

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice, Batchelor.

1908
February 27.

JANARDAN VISHNU KULKARNI (ORIGINAL DEFENDANT 1), APPELLANT, v. ANANT LAKSHMANSHET AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT 4), RESPONDENTS, AND, RAVJI MANGESH KULKARNI (ORIGINAL DEFENDANT 4), APPELLANT, v. ANANT LAKSHMANSHET AND ANOTHER (ORIGINAL PLAINTIFFS 1 AND 2), RESPONDENTS.*

Documents executed in the mofussil—Contracts of the people of India—Liberal construction—Regard to be and to all the circumstances of a transaction—Intention to make land security for payment of debt—Charge—Transfer of Property Act (IV of 1882), section 100.

Documents executed in the mofussil come within the statement of the Privy Council in *Hunoomanpersaud Panday v. Mussumat Baboos Munraj Koonweree*⁽¹⁾ that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be regarded so much as the real meaning of the parties which the transaction discloses."

Where having regard to all the circumstances of a transaction there remains no doubt that the documents are sufficient and do show an intention to make the land security for the payment of the debt mentioned therein, the documents create a charge.

SECOND APPEALS from the decision of A. L. Emanuel, Assistant Judge of Ratnágiri, confirming the decree of S. S. Wagle, Subordinate Judge of Málvan.

This was a suit for redemption and the facts necessary for the purpose of this report were as follows :—

The property in dispute originally belonged to three brothers, Tuke, Ram and Lakshman Bable Parab. They mortgaged it with possession to the family of defendants 1, 2 and 3 for Rs. 75 of the Chándwad Currency, equivalent to Rs. 72 of the British Currency. The mortgage was dated Shake 1766 (1844-45 A. D.). Tuke having died childless, his share in the property devolved on his two surviving brothers Ram and Lakshman. Subsequently Bapu, son and heir of Lakshman, mortgaged the said property

* Joint second Appeals Nos. 182 and 255 of 1905.

(1) (1856) 6 Moo. I. A. 411.

along with some other property to the plaintiffs on the 2nd April 1875 stipulating that they should redeem the mortgage of defendants 1—3. Hence the present suit. Defendant 4 was the purchaser at Court-sale of the rights of the heirs of Lakshman who were joined as defendants 6 and 7 and defendant 5 was the heir of Ram.

1908
JANARDAN
v.
ANANT.

Defendants 1 and 2 answered, *inter alia*, that in addition to the amount of Rs. 75 secured by the mortgage they were entitled to recover the amount of four money bonds, three of which were registered. Two out of the four bonds were executed by Tuke Bable, the third by Lakshman Bable and the fourth by Bapu Bable, and the executants of the bonds had bound themselves to pay the amounts before the redemption of the mortgage. The defendants further contended that if the plaintiffs had a right to redeem, they could exercise that right with respect to a half share of that property.*

Defendant 4 set up his right as auction-purchaser in addition to the above.

The other defendants were absent.

The Subordinate Judge found that the plaintiffs were entitled to redeem only a moiety of the mortgage as they were mortgagees under Bapu alone. He, therefore, passed a decree for redemption

* The particulars of the four money bonds referred to by defendants 1 and 2 in their written statement were as follows :—

Exhibit 41.—Registered money bond passed by Lakshman Bable for Rs. 72. It recited—Our *thikans* are mortgaged to you. Before the redemption of the *thikans* by payment of the mortgage debt, I shall at first pay you in full this amount and then redeem the *thikans*. No default will be made herein.

Exhibit 42.—Simple money bond passed by Bapu Bable for Rs. 99. It recited—Our *thikans* are mortgaged to you. At the time of redemption, I shall pay you in full this amount, including interest. Before I pay you this amount I shall not seek redemption.

Exhibit 44.—Registered money bond passed by Tuke Bable for Rs. 15½. It recited—Our *thikans* are mortgaged to you. At the time of the redemption of the *thikans*, I shall at first pay you this amount and then redeem the *thikans*.

Exhibit 45.—Registered bond passed by Tuke Bable for a certain quantity of paddy borrowed. It recited—Our two *thikans* are mortgaged to you. At the time of the redemption of the two *thikans*, I shall at first pay off the paddy and then redeem the two *thikans* on payment of the mortgage debt.

1908

JANARDAN
v.
ANANT.

directing the plaintiffs to pay to defendants 1 and 2 Rs. 36 within six months from the date of the decree, and the defendants to put the plaintiffs in joint possession along with themselves of a moiety of the mortgaged property. The contention of the defendants that they were entitled to be paid the amount of the four money bonds before redemption was disallowed on the following grounds :—

In addition to the amount of Rs. 75 secured by Exhibit 43 the defendants 1 and 2 claim the amounts of four bonds, Exhibits 44, 45, 41 and 42. The first two are executed by Tuke Bable, the third by Lakshman Bable and the last by Bapu Lakshman. They are all simple bonds, but the executants bind themselves to pay the amounts before redemption of Exhibit 43. Such bonds do not create a charge on the mortgaged property: *Hari Mahadaji v. Balambhat*⁽¹⁾, *Rama v. Martand*⁽²⁾, *Yashvant v. Vithoba Sheti*⁽³⁾. The condition contained in such bonds is binding on the conscience of the mortgagor: *Allu Khan v. Roshan Khan*⁽⁴⁾, *Krishnaji v. Maheshwar*⁽⁵⁾. But it is not binding on the subsequent assignee of the mortgagor: *Hari v. Balmbhat*⁽⁶⁾, *Unni v. Nagammal*⁽⁷⁾, *Ramchandra v. Dhondi*⁽⁸⁾. I am of opinion, therefore, that plaintiffs are not bound to pay the amounts of Exhibits 44, 45, 41 and 42. They are only liable to pay half the amount of Exhibit 43, viz., Rs. 36. Exhibit 43 does not bear interest.

On appeal by defendant 1 the Assistant Judge confirmed the decree.

Defendants 1 and 4 preferred second Appeals Nos. 182 and 225 of 1905, respectively.

SECOND APPEAL No. 182 OF 1905.

Rao Bahadur G. N. Nadkarni for the appellant (original defendant 1) — The four money bonds do create a charge on the property. In construing such documents the intention of the parties must be considered. The language of the bonds makes the intention quite clear: section 100 of the Transfer of Property Act. Further the fact that the bonds were registered confirms the intention. The rulings in *Hari Mahadaji Savarkar v. Balambhat Raghunath Khare*⁽⁹⁾ and *Subrao Mangeshaya v. Manjapa Shetti*⁽¹⁰⁾ against clogging the equity of redemption are

(1) (1884) 9 Bom. 233.

(2) (1884) 9 Bom. 236 Note.

(3) (1887) 12 Bom. 231.

(4) (1881) 4 All. 85.

(5) (1895) P. J. p. 112.

(6) (1884) 9 Bom. 233.

(7) (1895) 18 Mad. 368 at p. 372.

(8) (1890) P. J. p. 165.

(9) (1884) 9 Bom. 233.

(10) (1892) 16 Bom. 705.

not approved in the later ruling in *Rajmal v. Shivaji*⁽¹⁾. Further in the present case the question as to a clog does not arise. We therefore submit that we are entitled to recover the amounts of the four bonds before redemption is allowed

1908

JANARDAN
v.
ANANT.

K. N. Koyaji for the respondents (original plaintiffs):—The money bonds, which were passed subsequent to the mortgage sued upon, provide for payment before redemption. They therefore distinctly clog the equity of redemption and cannot be enforced: *Hari Mahadaji Savarkar v. Balambhat Raghunath Khare*⁽²⁾, *Subrao Mangeshaya v. Manjapa Shetti*⁽³⁾.

SECOND APPEAL No. 255 OF 1905.

G. S. Mulgaonkar for the appellant (original defendant 4).

K. N. Koyaji for the respondent (original plaintiff 1).

JENKINS, C. J.:—The only question that arises on this appeal (No. 182 of 1905) is whether the appellant is entitled to priority of payment in respect of the amount due on four instruments being Exhibits 45, 44, 41 and 42. Of these Exhibits 45 and 44 were executed in 1847, 41 in 1848, and 42 in 1868; and the appellant claims the benefit of them. He also claims the benefit of the mortgage created by an instrument, Exhibit 43.

The lower appellate Court has decided against the appellant relying on *Rajmal v. Shivaji*⁽¹⁾. But that case really is not applicable as the decision cited by the learned Assistant Judge turned altogether on the fact that it was conceded and had to be conceded in the absence of registration that the document there under consideration did not create a charge.

It seems to us therefore that we are in no way concerned with the doctrine which forbids anything that would amount to a clog on the equity of redemption.

All we have to consider is whether by these four documents charges were created.

Now we start with this that these documents were executed in the mofussil and come within the statement of the Privy

(1) (1902) 27 Bom. 154.

(2) (1884) 9 Bom. 233.

(3) (1892) 16 Bom. 705.

1908

JANARDAN
v.
ANANT.

Council in *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonwerae*⁽¹⁾, where it was said that "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

Exhibits 45, 44 and 41 are registered, and Exhibit 42, the only unregistered document, is security for an amount less than that in respect of which registration is required under the Registration Act. This is not without its significance.

From section 100 of the Transfer of Property Act we learn what a charge is : for, it is there provided "Where immoveable property of one person is by act of parties made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property." The form of words used is immaterial, all we have to be satisfied of is that the documents show an intention that the person in whose favour they were executed should have the benefit of the security of the land.

Approaching these documents in the spirit of what is laid down by the Privy Council, and having regard to all the circumstances of the transaction we feel no doubt that the documents are sufficient and do show an intention to make the land security for the payment of the money mentioned therein, and from that it follows that the documents do create the charge : and we therefore think that the appellant is right in his contention. The plaintiff is entitled to redeem on payment of the amount that will be found due on the basis of our decision.

The final decree will be passed after the pleaders have settled the amount between themselves.

The appellant will have his costs of this appeal.
Appeal No. 255 of 1905 is dismissed with costs.

The appellant to get all his costs, charges and expenses as mortgagee.

G. B. R.

(1) (1856) 6 Moo L. A. 393 at p. 411.