,  
 therefore, that the endorsement in the present case does not  
 come within this clause of Section 17. Nor does it seem to  
 come within any other clause of that Section. I am of  
 opinion, therefore, that this case is not governed by the de-  
 cision in IV, M. H. C. Rep., 378, but I am unable to agree  
 in the *reasons* of his Lordship the Chief Justice for the con-  
 current conclusion at which I have arrived, that the Regis-  
 tration Act does not shut out the reception of the document  
 in evidence.

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