

grown up in his collectorate, and in insisting upon the preservation of the village grazing grounds and the Government forests for the purposes for which they are properly reserved. We deem the suit of the plaintiff to be characterized by no ordinary effrontery, and we reverse the decrees of the Courts below with costs of suit and both appeals, which must be paid by the plaintiff to the defendant.

1877.

THE  
COLLECTOR  
OF THANA'  
c.  
BA' L. PATEL.

*Decrees reversed.*

[APPELLATE CIVIL.]

*Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Melvill.*

SUBHA'BHAT BIN BABANBHAT (PLAINTIFF AND APPELLANT) *v.*  
VA'SUDEVBHAT BIN SUBHABHAT AND OTHERS (DEFENDANTS AND  
RESPONDENTS),\*

July 4.

*A sale convertible into a mortgage.*

Where a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor, and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him,

*Held* that the deed was a sale liable to be converted into a mortgage, and not a mortgage liable to be converted into a sale.

*Howard v. Harris*, (1) *Rámji v. Chinto*, (2) *Shankurbháí v. Kassibháí*, (3) referred to and distinguished.

THIS was a special appeal from the decision of W. H. Crowe, District Judge of Kanara, affirming the decree of J. L. Fernandez, Subordinate Judge at Coompta.

The plaintiff Subhábhat brought this suit against Vásudev-bhat and four others to redeem a mortgage of certain immovable property described in the plaint. He alleged that the property originally belonged to one Haribhat, from whose representatives—

(1) 1 Vern. 190; S. C. 2 Wh. and Tud. L. C 947, 3rd Ed.

(2) 1 Bom. H. C. Rep. 199.

(3) 9 Bom H. C. Rep. 69.

\* Special Appeal No. 23 of 1877.

1877.

SUBHA' BHAT  
BIN  
BAWANBHAT  
v.  
VÁSUDEV-  
BHAT BIN  
SUBHA' BHAT  
AND OTHERS.

the fourth and fifth defendants—the plaintiff had himself purchased it. Vásudev bhat, the first defendant, pleaded that he was the owner of the property in dispute; that it was mortgaged to his ancestor Subhat Gopi by the said Haribhat by two deeds, the later of which (Exhibit No. 21) was dated the 12th March 1832, and intended to operate as a sale if the said Haribhat died without adopting a son, which event happened, and that consequently this defendant's ancestor became the absolute owner of the property. The answers of the other defendants are not material to the case.

The following is an English translation of Exhibit No. 21 on which the first defendant based his claim:—

“Prosperity. The year of the victorious king Sháliváhan, 1753, Khara being the name of the cyclical year, the month Falgoon Shoodh, the date 10th, Monday, the Fasli year 1241 [1832 A.D.] the 12th of March. To Shrimant Shootbhat, son of Shambhat Gopi. A second [or additional] mortgage-deed of land is executed by Haribhat, son of Raghoobhat, as follows:—

Owing to my necessity, I formerly, on the 2nd of Kártik Shoodh, in the cyclical year called Vikráma (7th November 1820), mortgaged, for Hons 36 and Falams  $2\frac{1}{2}$  (Rs. 145), to your elder brother Máhábaleshvarbhat my share in my nuli-land, and my share in the allowances payable to the god Rámáthirtha, together with the profits which accrue from the Upádhiship to the god Shri Máhábaleshwar, with right to enjoy the same, and made over into your possession the said land, the allowances and the profits. Latterly I received from you (money in) cash, rice, and other goods. Together with the value thereof, the debt is found, on account made up to this day, to amount to Hons 38 and Falams  $6\frac{1}{4}$  [Rs. 154-8-0]; I have no other means whereby to pay you interest thereon. Therefore, as you have been enjoying all the property mentioned in the original mortgage-deed with the right to enjoy the same, passed by me, as also my house-site, and the rent, Hons 2 and Falams  $2\frac{1}{2}$  [Rs. 9], of my share due from Belekan Jetti, so you may continue to enjoy the same in reduction of interest, as much as possible, on sums borrowed by me. I will manage the Pujáriship of the god Rámáthirtha, and the Upádhiship of the temple of Shri Máhábaleshwar. If I get a boy of my

liking for adoption, and make him my adopted son, I will pay you off, in one lump sum, Hons 36 and Falams 2½ due under the original mortgage deed and the money due under the second mortgage, together with interest remaining due, and redeem my share of land, allowances, profits aforesaid. In the event of my not adopting a son, my share of property, all multi-land, allowances, profits, &c., may be enjoyed by you in the same way as I did, in right of purchase for the sum, principal, and interest due to you. Even the Pujáriship of the god Rámáthirtha, and the Upádhiship of the god Shri Máhábaleshvar, so far as appertaining to my share, may be enjoyed by you. You are to enjoy the same from generation to generation. Thus I execute the second mortgage. The proceeding in respect of the house-site is also given into your charge. Thus I execute the second mortgage. The signature of Haribhat.”

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The Subordinate Judge held the suit barred, and rejected the plaintiff's claim. In appeal that decree was confirmed by the District Judge.

*Shámráv Vithal*, for the appellant:—Restrictions on the redemption of a mortgage are always discountenanced in equity. No agreement in a mortgage can make it irredeemable, either after the death of the mortgagor, or upon failure of issue male of his body, as held in *Howard v. Harris*.<sup>(1)</sup> The learned pleader also cited Fisher on Mortgages, page 278, Section 489, 2nd Edition.

*Shántáram Náráyan*, for the respondent.

WESTROPP, C.J.:—Although the deed of the 12th March 1832 (Exhibit 21) is on the face of it described as a mortgage, it is necessary to see whether its contents warrant that description. The grantee was already in possession under a mortgage of the 7th November 1820, and was under the new deed to receive the profits in liquidation of interest so far as they would go—and, as it appears to us, the grantor was not to be liable to repay the principal money, or such balance of interest (if any) as might accrue upon it, unless he adopted a son. We do not perceive how, so long as he remained without making such an adoption, the

(1) 1 Vern. 190; S. C. 2 Wh. and Tud. L. C. 947, 3rd Ed.

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grantee could have maintained any suit against him either for principal or interest—(vide *Goodman v. Grierson*<sup>(1)</sup> and per Cottenham L. C. in *Williams v. Owen*<sup>(2)</sup>). In *Howard v. Harris*<sup>(3)</sup> there was a covenant by the mortgagor to pay, upon which he might be sued by the mortgagee—a circumstance which distinguishes that from the present case. Here, in fact, there would not have been any debt whatever due from the grantor until he adopted a son, and the grantee, except in that event, would not have the usual remedies of a mortgagee. This, therefore, seems to us to be a case of a sale liable to be converted into a mortgage, and not like *Rámji v. Chinto*,<sup>(4)</sup> *Shankarbhái v. Kassibhái*,<sup>(5)</sup> and the cases there mentioned, which are instances of mortgages liable to be converted into sales. There has not been any adoption by the grantor here, and he could not have redeemed unless he adopted a son. For these reasons we affirm the decree of the District Judge with costs.

*Decree affirmed.*

[ORIGINAL CIVIL.]

*Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Green.*

THE LONDON, BOMBAY, AND MEDITERRANEAN BANK, LIMITED,  
(PLAINTIFFS, APPELLANTS) v. BHANJI ZUTANI AND ANOTHER  
(DEFENDANTS, RESPONDENTS).\*

*Company—Contributory—Description—Balance order—List of contributories—Cause of action—Evidence—Amendment of plaint.*

Where the holder of shares in a company was described in the list of contributories, against whom a balance order by the Court of Chancery had been made, as “Devji Bhanji, cotton merchant,” and as being sued “in his own right”,

*Held* that the plaintiff company could not be allowed to give evidence that the shares were in fact held by a firm consisting of two individuals, named respectively Bhanji Zutani and Devji Hemráj; nor could the plaintiffs be allowed, at the hearing of the appeal, to amend their plaint, originally framed against both partners with a view to making the firm liable for the amount of the calls, so as to sue Bhanji Zutani only, who alone was alleged to have signed the articles and memorandum of association in the name of Devji Bhanji, and to make him personally liable as the holder of the shares.—*Weikersheim's Case* (L. R. 8 Ch. Ap. 831) distinguished.

(1) 2 B. and B. 274, 279.

(3) 1 Vern. 190.

(2) 5 My. and Cr. 303, 308.

(4) 1 Bom. H. C. Rep. 199.

(5) 9 Bom. H. C. Rep. 69.

\* Suit No. 514 of 1875, Appeal No. 135.

July 27.