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HASONBHOY VISRAM v. H. CLAPHAM.

The second defendant to bear his own costs.

Judgment for plaintiffs.

Attorneys for the plaintiffs.—Messrs. *Payne and Gilbert.*

Attorneys for the defendants.—Messrs. *Prescot and Winter.*

APPELLATE CIVIL.

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

GOVINDA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* JESHA PREMAJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1878 *February* 11.

Mortgage—Sale—Burden of proof.

Where one party to a transaction alleges it to be a mortgage and the other alleges it to be a sale, the question for consideration is whether or not there continued to be a debt from the former to the latter.

The plaintiffs sued for possession of certain lands, alleging that they had been mortgaged to the defendant by their father under two documents. The defendant produced them and relied upon them as deeds of sale, which conveyed to him absolutely the lands mentioned in them. The form of the instruments was not conclusive, but it appeared *aliunde* by the conduct of the defendant himself that the deeds were intended as mere securities for money, and that he had treated them as such. Certain entries in the defendant's accounts also treated the respective considerations named in the deeds as continuing debts due to the defendant from the plaintiffs' father. The Subordinate Judge awarded the plaintiffs' claim, but his decree was reversed, in appeal, by the Assistant Judge, who held that the transaction was a sale and not a mortgage. On appeal to the High Court,

Held that, under the circumstances mentioned above, a Court of Equity would regard the instruments as mere securities for money.

Held further that the entries, when put in evidence, were sufficient to shift the burden of proof from the plaintiffs to the defendant, and that it was incumbent on the latter to give either oral or documentary evidence which in some way neutralized or explained away their effect, or showed that they related to other transactions than those mentioned in the two documents.

The High Court, accordingly, reversed the decree of the Assistant Judge, and restored that of the Subordinate Judge, with costs throughout.

THIS was a second appeal from the decision of H. Batty, Acting Assistant Judge at Thana, reversing the decree of the Second Class Subordinate Judge of Pen.

* Second Appeal, No. 309 of 1877.

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The plaintiffs, Govinda and his brother, brought this suit for possession of certain lands, alleging that they had been held by the defendant under two documents, one of which had been executed by their father Hasha in his own name for Rs. 351, and the other for Rs. 199 by one Krishnaji Vishvanath as trustee for Hasha. They offered to pay the money due to the defendant under those documents. The defendant, Jesha, produced the two writings (exhibits 8 and 9) and contended that they were deeds of sale, and that they had absolutely conveyed to him the lands mentioned in them.

The Subordinate Judge held on the evidence that the transaction was a mortgage, and awarded the lands to the plaintiff on payment of the money due. He applied the provisions of section 170 of Act VIII of 1859 to the case, inasmuch as the defendant, although summoned, had failed to appear in person to answer certain questions regarding the nature of the transaction as it appeared in certain entries in his account books (exhibits 50, 51 and 52).

The defendant appealed to the District Court. At the hearing of the appeal the plaintiff presented an application to the Assistant Judge, Mr. E. Hosking, who heard the appeal, stating that, at the time of the execution of exhibit 8, the defendant gave Hasha a *pote-chitti* (agreement), agreeing to give up the lands to him (Hasha) on his paying Rs. 331; that the *pote-chitti* had been stolen by the defendant's brother Sava Premaji out of the plaintiff's house, and praying that secondary evidence of the *chitti* should be received. Mr. Hosking rejected the application, observing that the non-production of the *pote-chitti* was not satisfactorily accounted for, and that consequently secondary evidence of its contents was inadmissible. He, however, remanded the case for further inquiry on certain issues to the Subordinate Judge, who adhered to his former decision in the case. The defendant again appealed, and another Assistant Judge, Mr. Batty, who in the meantime succeeded Mr. Hosking, again reversed the decree of the first Court, and dismissed the plaintiff's claim, holding that the transaction was not a *benami* purchase, but an absolute sale. With respect to the entries in the defendant's account books, Mr. Batty observed :—

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"The entries on which the plaintiff seems mainly to have relied, are exhibits 51 and 52. The first of these is dated Bhadrapad Shud Pratipada, or ten days anterior to the agreement. There is nothing in it to show the real nature of the agreement to have been as alleged, and nothing to show what arrangements were made as to interest or the term for payment. Exhibit 52 is signed by the deceased Hasha, but though there is a coincidence in the amounts, there is nothing further to identify the two transactions beyond the fact that the date is the same as that of exhibit No. 9. * * * *

The evidence seems, therefore, to raise only a faint presumption of some money transactions having taken place about the time of the deed of sale, which may have had in contemplation some arrangement with regard to land to be purchased; but in the entire absence of any definite proof as to what this arrangement was, as to how long it was adhered to, as to the terms agreed upon for interest and re-payment, as to demands made for it repayment or for interest on the loan, it would be eminently unsafe to interfere with possession, admittedly of some twelve years' standing, on oral evidence so vague and supported only by entries of such questionable relevancy."

The plaintiffs appealed to the High Court.

M. C. Apte for the appellants.—Although the transaction appears to be a sale from exhibits 8 and 9, it is realy and truly a mortgage when seen in the light of exhibits 50, 51, and 52. The Assistant Judge has misconstrued these entries. The consideration monies of the two deeds (exhibits 8 and 9) exactly correspond with the amounts mentioned in the entries. Moreover, the date of the deed 9 is the same as the date mentioned in exhibit 52. So the deeds and the entries refer to the same transactions. The entries are consistent with and bear out the plaintiff's statement that the lands were held by the defendant as security for his money. The defendant, though summoned, did not appear to explain the entries. He has not given any evidence whatever which might have counteracted their effect. This is a case of a sale convertible into a mortgage by mutual agreement. The subject is clearly discussed in *Subabhat* v. *Vasudevbhat* (1) and *Bapuji Apaji*

(1) I. L. R., 2 Bom., 113.

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v. *Senavaraji* (1). The Subordinate Judge was right in holding, on the strength of the three entries and other evidence in the case, that it was a mortgage.

Pandurang Balibhadra for the respondent.—The nature of the transactions should be determined by the contents of exhibits 8 and 9. They clearly show that the lands were absolutely sold to the defendant. The cases cited on the other side do not apply to the present case.

WESTROPP, C. J.—In such cases as the present, where one party alleges a transaction to be a mortgage, and the other alleges it to be a sale, the question which presents itself for consideration is whether or not there continued to be a debt from the former to the latter—see *Goodman* v. *Grierson* (2); *Bapuji Apaji* v. *Senavaraji* (3); *Murphy* v. *Taylor* (4); *Subabhat* v. *Vasudevbhat* (5). The exhibits 8 and 9 are relied upon by the defendant Jesha Premaji as deeds of sale, whereby the lands therein respectively mentioned were conveyed to him absolutely. But the form of the instruments is not conclusive. If it appear *aliunde*, as, for instance, by the conduct of the apparent vendee himself, that the deeds were intended as mere securities for money, and that he so treated them, a Court of Equity will deal with them as such accordingly. Now the books of the defendant, Jesha Premaji, have been produced by him on the requisition of the plaintiffs, and they contain entries (see exhibits 50, 51 and 52) which treat the respective consideration moneys named in the alleged deeds of sale as continuing debts due to the defendant, Jesha Premaji, from Hasha, through whom his sons, the plaintiffs, claim. Of these entries, exhibits 51 and 52 show also that although exhibit 9 was executed by Krishnaji Vishvanath as nominal vendor, and only attested by Hasha, yet the transaction was really that of Hasha,—Krishnaji Vishvanath being merely a trustee for him, as appears from the fact that Jesha Premaji treated the consideration money for that deed (exhibit 9), namely, Rs. (199) one hundered and ninety-nine, as a debt due from Hasha to him, Jesha Premaji. These entries,

(1) I. L. R., 2 Bom., 231.
(2) 2 Ball and Beatty, 279.
(3) I. L. R., 2 Bom., 231.
(4) Ir. Chan. Rep., 92.
(5) I. L. R., 2 Bom., 113.

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exhibits 50, 51, and 52, when put in evidence, were, at the very least, sufficient to shift the burden of proof from the plaintiffs to the defendant, Jesha Premaji, but he has not attempted to give any evidence to contravene their effect. On the contrary, he admitted the genuineness and truth of those entries, and neither at the time of their production by himself, or of copies of them as extracts being filed in Court, or subsequently, although opportunities were afforded to him to put in evidence, did he give either oral or documentary evidence which in anywise neutralized or explained away their effect, or showed that they related to other transactions than those to which exhibits 8 and 9 related. It was incumbent on him to do this, but he permitted the case to proceed to judgment without attempting to do so. It must be distinctly understood that we do not deem it necessary to deal with the question as to whether the *potechitti* (unproduced and unstamped as it is found to have been) might be proved by other documentary or oral evidence, or with the applicability of section 170 of the Civil Procedure Code of 1859 to this case. We rest our decision on the conduct of the defendant, Jesha Premaji, himself, who treated the sums of Rs. (351) three hundred and fifty-one and Rs. (199) one hundred and ninety-nine, which coincide with the consideration moneys mentioned in exhibits 8 and 9, as debts due to himself from Hasha, and offered no explanation or evidence to the contrary. For these reasons we reverse the decree of the Assistant Judge and restore that of the Subordinate Judge, with costs of suit and both appeals to be paid by the defendant, Jesha Premaji, to the surviving plaintiff, Mahadev bin Hasha. The Subordinate Judge should have named a reasonable time (say six calendar months) within which the redemption money should be paid; but as we are informed by the pleaders on both sides that the redemption money mentioned in the decree of the Subordinate Judge has been paid, and possession of the lands given to the plaintiff, we deem it unnecessary to make any amendment in the Subordinate Judge's decree.

Decree reversed.