1914.

BHAGWAT BHASKAR v. NIVRATTI SAKHARAM.

We must, therefore, reverse his decision on issue No. 1 and remand the case to the learned Judge below to dispose of upon the remaining points awaiting his decision in the light of the foregoing remarks. In doing so we must observe that the case of the 6th defendant has not been dealt with in the Court of first appeal. The learned Judge should inquire into and decide upon the alleged legal necessity of the mortgage under which the defendant No. 6 claims to hold the property from the widow Jankibai. Costs will abide the final result.

Decree reversed: case remanded.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1914. *August* 21.

MADHAVRAO KESHAVRAO AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SAHEBRAO GANPATRAO AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Construction of deed—Simultaneous execution of sale deed and agreement to reconvey—Transaction amounts to mortgage by conditional sale.

The land in dispute was sold by the defendants to the plaintiffs' father on the 7th November 1892 for Rs. 300. On the same day, the latter agreed with the defendants that if they repaid Rs. 300 in five years, he would re-sell the land to them. From 1895 the defendants were in possession of the land as tenants of the plaintiffs and paid Rs. 18 as rent every year. In 1910, the plaintiffs sued to recover possession of the land. The defendants claimed to redeem the lands alleging that the transaction of 1892 amounted to mortgage. The first Court held that the transaction was a mortgage and allowed redemption; but the lower appellate Court held that it was a sale and decreed plaintiffs' claim. The defendant having appealed:—

Held, reversing the decree, that in view of the facts and the contemporaneous nature of the two documents the proper construction would be that they constituted conditional sale, and that the real intention of the parties was to

* Second Appeal No. 329 of 1913.

1914.

MADHAVRAO KESHAVRAO v. SAHEBRAO GANPATRAO.

effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and re-sale.

SECOND appeal from the decision of Balak Ram, Assistant Judge of Poona, reversing the decree passed by T. R. Kotwal, Subordinate Judge at Talegaon.

Suit to recover possession of land.

On the 7th November 1892, the defendants sold the land in dispute to plaintiffs' father for Rs. 300.

The plaintiffs' father passed on the same day an agreement to defendants, agreeing as follows :—

It is agreed between us that if you both pay Rs. 300 the sale money in five years from today, we shall re-sell the lands to you and will raise no objection. If you do not pay the money in five years, you will have no right to ask for a reconveyance and the right will not avail and the sale-deed taken is to be considered final.

From 1895, the defendants went into possession of the land as tenants of the plaintiffs. The rent Rs. 18 was paid by the defendants every year. The plaintiffs used to pay the assessment which was Rs. 32. The price of the land, *viz.* Rs. 300, was found to be inadequate for the land. The khata of the land which stood in the name of defendants' father, was in 1892 transferred to the name of defendant No. 1.

The plaintiffs sued to recover possession of the land in 1910, relying on the sale-deed of 1892.

It was contended by the defendants that the transaction of 1892 as evidenced by the sale and re-sale amounted to a mortgage and that they should be allowed to redeem it.

The Subordinate Judge held that the transaction was a mortgage and passed a redemption decree in favour of the defendants allowing them to repay the amount of Rs. 300 in annual instalments of Rs. 40 each.

The District Judge on appeal reversed the decree on the ground that the transaction was a sale. He, therefore, decreed the plaintiffs' claim.

The defendants appealed to the High Court.

T. R. Desai, for the appellants :—The two documents being contemporaneous should be read together. When so read, the transaction is clearly a mortgage : see *Jhanda Singh* v. *Wahid-ud-din*[1] ; *Wajid Ali Khan* v. *Shafakat Husain*[2] ; *Balkishen Das* v. *W. F. Legge*[3] ; and *Maruti* v. *Balaji*[4].

The cases of *Bhagwan Sahai* v. *Bhagwan Din*[5] and *Ghulam Nabi Khan* v. *Niaz-un-nissa*[6] turned on the special words in the document for re-sale. The remarks in *Alderson* v. *White*[7] are distinguishable.

The test in such cases is, was there a debt? The amount of rent in usufructuary mortgages usually represents interest payable : see *Nagindas* v. *Kara*[8].

A. B. Gumaste, for the respondents :—The construction placed upon the two documents by the lower appellate Court is correct. The mere circumstance that the two documents are of even date is immaterial. There was no pre-existing debt and it does not follow that the present transaction was a mortgage : see *Ghulam Nabi Khan* v. *Niaz-un-nissa*[6] ; *Jhanda Singh* v. *Wahid-ud-din*[1] ; *Bhagwan Sahai* v. *Bhagwan Din*[5].

HAYWARD, J. :—The plaintiffs sued as purchasers from the defendants to recover possession of the purchased lands which were subsequently leased to the defendants. The defendants pleaded that the transactions amounted really to a mortgage which they were entitled to redeem, and not to a sale and subsequent lease owing to a contemporaneous agreement for a re-sale.

(1) (1911) 33 All. 585.
(2) (1910) 33 All. 122.
(3) (1899) 22 All. 149.
(4) (1900) 2 Bom. L. R. 1058.
(5) (1890) 12 All. 387.
(6) (1910) 33 All. 337.
(7) (1858) 2 DeG. & J. 97.
(8) (1904) 6 Bom. L. R. 630.

1914.

MADHAVRAO KESHAVRAO v. SAHEBRAO GANPATRAO.

The original Court held in all the circumstances that the two documents effected a mortgage and not a sale. The first appeal Court held on a practically similar view of the circumstances that the two documents constituted a sale with an agreement for a re-sale.

The judgment of the learned Subordinate Judge is not as clear as it might have been and consists very largely of a vain repetition of the evidence without any indication of the particular bearing of the evidence quoted upon the issues to be determined. But it appears that the following material facts were held established. On the 16th of September 1892 a relation of defendants sold his interest in the lands for Rs. 300 to one Manikchand. On the 7th of November 1892 defendants bought out Manikchand for Rs. 300 raised by the sale and re-sale in suit. From 1895 onwards the defendants remained in possession as tenants of their purchaser with liability to pay the assessment amounting to Rs. 32 at a nominal rent of about Rs. 50. But as a matter of fact the assessment was not paid by the tenants but by the purchaser, so that the rent actually received was about Rs. 18 only, which would be interest at 6 per cent. on the purchase money Rs. 300, instead of the nominal rent of Rs. 50. There was subsequent to the sale and re-sale a transfer of the names in favour of defendant 1, and not in favour of the purchaser in the revenue records. There was evidence to show that Rs. 300 was a wholly inadequate price for the lands. Two Kulkarnis stated that a fair rent would have been Rs. 75 a year, so that the real value of the lands would have been anything from Rs. 750 to Rs. 1,500. It appears that these were the facts upon which the original Court held that the real intention of the parties in executing the two documents of sale and re-sale was to effect a mortgage and not an absolute sale with agreement of re-sale.

The first appeal Court appears to have accepted these facts generally, though the learned Judge without stating definitely that he considered Rs. 300 a fair price cast some doubt upon the value of the lands as estimated. On those facts he came to the opposite conclusion, namely, that the proper construction of the two documents was that they effected an absolute sale with an agreement for re-sale.

On second appeal to this Court it has been urged that in view of the facts established and the contemporaneous nature of the two documents the proper construction would be that they constituted conditional sale. We have no doubt in all the circumstances that that is the proper construction and that the real intention of the parties was to effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and re-sale. It was suggested on the other side that it was not open to us to speculate on the exact relations of the parties in this suit which was in form one between a landlord and tenant, but it appears to us that the real nature of the leases as well as of the transactions of sale and re-sale have been called in question in this litigation, and that we are bound to consider them in view of the very wide terms of section 10A of the Dekkhan Agriculturists' Relief Act.

We must, accordingly, allow this appeal and restore the decision of the original Court and reverse that of the appeal Court. Each party to bear his own costs of both appeals.

BEAMAN, J. :—I concur in the judgment just delivered by my learned brother. I have no doubt but that the contemporaneous documents of 1892 do constitute what is known in this country as a mortgage by conditional sale. Neither have I the least doubt that that was the intention of the parties executing them. Such mort-

1914.

MADHAVRAO KESHAVRAO v. SAHEBRAO GANPATRAO.

gages are legislatively recognised, and I have only to observe that in no true mortgage of this class will any debt be apparent. It is idle, therefore, to criticise mortgages by conditional sale by reference to the essential conditions of a mortgage in the English sense of that word. It only needs to peruse the judgments of the Courts relating to these mortgages to observe how necessary it is to bear this in mind when the question is whether upon an interpretation of documents alone the result is a mortgage by conditional sale or an out and out sale.

Appeal allowed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar and Mr. Justice Beaman.

1914.
March 27.

IN THE MATTER OF THE ARBITRATION BETWEEN THE BOMBAY GAS COMPANY, LIMITED AND THE BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY, LIMITED.

M. R. JARDINE AND STUART MENTETH, PETITIONERS.

Indian Electricity Act (IX of 1910), sections 14 and 19—Responsibility of licensee to make full compensation for any damage, detriment or inconvenience caused by him or by anyone employed by him—Damage, whether caused in the exercise of the powers granted to the licensee.

A gas company laid a 3-inch main in a street in Bombay. Subsequently an electric supply company caused cables contained in troughing to be laid over this main in such a manner that the main for the distance of some 36 feet was rendered inaccessible for the purpose of removing the same except by slinging the electric company's cables, by reason of the position of the cables. It was found that the work of laying the cables had not been executed, nor must it be deemed to have been executed, to the reasonable satisfaction of the gas company.

Subsequently the gas company desired to replace their 3-inch main with a 4-inch main and for this purpose opened up the street in question, when they discovered the position of the cables. On account of the position of these cables the gas company were compelled to make a diversion in the route taken