

*Special Appeal No. 79 of 1868.*1868.  
July 22.

MANCHARSHA' ASHPANDIA' RJI ..... Appellant.  
KAMRUNISA' BEGAN..... Respondent.

*Parsi Law—Mortgage—Improvement—Repairs—By-al-Wafa—  
Reg. IV. of 1827, Sec. 26.*

In a suit brought by a Muhammadan to redeem from the defendant, who was a Parsi, certain property that had been conveyed by the ancestor of the former to the ancestor of the latter by a *by-al-wafa* (deed of conditional sale):

*Held* that the law to be applied was, under Sec. 26 of Reg. IV. of 1827, that of the defendant. That, in the absence of any specific law for Parsis in the Mofussil, the rule of justice, equity, and good conscience should be observed, and the Court should follow with certain necessary modifications the practice of the Courts of Equity in England.

That the *by-al-wafa* amounted in effect to a mortgage of the property, and that, according to the practice of the Courts of Equity, a mortgagee in possession ought to be allowed for proper and necessary repairs to the estate.

Where portion of the mortgaged premises was accidentally burned, and portion of them fell down, and the mortgagee rebuilt them, it was held that the mortgagor was not entitled to redeem, unless upon payment of the sum so expended by the mortgagee, though such sum amounted to more than double the price for which the premises had been conditionally sold to the mortgagee.

THIS was a Special Appeal from the decision of C. G. Kemball, District Judge of Surat, in Appeal Suit No. 273 of 1866, amending the decree of the Principal Sadr Amin of Surat.

The plaintiff, as daughter and heir of one Mirzá Muhammad Ráji, sued to redeem four-fifths of a house, alleging that it had been mortgaged by the said Mirzá to the defendant's grandfather by deed ("*by-al-wafa*").

The defendant rested his defence on the ground that the house had been sold to him, and not mortgaged; that there was no condition in the bond by which the sale could be cancelled by Mirzá's heir after his death; that he had expended many thousand rupees in repairing parts of the house, which had been burnt or had fallen; and that it was fifteen years since Mirzá died, so that the suit was barred by the provisions of Act XIV. of 1859, as the house had been in his, the defendant's, possession for more than twelve years.

1868.  
 MANCHARSHA  
 ASHPAN-  
 DIA'RI  
 v.  
 KAMRUNISA  
 BEGAM.

The Principal Şadr Amín decreed for the defendant, on the ground that the deed *by-al-wafu* was a deed of sale, and not of mortgage; but the District Judge, in Appeal No. 289 of 1865, held that the promise in the deed to reconvey the house to the vendor on payment of the purchase-money gave the transaction the character of a pledge, and that, therefore, the property so pledged was redeemable within sixty years. The District Judge, therefore, remanded the case to the Principal Şadr Amín, to determine what sum of money the defendant was entitled to for expenses fairly incurred in repairs, &c. according to the condition of the deed. The Principal Şadr Amín, on the 27th of November 1867, decreed that the plaintiff should recover possession of the house on payment to the mortgagee of the sum of Rs. 4,000, being the original sum borrowed, together with Rs. 9,862-5-7 expended in repairing and preserving the mortgaged property. The District Judge in appeal delivered a judgment, amending the decree of the Principal Şadr Amín, from which the following is an extract:—

“Before proceeding to consider the question now before me, namely, whether the pledgee is entitled to recover in respect of the ameliorations and improvements alleged to have been made by him on the pledged property, and allowed by the original court, I think some remarks are necessary in support of the finding that this, to all appearances, absolute *bonâ fide* sale and conveyance, with a collateral agreement attached, is in reality a pledge, or, in more guarded language, a *pignus*. \* \* \*

“It appears to me unnecessary to argue further that a sale by way of *by-al-wafu* created only a special property in the thing sold, *i. e.*, the purchaser held possession of such thing subject to the claim of the seller to resume possession on repayment of the amount of purchase-money. Whether the purchaser could use such property is a question foreign to the present inquiry; but it is clear that he had simply a right to possess and retain it until the charge attaching on it, namely, the amount of purchase-money, was paid. This

transaction, therefore, is in all respects a pledge, the right being in the pledgor to take back the property, on the payment of a certain sum expressly stipulated; it is not a mortgage, for it is not a conditional transfer or conveyance with this consequence, that if the condition be not duly performed, the whole title rests absolutely in the mortgagee. Where no time is fixed for the repayment of the purchase-money, the pledgor or his representative has the power to redeem at any time, subject, I assume, to the right of the pledgee to call upon him to redeem; and it is in these respects I understand property sold by way of *by-al-wafa* to be redeemable, like ordinary mortgages, and subject to foreclosure. I do not myself understand on what ground the pledgee can demand from the pledgor, as a condition precedent to the restitution of the property, any money that he has expended in repairs; the whole legal title never passed to him; he distinctly covenanted to restore it on payment of a stipulated sum; and the debt cannot, according to Muhammadan Law, receive any accession. He cannot be regarded in the light of an innocent person who has expended sums of money on the property supposing himself to be the absolute owner; for the deed under which he held showed clearly that he had merely a special property in the house; and there was a distinct agreement that the pledgor, and not the pledgee, was to execute the repairs, the former being responsible, according to custom, for any loss or injury from accident. It is not pretended that the pledgor refused to execute repairs; yet the pledgee now comes forward and makes a demand, which by the way appears to me founded on very imperfect evidence, for repairs amounting to more than double the value of the house. I consider that whereas the plaintiff is entitled by express agreement to recover the property pledged on payment of the amount of purchase-money, no ground, on the other hand, has been shown for the equitable interference of the Court on behalf of the defendant.

“Assuming that the defendant did repair the house in question, as he alleges, he has had all these years the benefits arising from his possession of the property. I consider,

1868.

MANCHARSHA  
ASHPAN-  
DIA'RI  
v.  
KAMRUNISA  
BEGAM.

1868.  
 MANCHARSHA  
 ASHPAN-  
 DI'ARI  
 v.  
 KAMRUNISA  
 BEGAM.

in conclusion, that the lower court should have decreed restoration on payment of the purchase-money, and that the defendant should have been saddled with costs. To this extent, therefore, I amend the Principal Sadr Amín's decree, with costs on the respondent."

The deed alluded to in the above judgment was in the following terms :—

The cause of these lines being written is as follows :—I, namely, Valabhdás the son of Shankárdás the son of Shivdás, of the Baniá caste, and an inhabitant of the auspicious seaport town of Sírát, make a legal and trustworthy declaration while being absolute agent, according to the power of attorney, regarding the things herein mentioned, on behalf of Mirzá Muhammad Rezá, the son of the deceased Mirzá Alawuddín Husen, the son of the pardoned Mirzá Abdul Baki Sházádá Sháfifá, (the declaration is) attested by Málíkchand the son of Málík Kázim the son of Málík Fázal, and Dost Muhammad the son of Shek Abdul Kádar the son of Shek Omar, (and is) to the following effect; that I, the declarant, as an agent, sold all and entire four parts out of the five parts of a large *Howeli* (or mansion) called Láti, which is rented by Sarkár. (The premises) consist of land and teakwood, and pillars and beams, and a covered balcony and a compound, and halls, and substantial brick walls, situated in Modará Street, within the wall of the abovementioned seaport town. The boundaries and measurement thereof are known, and it is as described by me. The same is owned and belongs as a heritage to the hereinmentioned, my constituent, which he inherited from his father, and which he possessed by way of ownership up to the time of this sale, without any joint partner. No one has any claim against it, and there is nothing to prevent its sale. The whole, with all its boundary-walls and watercourses and legal rights, and with all the proprietorship that is in it or connected with it, is sold for the sum of genuine four thousand rupees of full weight, (and) of the present currency, coined at Sírát, the half of which is two thousand rupees. (The same were received) from the hand of Ashpandiárji the son of Kávaşji the son of Beheránji, of the Parsi community, residing in the abovementioned seaport town. And I the abovementioned Ashpandiárji make a legal declaration (as follows :—) that I purchased from the abovementioned seller for my said sum four parts out of the five parts of the entire abovementioned mansion called Láti. According to law the purchase is valid, being effected with mutual consent. Nothing shall annul or invalidate the purchase. And I the abovementioned seller have received the whole and full of the abovementioned sum from the hereinmentioned purchaser, and, having received it, have given the same to my constituent, (and) have given the property sold into the possession of the herein-mentioned purchaser. And I, the hereinmentioned purchaser, after the sale was effected, and (after) the assembly was dissolved, agreed with the hereinmentioned seller to fulfil my promise, which is to the effect that whenever the hereinmentioned seller, either as agent or through his constituent, shall repay the abovementioned sum in full and whole, I shall annul this deed of sale and return (the property). And I, the here-

inmentioned seller, have agreed to this promise through my agent. And this (deed) of sale was agreed to and was effected according to law. And there does not remain any balance, even a pie, due to me or to my constituent against the purchaser. And my constituent is responsible for all (these, namely) the repairs of dilapidations and calamities coming from Heaven. And the hereinmentioned sum, which I have received, is of the Sûrat currency, (and) at the time of redemption my constituent will pay him money of the Sûrat currency. Therefore, these few words, having been written by way of a deed of sale, are given. Dated the twenty-fourth day of the month of Rabioussani 1222 (one thousand two hundred twenty-two) of the Hijra year (1st July 1807).

1868.  
MANCHARSHA  
ASHPAN-  
DIA'RJI  
v.  
KAMRUNISA'  
BEGAM.

The case was heard this day before COUCH, C. J., and NEWTON, J.

*Pigot* (with him *Shântâram Nârâyan*), for the appellant:—The construction of the deed is the real point for decision. It is dated the 1st of July 1807, and says the house is sold for 4,000 rupees. When the case was first before the Judge, he treated the transaction as one of mortgage, and now he has applied the strict Muhammadan Law to it. Whatever may have been the original Muhammadan law on this subject, that is not the law now prevailing even amongst Muhammadans themselves; but here the defendant is a Pârsi. The Judge, in treating this transaction as a pledge, and not a mortgage, and in disallowing all sums for repairs, &c., is, I submit, in error. If the plaintiff is, after nearly sixty years, entitled to anything, it is to redeem the property on payment of all sums expended upon it by the defendant, and all sums due to him on the original loan.

*Marriott* and *Nânâbhâi Haridâs*, *contra*:—The point for consideration is whether, according to the intentions of the parties, the transaction was one of pledge or mortgage; and the Judge has found that it was only a pledge. By a clause in the deed the plaintiff is responsible for “repairs and heavenly calamity;” so the appellant was not under any obligation to incur any expenses. [COUCH, C.J.:—You must not assume that. That is the very proposition you have to establish.] There was no express agreement for repairs. [COUCH, C.J.:—You must make out that there was no implied agreement.] We had no notice of the rebuilding, and there is no evidence to show what amount was actually

1868.

MANCHARSHA  
ASHPAN-  
DIA'RJI  
v.  
KAMRUNISA  
BEGAM.

expended. If repairs are to be allowed for, they should be such only as are necessary to preserve the property, and should not be such as to over-improve it, so as to prevent the mortgagor from redeeming: *Sandon v. Hooper (a)*. [Couch, C. J. :—The Executive Engineer shows what was burnt and what fell, and there is nothing in this case to show over-improvement.] Rs. 4,000 only were paid as the price of the house, and the expenses are said to be more than double that amount. This is certainly an over-improvement. [Couch, C.J. :—If the parties meant it to be a mortgage, the value does not necessarily correspond with the amount of the mortgage-money.]

*Pigot* in reply :—A mortgagee in possession in this country is in the position of a trustee, and is bound to treat the mortgaged premises as liable to become again the property of the mortgagor. He must, therefore, not do any act to diminish the security upon which the money was lent: *Jogendronath Mullick v. Raj Narain Palooye (b)*.

Couch, C.J. :—This was a contract entered into between the Hindú agent of a Muhammadan on the one part, and a Pársi on the other part. The Judge, in an elaborate judgment, has treated the question according to the Muhammadan Law, but there is no authority for his doing this. According to Sec. 26 of Reg. IV. of 1827, this case is to be governed by the law of the defendant, who is a Pársi. There is no law generally applicable to Pársis in India, but the law applicable to them within the jurisdiction of the High Court on its Original side is that which is applied to British-born subjects, and in the absence of any specific law for the Pársis in the Mofussil, the rule of justice, equity, and good conscience should be observed; and in such cases we should follow, with certain necessary modifications, the practice of the Courts of Equity in England.

It is expressly stated in the deed that the borrower is to be liable for repairs of dilapidation and heavenly calamities ;

(a) 12 L. J. Ch. 309.

(b) 9 Cal. W. R., Civ. R. 488.

and, looking to what equity would require, the mortgagor should not be allowed to recover the property on payment only of the principal advanced, since it would be clearly inequitable to say that a mortgagee who has rebuilt and repaired the premises must have no allowance made to him. The rule laid down in Fisher on Mortgages, p. 887, 2nd ed., is the result of all the authorities on the subject, and it fully supports the claim of the mortgagee to a proper allowance. The passage to which I refer is—"The mortgagee in possession will be allowed for proper and necessary repairs to the estate; and if buildings become ruinous, so as to be unfit for use, he may pull them down and rebuild \* \* \*. And the rebuilding, or repairing, may be done in an improved manner, and more substantially than before, so that the work be done providently, and that no new or expensive buildings be erected for purposes different from those for which the former buildings were used." The Principal Şadr Amín, acting upon sufficient materials, has found that Rs. 9,862-5-7 ought to be allowed as a fair remuneration to the mortgagee. We feel reluctant to prolong litigation, unless it is absolutely necessary to do so. In this case there is no reason to believe that the Principal Şadr Amín has fallen into any error in estimating the amount, so a remand is not necessary. As the defendant is fairly and properly entitled to the amount awarded by the Principal Şadr Amín for what he did in regard to the property, we hold that the Judge's decree is manifestly wrong, and, accordingly, reverse it, and direct that the costs of both appeals be paid by the respondent.

NEWTON, J. :—I fully concur.

*Decree of District Judge reversed.*

1868.

MA NCHARSHA  
ASHFAN-  
DIA'RJI  
v.  
KAMRUNISA'  
BEGAM.