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be debited with Rs. 330 in taking the account of the mortgage of 1761 *Shake* to secure Rs. 125. The account stated on 5th *Vayashak Vad*, *Shake* 1769, in which the unsecured debts were included, showing a balance of Rs. 1,336-10-6, was a general and not a mortgage account, and no inference can, therefore, be drawn from it of an agreement on the part of the mortgagor that the above debts should be regarded as further charges on the mortgaged properties. They must, therefore, be omitted in taking the account.

As to compound interest, we think that the provisions in the mortgage-deed for annual accounts being made up is sufficient to show in this country, where it is the universal practice to convert interest into principal in taking such accounts, that the parties intended that compound interest should be charged.

We must, therefore, reverse the decree of the Court below and send back the case for the mortgage accounts to to taken afresh with due regard to the above remarks, and new decree to be passed. Appellant to have his costs of this appeal.

Decree reversed.

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14 B. 78.

[78] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

ABDUL RAHIM AND OTHERS (*Original Plaintiffs*), *Appellants v.* MADHAVRAV APAJI (*Original Defendant*), *Respondent.**

[29th April, 1889.]

Mortgage—Clause of conditional sale—Gahan lahin—Merger—Redemption—Admissions in depositions or pleadings—Estoppel.

The land in dispute was mortgaged with possession to the father of the defendant by the father of the plaintiffs in 1854, on condition that the same was to be considered as sold to the mortgagee if Rs. 240 were not paid to the mortgagee within five years from the date of the mortgage. No such payment, however, was made. In 1860 the plaintiffs' father executed to defendant's father another deed respecting another land, which deed mentioned the land in dispute as being in the possession and enjoyment of the same mortgagee as purchaser thereof. In 1866, the defendant mortgagee brought a suit on the mortgage of 1854, as also on other mortgages, and claimed Rs. 721 as due upon the mortgage after deducting Rs. 240 as the price of the land mortgaged. The mortgagor objected to the claim, but his objection was overruled, and the account was taken, allowing Rs. 240 as the consideration for the sale of the land under the conditional sale-clause, and the claim was decreed accordingly.

In 1884 the present suit was brought to redeem the mortgage. The defendant contended that under the conditional sale clause the mortgage did not subsist, and that the present suit was barred by the suit of 1866. The lower Courts held the plaintiffs' claim to be too stale for admission, and the mortgage of 1854 to be merged in the decree of 1866, and rejected the claim. On appeal by the plaintiffs to the High Court.

Held, reversing the decree of the lower Courts, that the mortgage in question still subsisted, regard being had to the rule in *Ramji* v. *Chinto* (1), which is still in force in the Presidency of Bombay with regard to mortgages containing clauses of conditional sale, whether executed before or after 1864.

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* Second Appeal No. 585 of 1887.

(1) 1 B. H. C. R. 199.

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Held, also, that the mortgage had not merged in the decree of 1866, which was in a suit to recover a different mortgage-debt secured by different property.

It was contended that the understanding of the parties up to 1866 was that the mortgage had been converted into a sale and that the property had passed to the defendant by purchase, and, therefore, the plaintiffs were prevented from redeeming it.

Held that such understanding did not operate as an estoppel, or prevent the mortgagors (plaintiffs) from redeeming their property.

[Appr., 27 B. 297=9 Bom. L.R. 140.]

THIS was a second appeal from a decision of A. H. Unwin Acting Judge of Satara.

[79] The plaintiffs brought this suit to redeem the land in dispute alleged to have been mortgaged with possession by their father Mira in 1854 to the defendant's father. The deed of mortgage stipulated that the land was to be considered as sold if within five years from its date Rs. 240 were not paid by the mortgagor. It further recited that the said land was to be considered after that period to be uninterruptedly possessed by the mortgagee, and "any one disposed to obstruct you (mortgagee), may pay you the principal and redeem the land."

The five years' term came to an end in April, 1859, and a statement of account was made and admitted as correct by the mortgagor, Mira, who endorsed it to that effect.

In 1860 Mira executed another mortgage in favour of the defendant's father, which recited, among other things, "that I and my father have already sold to you Lalabag and Gavadara (the land in dispute), and accordingly you are in possession and enjoyment of those lands. We have no objection whatever for your being so; you are in possession and enjoyment as purchaser, and should be so hereafter."

In 1866 the defendant's father (the mortgagee) brought suit No. 356 against Mira upon the mortgage of 1854 and other mortgages, and sought to recover Rs. 721 as principal due upon the mortgage after deducting Rs. 240 as the price of the property, the said sum not having been paid as stipulated. Mira denied that the land had become the property of the defendant's father, but his contention was overruled, and the mortgage account was taken on the basis that the land in dispute had become the defendant's father's property by purchase for Rs. 240, and a decree was accordingly made.

In 1884 the plaintiffs brought the present suit to redeem the land mortgaged in 1854 and for account, under the Dekkhan Agriculturists' Relief Act, XVII of 1879.

The defendant denied that the plaintiffs were agriculturists, contended that the land had become the property of his father at the expiry of the stipulated five years, and that the plaintiffs' claim was barred by suit No. 356 of 1866 brought by his father against Mira.

[80] The Subordinate Judge of Wai held that the mortgage no longer subsisted, and that the plaintiffs' claim was barred by the suit of 1866. He, therefore, rejected the plaintiffs' claim.

On appeal by the plaintiffs to the District Judge the decree was confirmed with the following remarks :—

"I find that the Subordinate Judge was right. Upon reference to the exhaustive judgments in the cases of *Bapuji Apaji* v. *Senavaraji*

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Marvadi(1) and *Thumbusawmy Moodelly* v. *Hossain Rowthen*(2) I think there can be no possible doubt that this claim is too stale for admission in the first place, the conditional sale being one made in this Presidency prior to A.D. 1864. Secondly, I concur with respondent's pleader that the mortgage has merged in the decree passed against Mira on the mortgagee Apaji's suit, No. 356 of 1866, and that the conduct and clear understanding of the parties subsequent to the expiry of the five years suffice to neutralize whatever sense or meaning there may previously have been in the expression "any one disposed to obstruct, &c.," upon which appellant's pleader has chiefly laid stress, as showing the subsistence of the mortgage in the parties' minds."

From this decision, the plaintiffs preferred a second appeal to the High Court.

Manekshah Jehangirshah, for the appellants:—The lower Courts were wrong in holding the claim for redemption as too stale. The rule in *Ramji* v. *Chinto*(3) has been referred to in *Bapuji Apaji* v. *Senavaraj. Marvadi*(1) as applicable to all mortgages containing clauses of conditional sale executed before or after 1864. The circumstances in the present case are similar to those in the case of *Ramchandra Baba Sathe* v. *Janardan Apaji*(4). The land should, therefore, be held still redeemable.

Mahadev Chimnaji Apte, for the respondent :—The mortgage ceased to exist after the term of five years, and the plaintiffs cannot, therefore, be allowed to redeem. After the five years had elapsed, the sale was recognized by the mortgagor in the deed of 1860. The mortgage was expressly recited as not existing.

[81] Since then our possession became adverse. The clause of conditional sale was introduced in the deed of 1834, because the mortgagee had given a considerable reduction in the previous debt, and such a clause should be enforced. The decree of 1866 was in the suit upon the mortgage of 1854, though along with it other mortgages were also sued on. The lower Courts were quite right in holding the mortgage merged in it. There is still a stronger circumstance here, *viz.*, that the parties treated the mortgage as converted into a sale. Such understanding subsisted till 1866 at least, and the plaintiffs are estopped from redeeming now.

JUDGMENT.

The judgment of the Court was delivered by

SARGENT, C. J.—The District Judge held, upon reference to the cases of *Bapuji Apaji* v. *Senavaraji Marvadi* (1) and *Thumbusawmy Moodelly* v. *Hossain Rowthen*(2), that there could be no possible doubt that the present claim was too stale for admission, the conditional sale being one made in this Presidency prior to A.D. 1864. In so holding the District Judge was wrong. As has been recently pointed out in *Ramchandra Baba Sathe* v. *Janardhan Apaji*(4), the judgment of the Privy Council in *Thumbusawmy's Case* was fully considered by Westropp, C. J., and West, J., in *Bapuji Apaji* v. *Senavaraji Marvdi*(1), and the conclusion arrived at was that the rule in *Ramji* v. *Chinto* (3) is still in force in the Presidency of Bombay with regard to mortgages containing clauses of conditional sale, whether executed before or after 1864.

(1) 2 B. 231. (2) 1 M. 1=2 I.A. 241. (3) 1 B.H.C.R. 199.
(4) *Ante*, 14 B. p. 19.

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Again, we think the District Judge was wrong in holding that the mortgage had merged in the decree passed against the mortgagor on the mortgagee's suit No. 356 of 1866. The mortgage could not merge into the decree in a suit brought by the mortgagee to recover a different mortgage-debt secured by different property. The question, whether the property now in suit should be considered to be still held in mortgage by the mortgagee, was mentioned by the parties in that suit, but it [82] could not be directly and substantially in issue at that time, and it certainly was not decided by the Court in its finding as to what was due from the mortgagor to the mortgagee on taking an account of the debt then in litigation.

Lastly, the District Judge held that the conduct and clear understanding of the parties subsequent to the expiry of the five years sufficed to neutralize whatever sense or meaning there may have been in the expression in the mortgage-deed, showing the subsistence of the mortgage in the parties' minds, notwithstanding the terms of the conditional sale. Now no doubt up to 1866 the understanding of the parties was that the mortgage had been converted into a sale, and that the property had passed to defendant by purchase. But it has been held that mere admissions of such an understanding, even in depositions and pleadings, do not operate as estoppel or prevent the mortgagor from redeeming his property. (See *Ramshet Bachashet* v. *Pandharinath* (1), *Vallabh Bhulu* v. *Rama* (2) and *Anaji Ramji Bhagvat* v. *Dhondi Salu Kotwal* (3).

We must, therefore, reverse the decree of the lower Court, and remand the case to be tried on the merits. All costs up to date on respondent.

Decree reversed.

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14 B. 82.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

BHIMAJI BALVANT AND ANOTHER (*Original Defendants*), *Appellants* v. GIRIAPA TIMAPA DESAI, (*Original Plaintiff*), *Respondent.**
[4th May, 1889].

Vatan—Power of a vatandar to create a perpetual mutalik—Exclusion of successors from entire management of vatan—Kararpatra—Sanad—Construction.

The creation of a perpetual *mutalik*, with a certain share of the *vatan* as *vritti* on account of *mutaliki*, is within the powers of a holder of the *vatan* for the time [83] being, more especially when it is done for good and valuable consideration passing to the *vatan*. But it is not competent to him exclude his successors from the entire management of the *vatan*.

In 1825 the ancestor of the plaintiff, who was a *desai* and the last proprietor of the *deshgati vatan* of Tegur, granted to the ancestor of the defendants a *kararpatra* (Ex. A.) whereby, in consideration of the services the latter was to render to the former in recovering the *vatan*, the defendants' ancestor was to enjoy one-third of *vatan* as *vatani mutalik* from generation to generation. Subsequently the plaintiff's ancestor granted to the defendants' ancestor *sanad* (Ex. B) which referred to the *kararpatra* already executed, and vested the entire management of the *vatan*. In the defendants' ancestor from generation to generation after the said *vatan* was recovered.

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* Appeal No. 9 of 1887.

(1) 8 B. H. C. Rep. A. C. J. 236.
(2) 9 B.H. C.R. 65.
(3) Printed Judgments for 1874, p. 133.