

(1914) 09 MAD CK 0049
In the Madras High Court

P.K. Kalliani Amma and Others

APPELLANT

Vs

M.T. Narayanan Nambiar and Others

RESPONDENT

Date of Decision : 22-09-1914

Acts Referred:

Citation : AIR 1915 Mad 962 : (1915) 28 MLJ 266

Hon'ble Judges : Tyabji, J;Spencer, J

Bench : Full Bench

Judgement

Spencer, J.—The plaintiffs brought this suit to redeem a kanom (Exhibit B) of the Malabar year 1025 corresponding to 1850 A.D.

2. According to the allegations in the plaint, Exhibit B was a renewal of a prior kanom (Exhibit A) of 1012 (1837), which was transferred to defendants' ancestors in 1022 (1847) through Exhibit G.

3. Both the lower courts have found against the genuineness of the plaint Marupat (Exhibit B). They are also agreed that the jenm title is in plaintiff's tarwad, and that the defendants have not proved the existence of any jenm title in their tarwad or tavazhi. These are findings on questions of fact which we must accept.

4. The District Munsif gave the plaintiffs a decree for redemption on the strength of the prior kanom-deed of 1837, Exhibit A, about which he remarked that it was "a very suspicious-looking document " but " might be genuine, " as plaintiffs had, in his opinion, succeeded in showing a subsisting right in the year 1861.

5. The District Judge has not distinctly found in so many words that Exhibit A is not a genuine document, but I think the effect of paragraph 7 of his judgment is to that effect, as he begins it by observing " The case must depend entirely on the question whether Exhibit A is accepted as genuine, " and he ends it by saying " The document is unstamped and the evidence about its custody is not very satisfactory," and he thereon proceeds to allow the appeal and dismiss the plaintiffs' suit.

6. Mr. Rosario for the plaintiffs--appellants relies on certain admissions contained in Exhibits C and E which are written statements filed in O.S. No. 412 of 1888 and O.S. No. 202 of 1901 by Cherunni Amma, mother of 6th defendant and predecessor-in-title of defendants 5, 6 and 8 who claim as donees from her. He wishes to make the statements of fact made in these documents serve the double purpose of acknowledgments of liability saving limitation u/s 19 of the Limitation Act, and as evidence of the mortgage transaction.

7. For the former purpose, I consider that they are sufficient as they state the facts that Govindan Embrandiri took this property from P.K.R. Nambiar and Rairappan Nambiar on kanom for a sum of Rs. 808, that Cherunni Amma's deceased brother took an assignment of that right from Embrandiri and that Cherunni Amma got patta transferred in her name and was holding the property under that title.

8. For the purpose of Section 19 of the Limitation Act, it is not necessary that all the legal consequences that may flow from the obligation acknowledged should be specified to constitute an acknowledgment (vide *Sukhamoni Chowdhurani v. Ishan Chunder Roy* ILR (1898) C. 844 *Maniram Seth v. Seth Rupchand* (1906) ILR 33 C. 1047 (P.C.) and *Kddiri Pakirappa v. Manki Husan Saheb* (1909) 19. M.L.J.650.

9. On the second point, it appears that it is plaintiffs' case that the relationship of mortgagor and mortgagee was created by the transaction which was expressed in writing in Exhibit B, which superseded the prior mortgage, Exhibit A.

10. Now when a contract has been embodied in a document, the parties to it are precluded by Section 91, Evidence Act from enforcing by way of suit obligations arising out of such contract except by proving the original document itself or by letting in secondary evidence of its contents in cases where secondary evidence is admissible, as when the original is lost or withheld by the opposite party with the knowledge that they will be required to produce it (vide *Pothi Reddi v. Velayudasivan* ILR (1886) M. 94 *Sheik Akbar v. Sheik Khan* (1881) ILR 7 C. 256 *Mallayya v. Ramayya* (1911) 21 M.L.J. 462 and *Muthu Sastrigal v. Viswanatha Pandara Sannadhi* (1913) 14 M.L.J. 520.

11. Of course if there is a pre-existing independent liability, the plaintiff can base his cause of action on that and may enforce the obligations arising out of such liability, without proving the genuineness of any particular document which may serve merely as one piece of evidence of the existence of the defendant's liability. For instance, if a loan has been given of which there is an independent admission and a hundi or promissory note is taken to secure its repayment and the hundi is inadmissible in evidence through being unstamped, the plaintiff can sue on the original consideration, which was the case in *Krishnaji v. Rajmal* ILR (1899) B. 360 *Pramatha Nath Sandal v. Dwarkanath Dey* ILR (1896) C. 851 and *Yarlagadda Veera Ragavayya v. Gorantla Ramayya* ILR (1905) M. 111.

12. There is another case in *Golapchand Marwaree v. Thakurani Mohokoom*

Kooaree ILR (1878) C. 31 the circumstances of which are not so clear from the report.

13. As stated in *Pothi Reddi v. Valayuda Sivan* ILR (1886) M. 94 there is no doubt as to the principle of the authorities and the only difficulty is in the determination in individual cases, to which class, a particular case belongs.

14. this Court has always held that where the cause of action is complete in itself and inseparable from the giving of the bond or note, the plaintiff must lose his suit if he fails to prove the document upon which his cause of action is based, and that to hold otherwise would be to defeat the provisions of Section 91 of the Evidence Act. This point was not raised in *Uppi Haji v. Mammavan* ILR (1893) M. 366 the only question there considered being whether the acknowledgment saved the bar of limitation. It was admitted by the defendants in that suit that the mortgage was true.

15. In the present case, the plaintiffs' right to redeem is inseparably bound up in Exhibit B which both Courts have found to be not genuine. Exhibit B is itself primary evidence of the matters contained in it, as it purports to be a counter-part of the *kanom-deed* which should be in the possession of the defendants, if they are the mortgagees.

16. Secondary evidence, as a general rule, is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents. (*Vide Queen Empress v. Viran* ILR (1886) M. 224 and Section 64 of the Evidence Act. If an admission cannot be made use of as secondary evidence of a document inadmissible in evidence for want of stamp or registration (*Cf. Varada v. Krishnasami* ILR (1882) M. 117 and *Somu Gurukkal v. Rangammal* (1873) 7 M.H.C.R. 13), a fortiori the Courts cannot allow admissions to be used as secondary evidence of the contents of a document when the document put forward as an original is found to be a forgery.

17. I may here state that I have had the advantage of reading my learned brother's judgment and I am quite willing to concede that the Evidence Act places written admissions on a higher footing than oral admissions of the contents of a document, and that the description of several kinds of secondary evidence given in Section 63 is not exhaustive. The advantage of written admissions over oral admissions appears to consist in the fact that it is not necessary for a party producing a written admission to give notice to the opposite side to produce the original of the document, but a party intending to rely on an oral admission of its contents must comply with the provisions of Section 66. Nevertheless even written admissions must be classed as secondary, not primary, evidence of the contents of a document so that proof of the original having been duly executed is indispensable. The provision for receiving written admissions as proof of the contents of a document is confined to cases where the original is in existence and might be, but is not, produced. (*Cf. note on Clause*

(b) of Section 65 in Mr. Ameer Ali's Evidence Act, 3rd edition, page 600).

18. It will not apply to cases where an original is put forward as primary evidence of the terms of a contract and that original is found to be a forgery. (Cf. note at p. 700 of the same commentary on the principle of Section 91). Nor will it be available against others than the person who made the written admission and his successors in interest. (Section 656).

19. It is thus difficult to see how the interests of defendants 1, 2 to 4, 7 and 9 and 10 in any case can be affected by the admission of Cherunni Amma in Exhibit C, when their case stands upon a denial of the truth of the marupat sued on.

20. Again, the plaintiffs having failed to prove Exhibit B to the satisfaction of the two Courts which are arbiters of questions of fact, cannot fall back on Exhibit A as the finding of the lower appellate Court is that this document also is not genuine. The plaintiffs' suit being for redemption, they must, in order to succeed, establish their right to redeem and the terms under which such right can be exercised. For the purposes of this suit, it is not sufficient for the plaintiffs to have proved their title of Jenmi and to rely on the defendants' failure to show that the Jenm right lies with them. Plaintiffs cannot even be given a decree for recovery of possession of Immovable property on the strength of their Jenm title without proof of possession within 12 years of suit against the defendants who have admittedly been in possession and enjoyment of the properties for more than the statutory period.

21. The appeal should therefore in my opinion be dismissed but in the circumstances without costs.

22. As my learned brother takes a different view, and the questions of law upon which we differ are of some importance, the case will be referred under the proviso to Section 98, Civil Procedure Code, to a third Judge for a decision upon the following points of law.

(1) Whether, having regard to the terms of the plaint and the fact that Exhibit B has been found not to be genuine, the plaintiffs can be permitted to rely on secondary evidence of the mortgage referred to in the plaint.

(2) If the answer to the first question is in the affirmative, then whether the documents relied upon by the plaintiffs are legally admissible as secondary evidence of the said mortgage.

Tyabji, J.

23. The appellants' suit for a redemption was dismissed as being barred by limitation. It is argued before us that limitation is saved by a series of acknowledgments each made by the mortgagors or their successors-in-title when the right to redeem was subsisting : *Atmaram v. Govind* (1873) 7 M.H.C.R. 13), a fortiori the Courts cannot allow admissions to be used as secondary evidence of

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25. It will not apply to cases where an original is put forward as primary evidence of the terms of a contract and that original is found to be a forgery. (Cf. note at p. 700 of the same commentary on the principle of Section 91). Nor will it be available against others than the person who made the written admission and his successors in interest. (Section 656).

26. It is thus difficult to see how the interests of defendants 1, 2 to 4, 7 and 9 and 10 in any case can be affected by the admission of Cherunni Amma in Exhibit C, when their case stands upon a denial of the truth of the marupat sued on.

27. Again, the plaintiffs having failed to prove Exhibit B to the satisfaction of the two Courts which are arbiters of questions of fact, cannot fall back on Exhibit A as the finding of the lower appellate Court is that this document also is not genuine. The plaintiffs' suit being for redemption, they must, in order to succeed, establish their right to redeem and the terms under which such right can be exercised. For the purposes of this suit, it is not sufficient for the plaintiffs to have proved their title of Jenmi and to rely on the defendants' failure to show that the Jenm right lies with them. Plaintiffs cannot even be given a decree for recovery of possession of Immovable property on the strength of their Jenm title without proof of possession within 12 years of suit against the defendants who have admittedly been in possession and enjoyment of the properties for more than the statutory period.

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33. It is thus difficult to see how the interests of defendants 1, 2 to 4, 7 and 9 and 10 in any case can be affected by the admission of Cherunni Amma in Exhibit C, when their case stands upon a denial of the truth of the marupat sued on.

34. Again, the plaintiffs having failed to prove Exhibit B to the satisfaction of the

two Courts which are arbiters of questions of fact, cannot fall back on Exhibit A as the finding of the lower appellate Court is that this document also is not genuine. The plaintiffs' suit being for redemption, they must, in order to succeed, establish their right to redeem and the terms under which such right can be exercised. For the purposes of this suit, it is not sufficient for the plaintiffs to have proved their title of Jenmi and to rely on the defendants' failure to show that the Jenm right lies with them. Plaintiffs cannot even be given a decree for recovery of possession of Immovable property on the strength of their Jenm title without proof of possession within 12 years of suit against the defendants who have admittedly been in possession and enjoyment of the properties for more than the statutory period.

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37. The appellants' suit for a redemption was dismissed as being barred by limitation. It is argued before us that limitation is saved by a series of acknowledgments each made by the mortgagors or their successors-in-title when the right to redeem was subsisting : *Atmaram v. Govind* ILR (1887) B. 282 *Venkataratnam v. Kamayya* ILR (1887) M. 218, *Mohesh Lal v. Busunt Kumaree* ILR (1880) C. 340 *Sukhamoni Chowdhurani v. Ishan Chunder Roy* ILR (1898) C. 844.

38. It has to be considered therefore whether each of these alleged acknowledgments was in its terms such as would fall within Section 19 of the Limitation Act and whether it was made before the expiration of the period prescribed or of the "fresh period" referred to in the section.

39. The last of such acknowledgments was that contained in Exhibit C, the written statement of a predecessor-in-title of the defendants, filed in O.S. No. 412 of 1888 dated 9th November 1888. The first question that has to be decided therefore is whether Exhibit C is a sufficient acknowledgment u/s 19 of the Limitation Act. Exhibit C contains a statement that "while" the predecessors in title of the plaintiffs "were holding this property for a long time with the

assessment in their names," the predecessors-in-title of the defendants " took this on kanom (mortgage) for the sum of Rs. 808;" the document goes on to state that an assignment of the mortgage was taken by another person and through that the writer of Exhibit C obtained possession of the property, and was holding and enjoying the property. Exhibit C is therefore an acknowledgment of the existence of a kanom for Rs. 808. The acknowledgment u/s 19 of the Limitation Act need not specify every legal consequence of the thing acknowledged; *Sukhamoni Chowdhurani v. Ishan Chunder Roy* ILR (1898) C. 814, 851 (P.C.).

40. Two objections are taken to Exhibit C as an acknowledgment on behalf of the respondents.

41. First it is argued that the statements contained in it are mere recitals of a liability that once existed, not amounting to an acknowledgment of a present liability existing at the date of the acknowledgment; *Narayana Ayyar v. Venkataramana Ayyar* ILR (1902) M. 220. But in Exhibit C it is stated that the predecessor-in-title of the defendants took the property on kanom, and that the same right devolved upon the writer of Exhibit C through an assignee. The reference to the kanom was for the purpose of showing how the lands were then held by the declarant, clearly implying that the kanom was subsisting. The effect of Exhibit C therefore seems to me to be similar to that of the statement in *Uppi Haji v. Mammavan* ILR (1893) M. 366. These lands were described by a testator in his will as " demised to me on kanom " and this description was held to be a sufficient and valid acknowledgment. The soundness of that decision has not been doubted in any case brought to our notice: it has been followed in *Lackmi Chand v. Allah Dia* (1908) N.W.P. WN 226.

42. Next it was argued for the respondent that Exhibit C cannot avail as an acknowledgment as it purports to be signed only by one of two co-mortgagees : *Narayana Ayyar v. Venkataramana Ayyar* ILR (1902) M. 320. Exhibit C is no doubt signed by Kunhi Amma alone; and it is stated in the course of Exhibit C itself that the property had devolved upon Kunhi Amma and her elder sister Kunhoonha. It appears however that the elder sister had predeceased the younger, leaving the latter the sole surviving mortgagee. The prior death of the elder sister is not recited in Exhibit C, but the defendants themselves claim to derive their title through Kunhi Amma (the younger sister) alone. Hence there can be no objection to Exhibit C as an acknowledgment on the ground of the person making it.

43. Assuming that Exhibit C was a sufficient acknowledgment in regard to its contents as well as the persons making it, it is argued for the appellants that it was made "before the expiration of the period prescribed," because it was made within 60 years of the next preceding acknowledgment, which again was made within 60 years of the date of the mortgage.

44. The acknowledgment next preceding Exhibit C that is relied upon is contained

in Exhibit G, a transfer of the mortgage rights, in 1847 by the then mortgagee. It is therein stated "As I have paid 4040 fanams (i. e., Rs. 808)...and have obtained a kanom demise in respect of those lands.... I have this day received from you... and have relinquished the right to you,"

45. It seems to me that Exhibit G is also a sufficient acknowledgment as regards its contents for reasons similar to those given with reference to Exhibit C.

46. Hence the question arises whether the Exhibit G was made before the expiration of the period prescribed"--in other words whether the mortgage was of some date more than 60 years prior to Exhibit G.--i. e., prior to 1788? If it is of a later date than 1788, then a fresh period of limitation has to be computed from the date of Exhibit G, and similarly from the date of Exhibit C, and it would follow that the suit is not barred. If on the other, hand, the mortgage is not shown to be of a date later than 1788 then the right to redeem was barred at the date of Exhibit G and therefore no fresh period can be counted from that date.

47. The appellants contend that the mortgage is proved to have been of a date after 1808, by the reference contained in Exhibit C to the mortgagors as " holding this property for a long time with the assessment in their name; " the statement that the mortgagors were so holding, it is argued, shows that they must have continued to hold it till the period when assessment was first payable; and that assessment was first payable in 1808 is shown by the fact that the British Government acquired the territory in 1792, and that the first survey was made in 1808. The proclamation for the survey is given in Logan's Malabar Manual, Vol. II p. CCLIII.

48. As against this contention, it is argued for the respondents that Exhibit C does not prove that the mortgagors had been paying assessment prior to the mortgage. For this purpose, it is argued first that the words above cited (and relied upon by the appellants) must be read in connection with the later part of Exhibit C, in which it is stated that "this property is in my possession by virtue of the possessory right extending for the last 100 years and more." This, it is argued, would take the mortgage to some date prior to 1798, when there was no assessment and that it consequently contradicts the earlier statement relied upon by the appellants. The latter portion of Exhibit C, however, when read with what precedes, seems to me to refer to the possession of the mortgagors (from whom title was derived by the mortgagees) no less than to the direct possession of the mortgagees themselves. It was necessary for the declarant of Exhibit G to show that the mortgagor, through whom the declarant claimed, had acquired title by adverse possession as against the alleged mortgagor of the opponent of the declarant. This also makes it clear that the statement that the predecessors-in-title of the declarant were " holding this property for a long time with the assessment in their name" on which the appellants rely) was not a casual statement but was deliberately made, with the intention of showing the title of the mortgagors whose mortgagee the declarant claimed to be.

49. Next it is questioned whether such a statement, made under such circumstances as are above referred to, is evidence of the facts stated. The fact whether or not the alleged mortgagors of the declarant of Exhibit C paid assessment is a relevant fact, as appears from what has been already said. The statement in question "suggests an inference" as to that relevant fact within the meaning of the Indian Evidence Act, Section 17. It will, therefore be an admission as defined in that section, if " it is made (a) by any of the persons, and (b) under the circumstances " mentioned in the Indian Evidence Act. (a) The person making the statement was one " from whom the parties to the suit have derived their interest in the subject-matter of the suit as required by Section 18 (2). (6) The circumstances under which it ought to be made is that it must be made during the continuance of the interest of the person making the statement. The requirement is also satisfied. The statement is therefore an admission. Hence it can be proved u/s 21 against the person who made it, or his representatives in interest (though it could not have been proved by or on behalf of the person who made it, unless it had come within the three exceptions contained in Section 21). It is, therefore, evidence against the respondents, who are the representatives in interest of the person that made it.

50. The issue of fact, whether the mortgagor referred to in Exhibit C paid assessment has not been determined by the lower Appellate Court and u/s 103 of the Civil Procedure Code, I determine it answering it in the affirmative.

51. Hence in my opinion the appellant succeeds on the third issue: the suit is not barred by limitation.

52. It is argued for the appellants that this would entitle them to the decree passed in their favour by the Court of First Instance. For the respondents it is argued that the plaintiffs cannot succeed as their plaint is on the basis of Exhibit B which has been held not to be genuine by both the Courts. The District Judge says: "The Munsiff's finding was that the property belongs in jenm to the plaintiffs, but is not held under Exhibit B. I agree with these findings." He then considers the question whether the suit is barred. With that question I have already dealt. The mortgage is identified in the plaint as being one dated 9th of August 1837, and also as being the mortgage of which an assignment was granted under Exhibit G. The mortgage being a contract or disposition of property, the terms of which were reduced to writing, the evidence that could be given in proof of its terms would consist either of the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible (Indian Evidence Act, Section 91). When therefore, the plaintiffs came to Court alleging that they would rely on a mortgage identified in the manner above referred to, the defendants had in my opinion, sufficient intimation that the mortgage would be proved in either of the two modes provided in the Indian Evidence Act. In fact, the real issue on which the parties went to trial, appears from the pleadings to be that which is referred to in the first part of the 2nd issue--whether the property belonged to the plaintiffs. The judgments of both the

lower Courts proceed on this basis; the point on which they differ being only whether or not the suit was barred by limitation.

53. For these reasons, it seems to me that no formal objection based on the frame of the suit is open to the defendants, by which the plaintiffs can be precluded from adducing secondary evidence of the mortgage.

54. Owing to the opinion of my learned brother, I must here refer to such cases as *Sheik Akbar v. Sheik Khan* ILR (1881) Cal. 256 *Pramathanath Sandal v. Dwarkanath Dey* ILR (1896) Cal. 851 *Krishnaji v. Rajmal* ILR (1899) Bom. 360 *Pothi Reddi v. Velayuda Sivan* ILR (1886) Mad. 94 *Yarlagadda Veera Ragavayya v. Gorantla Ramayya* ILR (1905) Mad. 111. In these decisions, as I understand them, it is laid down that if the claim of the plaintiff is based on an agreement which the law requires to be reduced to writing, and to be stamped but which is invalid on account of want of writing or of stamp, then the contract itself being incapable of proof, the plaintiff must fail. But on the other hand, if wiping out of consideration the contract--which is incapable of proof and must therefore be taken to be non-existent,--the plaintiff can show that he has other rights on which he may base his claim, then he may succeed, if and to the extent that he would have succeeded had there been no contract. If the plaintiff is unable to establish the existence of those other rights also, then it need hardly be said that he must fail in any case. He may fail on this second head because no such other rights exist apart from the abortive agreement--abortive in the eye of the law because incapable of proof. He may also fail because those other rights may be of such a nature that a registered document is the only means permitted by the law for the creation of those other rights--and no such registered document having been made, those alleged other rights never came into existence. The two alternative kinds of claims are stated succinctly and clearly in several cases, notably in the case last cited.

55. In the case before us, however, no such alternative claim on the basis of rights apart from the contract is set up. The plaintiffs do not say: We do not rely upon one contract but on rights apart from the contract. They do not say: We must succeed even on the basis that there never was any contractual relationship. The claim that the plaintiffs put forward rests on the agreement alone--the consensus ad idem. That consensus, the plaintiffs say, was expressed in a contract reduced to the form of a stamped, and otherwise valid, document, as required by law. On the other hand, the defence has not been that the agreement is ineffectual to create any rights, by reason of its not being expressed in a stamped document or for want of some essential required by law. The defence has been that the persons entitled to the jenm right are not the plaintiffs, and that even if the plaintiffs are so entitled their suit is barred by limitation. It is true that the defendants did take up the argument before us that the plaintiffs had not proved their case. This the defendants were entitled to do, for the plaintiffs cannot succeed unless they show that they have proved all that constitutes their cause of action. The plaintiffs' answer to such objection is that

they are able to prove that the document was valid, and duly executed and that they have prima facie evidence (viz., the admission in Exhibit C) which is sufficient at least to shift the burden on the party attacking the validity of the transaction on the ground that the document evidencing it failed in some essential particular required by law. The plaintiffs contend that in view of the real issues on which the case was tried they cannot at this stage be required to give more than prima facie proof of this part of their cause of action. As I have already said, the objection on the part of the defendants in the lower courts was not that the document was unstamped and thus invalid. I therefore accede to this contention on the part of the plaintiffs.

56. The conclusion at which I arrive is that if satisfactory prima facie evidence is given of the existence of the mortgage and its terms, it will be enough for the plaintiffs to succeed, although it is only secondary evidence and does not in direct and express terms prove that the document had been stamped.

57. Though the District Judge held that the property belonged in fact to the plaintiffs yet he held (erroneously in my opinion) that the suit was barred. He did not consider whether the plaintiffs had proved that the defendants held it as mortgagees of the plaintiffs, and if so on what terms. I must therefore deal with this question.

58. An argument was addressed to us that evidence other than that of the document itself which the plaintiffs were permitted to give, need not consist of secondary evidence of the document. For this purpose, it was contended that what had to be proved was the mortgage transaction, and not the document evidencing it and hence that any evidence that would be relevant for the purpose of proving that transaction would be available to the plaintiffs. I am unable to accept this argument. It is true that what has to be proved is the transaction. It is provided how-ever by Section 91 of the Indian Evidence Act that when the transaction to be proved consists of a contract or grant or other disposition of property the terms of which have been reduced, to the form of a document, no evidence can be given of its terms, except either the document itself or secondary evidence of its contents. Exemption is sought in the present case from this rule, on the ground that what the appellants desire to prove is not the terms of the mortgage, but the fact that there was a mortgage. But it is only by proving what the terms of the particular contract, or grant or disposition of property were, that it can be discovered whether the transaction consisted of a mortgage. Hence the operation of the rule cannot be varied in the way sought by the appellants. They cannot succeed unless they prove the terms of the mortgage transaction, either by proving the document itself, or by secondary evidence of the contents of the document (Sections 64 and 92 of the Indian Evidence Act).

59. Proof by secondary evidence of the document is admissible only in cases mentioned in the Indian Evidence Act. Section 63 purports to define what secondary evidence means and includes: Section 65 refers to cases in which

secondary evidence may be given. It would seem however that the five clauses of Section 63 referring to secondary evidence are not exhaustive: for though Section 65 expressly purports to enumerate the cases in which secondary evidence may be given, the evidence which is rendered admissible in cases (b) and (g) would not apparently fall under any of the 5 clauses of Section 63, referring to what secondary evidence means and includes. However that may be, we have it clearly laid down that " when the existence, con-dition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in title... the written admission is admissible " Section 65 (b). This express rule laying down a means by which the contents of such documents may be proved would be inconsistent with the more general provisions of Section 91 (which lays down that the terms of such documents can be proved only by proof of the document itself or secondary evidence of its contents) unless "a written admission " can be considered to be secondary evidence of the contents of such documents (within the meaning of that expression as used in Section 91) notwithstanding that Section 63 does not refer to "a written admission" but only to copies or counterparts and oral accounts. That such a written admission as is referred to in Section 65 (b) was intended to be considered as secondary evidence within the meaning of that term in Section 91 is Indicated by the fact (already adverted to) that Section 65 purports to refer to cases where secondary evidence may be given, and thus by implication a written admission is in Section 65 described as secondary evidence. On principle it is difficult to conceive that while oral admissions of the contents of a document may come within the definition of secondary evidence, and thus take the place of primary evidence, written admissions should be incapable of so taking the place of primary evidence.

60. If Exhibit C is such a written admission as is referred to in Section 65 (6), then it is secondary evidence within the terms of Section 91. I have already referred in detail to the reasons why Exhibit C falls in my opinion within Sections 17, 18 and 21 of the Indian Evidence Act relating to the definition and proof of admissions. Sections 22, 63 (5) and 65 (6) seem to indicate that the legislature has applied somewhat different rules to admissions as to the contents of a document when they are in writing from the rules "applicable to such admissions when they are oral.

61. Three classes of evidence must be distinguished.

62. First oral admissions are relevant u/s 22 when secondary evidence is admissible or the genuineness of a document produced in court is in question. Such admissions must fall within the rules laid down in Sections 17, 18 and 21 which require, amongst other things, that the admission should have been made by the person against whom it is sought to be proved. Secondly, written admissions are relevant u/s 65 (b). The definition contained in Section 65 (b) seems to be self-contained and independent of the provisions of Sections 17, 18, and 21; though the said definition is less elaborate, it does not seem to conflict

with the provisions referred to, in any material point.

63. It is objected that in this view written admissions become evidence without preliminary proof of the fact that the document itself cannot be produced, or even that the person relying on the written admission is not himself in possession of the document. But the answer to this objection seems to me to be plain. If it is shown that the person relying on the written admission with-holds the document itself or otherwise takes no steps to have the original produced, then Section 106 and illustration (g) to Section 114 would come into operation and the effect of the written admission would in many cases be nullified. Compare *Goss v. Quinton* (1842) 3 M&G. 825 per Tindal C.J.

64. Thirdly, oral accounts of the contents of a document given by some person who has himself seen it are secondary evidence u/s 63 (5). Here the requirements are different from those necessary in the first two classes : the guarantee for reliability of the accounts is not that it is given by some person against whom it is sought to be proved, but that the person has himself seen the document, and that his account will be subject to oath and cross-examination (Section 60) or to something considered by the Act as equivalent to them (e. g. u/s 32).

65. Hence Exhibit C is evidence of the mortgage relied upon by the plaintiffs if it falls within the class of admissions secondly mentioned above; but not otherwise. It seems to me that Exhibit C does fall within that class; for by means of Exhibit C the contents of the original mortgage are proved to be admitted in writing; the person by whom the admission is made is the representative in interest of the defendants, and the persons against whom it is sought to be proved are the defendants.

66. For these reasons, in my opinion, the plaintiff's suit is not barred by limitation, and a decree should have been given to them in the terms of the original decree given to them by the District Munsif on 25th September 1910 with a slight modification as against those defendants who are bound by the admissions of the contents of the mortgage-deed. The plaintiffs came to court asking that they should be permitted to redeem the properties on payment of Rs. 820. They cannot therefore have a decree for redemption on payment of Rs. 808 as given to them by the District Munsif. The decree of the District Munsif should in my opinion, be therefore modified by altering Rs. 808 mentioned therein to Rs. 820 and the appellants should have their costs in the Lower Appellate Court and in this Court, but the order for costs made by the Munsif should stand.

67. As my learned brother takes a different view on the questions stated in his judgment, I agree that those questions should be referred to a 3rd Judge u/s 98 of the Civil Procedure Code.

68. [This case came on for hearing on Thursday, the 17th day of September 1914, u/s 98 of the CPC before the Honourable Mr. Justice Sadasiva Aiyar].