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and we are unable to suggest any good reason, why the law in the Mofussil of this Presidency should be held to be different.

For these reasons we think that the decree of the District Judge should be reversed; and that the respondent should pay all costs of this appeal and of the suit in the courts below, and that, if the property were made over to the respondent, he should forthwith return it, or refund its value to the appellant.

GIBBS, J., concurred.

Appeal allowed.

Special Appeal, No. 530 *of* 1865.

KEDA'RI' bin RA'NU and BHAI'RU' bin JA'NKU' ..... *Appellants.*

A'TMA'RA'MBHAT bin NA'RA'YA'NBHAT and HARI' SADA'SHIV ..... *Respondents.*

Mortgage—Oppressive conditions of deed set aside—Directions as to account to be taken—Inadequacy of consideration.

Where money-lenders, dealing with ignorant, illiterate peasants, made use of the necessities of the position of those peasants, who were seeking to raise a sum of money for the purpose of stocking and tilling their lands, to impose upon them a contract, in the form of a mortgage, by which they agreed, in default of punctuality of payment of the half produce, and in other events, to sell their land at a gross undervalue, viz. one-third of the amount of the mortgage debt, which in itself was not more than equal to half the value of the annual produce of the land, and to remain liable to the remaining two-thirds of that debt with interest; and, even if no default should occur on their parts in payment of a moiety of the annual produce, or the performance of their other covenants, and notwithstanding full payment of the principal, to continue for fifteen years to pay the half produce of the lands to the mortgagees:—

Held (reversing the decrees of both the courts below) that the deed of mortgage should only stand as security for the payment of the principal sum of Rs. 300 and interest at nine per cent.; and in all other respects should be set aside as inequitable, fraudulent, and grossly oppressive.

Held, also, that if, in execution of the reversed decrees, the lands had been made over to the mortgagees as purchasers, they should be restored to the mortgagors, and that the rents, profits and produce, received by

the mortgagees while in possession, should be set off on account against the said principal sum and interest, and that the balance should be paid by the party against whom the same might be found.

Mere inadequacy of consideration, unless it be so great as to amount to evidence of fraud, is not sufficient ground for setting aside a contract, or refusing to decree specific performance of it. But inadequacy of consideration, when found in conjunction with any such other circumstances as suppression of true value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding or even ignorance, is an ingredient which weighs powerfully with a Court of Equity in considering whether it should set aside contracts, or refuse to decree specific performance of them.

As to the validity of a mortgage of future crops—*Quære.*

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THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátárá, in Appeal Suit No. 563 of 1864, affirming the decree of the Munsif of Wáí, in Original Suit No. 619 of 1864.

Báiravanáth Mangesh for the appellants.

Vishvanáth Náráyan Mandlik for the respondents.

The facts are fully stated in the Judgment.

Cur. adv. vult.

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WESTROPP, J.:—This suit was founded on a mortgage of certain fields in Wáí Táluká, containing 36 acres and 19 guntas of good land, and 5 acres and 16 guntas of bad land, assessed at Rs. 35-8-0. The mortgage bore date as of the 10th Paush Shúddha, Shake 1784 (30th December 1862), and purported to be made by Mandú Jotí and Kedárí, sons of Ránú Jádhau, to the abovenamed respondents (plaintiffs), in consideration of Rs. 300, lent by the latter to the mortgagors. It stipulated that the mortgagors should, in lieu of interest, annually bring and deliver to the plaintiffs, at their house at Wáí, a moiety of the whole produce of the land; that the principal sum of Rs. 300 should be repaid by instalments of Rs. 20 each, paid annually before the end of Márgashirsh, and that, even should the whole or part of that principal be liquidated before the expiration of fifteen years from the commencement of the following Shake year 1785, the mortgagors should continue annually to deliver the moiety of the produce of the land to the mortgagees; and that, if the mortgagors did not, within four months from the date of the

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mortgage, cause the land to be transferred to the names of the mortgagees in the Government revenue books, the land "shall be sold to you (the mortgagees) for Rs. 100; you are to enjoy it as you please, and the balance, Rs. 200, with interest, shall be paid on demand after one year in full, without making any excuse whatever as to future instalments which shall fall due." In the event of any default occurring in the annual delivery to the mortgagees of the moiety of the produce, the mortgage provided that, "we (the mortgagors) will pay any amount of damages you (the mortgagees) may mention, or we will *continue* to deliver 300 rupees' worth of juvárí and bázarí at the rate of, &c., *and* 4,000 bundles of juvárí karbí per, &c., to be delivered every year." The reaping and thrashing of the crops are to be performed in the presence of an agent of the mortgagees. "It shall not be done in your absence; should it be done, or should the share (moiety of the produce) contracted for be not paid, then two khandís of juvárí and bázarí by bárolí (twelve páyalís) measure and 4,000 bundles of karbí are agreed to be brought and delivered to you at Wáí." If the transfer in the revenue book be not made within the four months, or the annual instalment of Rs. 20 paid before the end of Márgashirsh in every year, or the moiety of the produce not delivered in full every year, or the land left uncultivated, "then the aforesaid mortgaged land is considered to be sold to you for Rs. 100. We shall make no claim of inheritance thereto, and the balance of rupees with interest we shall pay personally." Then followed a repetition of the fifteen years' clause, and then the mortgage proceeded thus:—"Even if the produce received by you on account of the share (moiety of the produce) exceed double the amount of principal to any extent, still the share shall be paid without objection, and all the conditions will be fulfilled. Even if the amount of the instalments be received in advance, still the share shall be paid in full; no excuse whatever shall be made."

Bhaírú and Sadú, as sureties, bound themselves in the same document to be responsible for the debt, and mortgaged their three pieces of land (Nos. 70, 66, and 76) to secure it,

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and agreed that, in default of payment by the principal debtors or themselves, their said land should be considered as sold to the mortgagees, together with the land of the principal debtors, for Rs. 100. Bálú and Nárú also joined in this document as sureties for the debt, and it then continued thus:—"We, all the debtors and the sureties, further give in writing that, besides the land we have mortgaged above, the houses and cattle belonging to all of us, and the bullocks and implements of husbandry, which we shall purchase with this money, together with the household furniture, shall be held as security for your money," &c. "We shall pay two annas a day as subsistence money to the sipáí who shall come to recover the same." The principal debtors and the sureties executed the mortgage as marksmen.

The mortgagees on the 26th of July 1864, filed their plaint, praying for a decree for the sum of Rs. 500 and costs, and that they should be declared purchasers of the mortgaged lands, as well of the principals as of the sureties, and for possession of the said lands and of the crops accordingly, and that the Rs. 500 should be paid out of the sale of the mortgaged houses, cattle, implements of agriculture and furniture.

The defendants denied the execution of the deed of mortgage sued upon, but admitted that they had executed another of a less oppressive character, by which they had agreed to give certain portions of the produce of their land to the mortgagees; and said that they had tendered such produce, but the plaintiffs had refused to accept it.

The Munsif, by his decree of the 7th of December 1864, held the mortgage sued upon to be proved, and that the defendants had received the Rs. 300. He declared that default having been made by the principal debtors in carrying out its provisions, the plaintiffs had become entitled to the mortgaged land of the principal debtors as purchasers; and he accordingly ordered it to be made over to them at a valuation of Rs. 100. He ordered the principal debtors, or, in their default, the sureties, to pay to the plaintiffs Rs. 200,

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the balance of the original debt, and, as arrears of interest, two khandís of juvárí, or Rs. 240, and 4,000 bundles of straw, or Rs. 60. The Munsif refused to grant relief to the plaintiffs against the mortgaged property of the sureties, on the ground that the mortgage was not sufficiently specific, and was too vague with respect to it.

The defendants appealed to the District Judge, who, on the 17th of July 1865, affirmed the Munsif's decree with costs.

The defendants have specially appealed to this court, and set forth their grounds of appeal as follows:—

"(I.) That the decision of the District Judge is contrary to law in that (1) he has enforced an unreasonable and oppressive condition, against which Courts of Equity give relief; (2) he has enforced the penalty of forfeiture, inserted in the mortgage instrument merely as a threat to secure the payment of loan, interest, &c.; (3) he overlooked the important principle of law, that the respondents waived their right to the penalty of forfeiture, by getting the fields in dispute transferred to their names after default; (4) he has declared the mortgagees (respondents) absolute proprietors of the mortgaged fields, contrary to the recent decision of the High Court in Special Appeals Nos. 299 and 735 of 1864; (5) he has awarded interest exceeding the amount of the principal, which is contrary to Hindú law; (6) most of the penal clauses being vaguely worded, the mortgage instrument is void for confusion and uncertainty. (II.) That substantial errors in law, in the investigation of the case, have occurred, which have produced errors in the decision of the case upon its merits: (7) the District Judge has overlooked the strong presumption of fact—arising from the evidence adduced in this case and the wording of the bond—that the mortgage instrument was not read over, or that it was misread, to the illiterate appellants, either before or after their signing it; (8) he left a material question at issue undecided, viz., whether or not the contents of the bond are different from those agreed to by the appellants."

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The case was argued before my brother Tucker and myself on the 13th of August last by Mr. Bháírávanáth Mangesh for the appellants, and Mr. Vishvanáth Náráyaṇ Mandlik for the respondents.

We deferred our judgment in this and a similar case (No. 533 of 1865), in order that official translations of the mortgages should be carefully prepared, and that we might look into the authorities. I cannot say, however, that we had any doubt as to what our decree should be.

It was very candidly and properly admitted by Mr. Vishvanáth Náráyaṇ Mandlik, that, so far as the decrees of the Judge and Munsif in the present case declared the respondents to be the purchasers of the land, and awarded it to them for Rs. 100, those decrees could not stand. In that respect the case falls clearly within the principle which was adopted in this court in Special Appeal No. 299 of 1864 (*Rámji* v. *Chinto*) by Arnould, Newton, and Janárdan, JJ., and in *A'nandráv* v. *Rávji* (*a*) by Couch and Newton, JJ., and in other cases by my brother Tucker and myself (*b*), in accordance with *A'rumugam Mudali* v. *Ammí Ammál* (*c*) and *Nallana* v. *Palani* (*d*) by the High Court at Madras, following the well-known English rule, that no agreement in a mortgage can make it irredeemable, as laid down in *Howard* v. *Harris* (*e*), *Jennings* v. *Ward* (*f*), and many other cases. We are quite unable to concur with the District Judge in thinking that the stipulation in the mortgage, that Rs. 100, part of the debt, should be set aside as the purchase-money of the land, is such a peculiarity in this case as can take it out of that rule, which prevailed in Special Appeal No. 294 of 1864, to which he refers, and in the other cases which I have now mentioned. In fact, the mortgage in the present case is the most oppressive that we have ever seen, even in this country, and is far more so than were the mortgages in any of the cases which have been cited. Not only are the mortgagees, on any de-

(*a*) 2 Bom. H. C. Rep. 225. (*b*) See also 7 Moore's Ind. App. 323.
(*c*) 1 Mad. H. C. Rep. 400. (*d*) 2 Mad. H. C. Rep. 420.
(*e*) 1 Vernon, 190; 2 Tudor, L.C., 752.
(*f*) 2 Vernon, 520; 2 Tudor, L.C., 757.

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fault on the part of the mortgagors, to become the owners of the land, which was of very much greater value than the whole of the mortgage debt, but they are to become such owners at the price of one-third of that debt, and the unhappy mortgagors are to remain liable personally, and out of their houses, cattle, furniture, and implements of husbandry, to pay the balance of Rs. 200 with interest. Even if no default were made in payment of the substitute for interest, viz., a moiety of the produce of the land, (*which moiety, it appears, was annually equal to the whole amount of the principal,* and has actually been fixed at that rate in the decrees of the lower court), and if the principal were paid off at any time before the expiration of fifteen years commencing from the Shake year 1785, nevertheless the mortgagors were to continue, during the whole of those fifteen years, to make over the half produce of the land, *i. e.* 300 rupees' worth per annum, to the mortgagees. As a mortgage of future crops, that provision seems to bring the case within the principle of *Janardhun* v. *Madapa* (*g*) decided by the Ṣadr Adálat (after consulting their law officer) in 1853, where such a mortgage was held to be contrary to Hindú law, as being a mortgage of that which was not visible or in existence. [See, on this point, Drishtadi, Drishtabandhak, Wilson's Glossary, p. 148, and 1 Mad. H. C. Rep. 464, note; and as to the law of England—*Lunn* v. *Thornton*, 1 C. B. 379; *Gale* v. *Burnell*, 7 Q. B. 850; *Robinson* v. *Macdonell*, 5 M. & S. 228; *Wood & Forster's Case*, 1 Leonard 42; *Grantham* v. *Hewley*, Hobart 132; and as to Muhammadan law—Macnaghten, Chap. III. Sec. 14, p. 43; Chap. V. Sec. 5, p. 50, and Appendix pp. 204, 205, 208 n.; Elberling para. 336, p. 163; Baillie's Digest 519, 520; 2 Hedaya 372 et seq., 378; Baillie on Sale pp. 3, 141 et seq. See, however, as to Hindú law, Elberling p. 128, and Steele p. 261, and as to English law *Petch* v. *Tutin*, 15 M. & W. 110.] We do not consider it necessary to give any positive opinion as to the validity of that principle, or as to the validity of such a proviso as that, notwithstanding the Hindú law to the contrary, the

(*g*) Morris, Part III., p. 98.

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creditor shall be entitled to receive on any one occasion (*h*) an amount of interest exceeding the principal, or as to how far that proviso may be supported by Act XXVIII. of 1855. *Primâ facie*, and independently of legislation, it would appear to come rather within the maxim *pactis privatorum juri publico non derogatur*, as shown by the decisions in England on the laws against usury, than the maxim *modus et conventio vincunt legem*. Such an agreement, contained in a document executed A. D. 1803, was upheld, on the 8th of September 1855, by the Ṣadr Adálat in *Vishrám* v. *Bhimji* (*i*), a decision which seems open to much question, and to amount to this, that Hindús might, if they chose, set aside their own law of contract. Act XXVIII. of 1855 was passed on the 19th of September in that year, did not come into force until the 1st of January 1856, and did not affect contracts entered into previously to the passing of the Act (Sections 7 and 8).

We think that, sitting as a Court of Equity, it would be wholly improper for us to support, or carry into execution an instrument so utterly oppressive and inequitable as the deed of mortgage in the present case. Mere inadequacy of consideration, it is true, unless it be so great as to amount to evidence of fraud, is not sufficient ground for setting aside a contract, or refusing to decree a specific performance of it (*j*). In *Coles* v. *Trecothick* (*k*), Lord *Eldon* said:—"Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance." Lord *Thurlow* in *Gwynne* v. *Heaton* (*l*) said:— "To set

(*h*) *Bhowanee* v. *Hussan Miya*, 1 Bom. H. C. Rep. 45; *Gholam Ahmed Khan* v. *Munohurdass*, 1 Macnaghten's S. D. A. Rep. 294. [And see post p. 23 et seq.—Ed.] (*i*) 2 Morris Bom. S. D. A. Ca. 279.

(*j*) *Low* v. *Barchard*, 8 Ves. 133; *Naylor* v. *Winch*, 1 Simon & Stuart 565; *Griffith* v. *Spratley*, 1 Cox 383; *Collier* v. *Brown*, *Ibid.* 428; *Abbott* v. *Sworder*, 4 De Gex. & Sm. 448. And see 10 Ves. 470, 209; 13 Ves. 103; 2 Hare 408; *Ibid.* 450; 2 Cox 320; 1 Kay & J. 571; 7 Ves. 30. But see *Day & Newman*, 2 Cox 77; 10 Ves. 300, 301.

(*k*) 9 Vesey 246. (*l*) 1 Bro. C.C. 1, 9.

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aside a conveyance there must be an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it." And in *Heathcote* v. *Paignon* (*m*) he said:—"If mere inadequacy is the ground it should seem that it was scarcely sufficient. But there is a difference arising between that and evidence arising from inadequacy. If there is such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will show a command over him which may amount to fraud. If the transaction be such as marks over-reaching on one side, and imbecility on the other, it puts the parties in such a situation as to show that it could not have taken place without superior powers on the one side over the other." And Lord *Eldon*, in *Stilwell* v. *Wilkins*, said that, though in general a sale will not be set aside on the ground of inadequacy of price, "yet there may be cases of inadequacy so enormously great as to form a ground for cancelling the contract" (*n*).

Inadequacy of consideration, when found in conjunction with any other such circumstance as suppression of true value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding, or even ignorance, is an ingredient which weighs powerfully with a Court of Equity in considering whether it should set aside contracts, or refuse to decree specific performance of them. *Deane* v. *Rastron* (*o*), *Stilwell* v. *Wilkins* (*p*) [the case of a common sailor lately come ashore, and hard-pressed for money], *Heathcote* v. *Paignion* (*q*), *Lewis* v. *Lord Lechmere* (*r*), *Herne* v. *Meeres* (*s*), *Young* v. *Clarke* (*t*). In *Evans* v. *Llewellyn* (*u*) a deed was set aside as improvidently executed, it having been obtained for

(*m*) 2 Bro. C.C. 167, 175, and see per the Chief Baron in *Griffith* v. *Spratley*, 1 Cox 389, to the same effect. (*n*) Jacob R., 282.

(*o*) 1 Anstruther 61. (*p*) Jacob R. 280. (*q*) 2 Bro. C.C. 167.
(*r*) 10 Mod. Rep. 503. (*s*) 1 Vernon 465. (*t*) Prec. Ch. 538.
(*u*) 1 Cox. 333.

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an inadequate consideration from persons in low circumstances, and unapprised of their rights until the time of the transaction, though no misrepresentation or actual fraud appeared to have been made use of. Lord *Romilly*, M. R., in *Cockell* v. *Taylor* (*v*), set aside a sale of land to the plaintiff, where the consideration was about ten times the value of the land; the purchase having been made the condition of a loan which the plaintiff was very anxious to negotiate in order to prosecute his claim in Chancery to some valuable property, and he, though no imputation could be cast upon his mental capacity, being in humble circumstances and illiterate. "Coupled with such circumstances," the Master of the Rolls said (*w*), "the evidence of over-price is of great weight; and, if the case stood here, I should have been of opinion that this transaction was one which could not stand;" and again, "I am of opinion that this was a transaction, in which advantage was taken of the necessities of the plaintiff, and that, so far as regards the case subsisting between the plaintiff and the defendant Finch (the vendor), it is wholly void, and must be set aside, except so far as money may have been actually advanced to the plaintiff by Finch upon the security of the indenture of mortgage of December 1848." In *Baker* v. *Monk* (*x*), a sale for inadequate consideration, the vendor being an old woman in humble circumstances, and without any independent professional advice, was set aside.

We are not at all to be understood as laying down, as a general principle, that men, who are perfectly cognisant of what they are doing, are to be relieved from the consequences of any hard bargain into which they may willingly enter. But, in the present case, in which money-lenders, dealing with ignorant, illiterate peasants, unable even to sign their own names, have made use of the necessities of the position of those peasants, who were seeking to raise a sum of money for the purpose of stocking and tilling their lands, to impose

(*v*) 15 Beavan 103. The marginal note of that case is not very accurate. (*w*) Pp. 115, 116.

(*x*) 10 Jurist N. S. 624, affirmed on appeal, *Ibid.* 691.

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upon them a contract by which they agree, in default of punctuality of payment of the half produce, and in other events, to sell their land at a gross undervalue, viz. one-third of the amount of the debt, which in itself was not more than equal to half the value of the annual produce of the land, and to remain liable to the remaining two-thirds of the debt with interest; and, even if no default occur on their parts in payment of a moiety of the annual produce, or the performance of their other covenants, and notwithstanding full payment of the principal, to continue for fifteen years to pay the half produce of the lands to the mortgagees, we feel bound to treat such an instrument, containing such oppressive and unjustifiable provisions, as a fraud upon the mortgagors. We have a difficulty in understanding how any sane persons could have executed such a document, if they had been fully and fairly acquainted with its contents, and the consequences to which they exposed themselves by so doing. Even assuming, as we are bound to do, (the District Judge having so found it), that the deed of mortgage sued upon was the deed actually executed by them, the mere reading a deed to unprofessional persons, does not in all cases fix them with knowledge of its contents. *Hoghton* v. *Hoghton* (*y*). It should also be properly explained to them, if its provisions be complicated or very unusual.

We reverse the decrees of both of the lower courts; and order that the deed of mortgage of the 30th of December 1862 shall stand, as security for the payment, in the manner and to the extent hereinafter mentioned, of the principal sum of Rs. 300, and interest at nine per cent. per annum, and further order and decree that in all other respects the said deed of mortgage of the 30th December 1862 be, and it is hereby, set aside as inequitable, fraudulent, and grossly oppressive; and we direct that the lands, if they have been made over to the respondents, be forthwith restored to the mortgagors (the principal debtors), and that an account be taken by the court of first instance of the rents, profits and pro-

(*y*) 15 Beavan 279, 310.

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duce of the said lands whilst in the possession of the respondents, and received by them, or for their use, or by their order; making all due allowances in respect of Government revenue, or other expenses reasonably and properly incurred by them while in such possession; and we decree that the plaintiffs (respondents) are entitled to recover from the principal debtors the sum of Rs. 300 with simple interest at the ordinary rate of nine per cent. per annum, from the said 30th December 1862 until the taking of the accounts aforesaid; and we direct that the sum with which the plaintiffs shall be debited in such account as the value of the net rents, profits, and produce received by them, or for their use, or by their order, out of the said lands, shall be set off against the said sum of Rs. 300 with interest at such rate as aforesaid, and should such last mentioned sum of Rs. 300 and interest exceed the value of the said net produce, then that the said defendants (the principal debtors) shall pay the amount of such excess to the plaintiffs; and, in default of such payment by the principal debtors, that the said defendants, the sureties, shall pay the same to the plaintiffs; and that if the value of the said net produce shall exceed the said sum of Rs. 300 and interest as aforesaid, then that the plaintiffs (A'tmárámbhat and Sadáshivbhat) shall pay the amount of such excess to the defendants, the principal debtors. We direct that the parties respectively shall bear their own costs in the courts below, and that the special respondents do pay to the special appellants the costs of this special appeal.

TUCKER, J., concurred.

Appeal allowed.

NOTE.—The Court made a similar decree in Special Appeal No. 533 of 1865, in which there was a mortgage of equally oppressive character as that in the above case.—ED.