APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

1916.
January 6.

NARAYAN RAMKRISHNA PANDIT AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* VIGHNESHWAR GANAP HEGDE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Construction of document—Sale or mortgage—Sale with option of re-purchase —Transfer of Property Act (IV of 1882), section 58, clause (c).

The plaintiffs mortgaged in 1899 with the defendants 92 fields for Rs. 8,000, the rate of interest agreed upon being 8 per cent. per annum. In 1904, the parties made up accounts under the mortgage and of other transactions, and the plaintiffs were found indebted to the defendants for Rs. 13,000. To pay the amount the plaintiffs sold to the defendants 20 out of 92 fields mortgaged. The sale-deed contained the provision that if within the period of 20 years the plaintiffs repaid Rs. 13,000 in one lump sum or in instalments the defendants should reconvey the lands to the plaintiffs. On the same day the plaintiffs executed to the defendants a permanent lease of the lands sold at a fixed annual rental of Rs. 412-8-0. The plaintiffs alleged that the transaction of 1904 was a mortgage, and sued to redeem the same in 1911, on accounts being taken under the Dekkhan Agriculturists' Relief Act:—

Held, that the transaction in dispute was not a mortgage, but a sale with an option to the plaintiffs to repurchase.

FIRST appeal from the decision of T. V. Kalsulkar, First Class Subordinate Judge at Karwar.

Suit to redeem a mortgage.

On the 2nd August 1899 the plaintiffs mortgaged with the defendants 92 fields for Rs. 8,000, the rate of interest agreed upon being 8 per cent. per annum.

In 1904, the parties made up accounts of moneys due on the mortgage and other transactions between the parties with the result that the plaintiffs were found indebted to the defendants in the sum of Rs. 13,000. The plaintiffs discharged the debt by sale to the defendants of 20 out of 92 fields mortgaged with them. The

* First Appeal No. 237 of 1913.

sale-deed which was executed on the 4th August 1904 contained a *stipulation that if* the plaintiffs repaid Rs. 13,000 in one lump sum or in instalments to the defendants within 20 years, they were to reconvey the lands to the plaintiffs. The material provisions of the sale-deed were as follows :—

The principal amount to be paid to you in respect of the said mortgage-deed is Rs. 8,000 ; the amount settled in respect of interest up to this time on the same is Rs. 3,000 making in all Rs. 11,000 ; amount of Rs. 2,000 settled in respect of the principal and interest of the promissory-note for Rs. 1944-14-0 given in writing on the date, the 26th of January *1904 in favour of your* elder brother, Ramakrishna by (1) Vishnu Hegde, the plaintiff No. 1, and the interest thereon for purposes of the debts incurred for the necessity of the family, so in all Rs. 13,000 (thirteen thousand) are due to you from our family up to this date. It was not convenient to pay you this amount for the reasons mentioned above. Moreover, excessive *interest is to be paid for the said debt and if* by reason of the inconvenience to pay it from the income of the family lands, the amount remains unpaid, it appeared that great loss might be caused to the family. So all of us who are members of the family considered (this matter) and thought (decided) that we should sell some lands to you and redeem the remaining *lands from the mortgage encumbrance and should* include in this sale-deed all the debts incurred by our family up to this time, in full satisfaction of our debts and that if in future any debt is required by the family, and if it is really required, it is to be contracted by Nos. 1 and 2 out of us, who carry on *vahivat* of our family with the consent of all the remaining members *of our family and that if any (debt) be incurred* by the said two persons, unless it is proved that it was incurred for the family, that debt is not to affect the rights of the share of other persons of the family. We have entered into an agreement as above and on informing you that we are going to make a sale to you for the amount of the said debt of Rs. 13,000 (thirteen *thousand), you agreed to it* and so the property mentioned below is sold to you (in respect of the said amount).

We have sold you the right, title and interest that we (and) our family have over the above mentioned lands. Therefore, we shall get the *khata* paying the said assessment transferred to your name. Therefore, you should pay every year Government assessment from the December instalment of this year and expend as much money for improvement on them as you please and enjoy them from generation to generation.

If from this date up to 20 years between the beginning of July to the end of August we go on paying (every year) Rs. 650 (six hundred and fifty rupees)

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or more than that amount out of the amount of sale, you should accept the same and should go on deducting a proportionate amount from the profits Rs. 412-8-0 (four hundred and twelve rupees and eight annas) in respect of the lands relating to this sale. If we and the members of our family also pay the whole amount of sale in 20 years by one lump sum or (by amounts) as mentioned above you should deliver back the right of this sale to us and to the members of our family, the cost having been paid by us and you half and half. This condition is not to apply after 20 years.

On the same day the plaintiffs executed in favour of the defendants a perpetual lease of the lands sold at a fixed annual rental of Rs. 412-8-0. It contained a provision that—

"If we pay any amount out of the amount in respect of the said sale-deed we shall deduct rent in proportion to the amount paid thus and go on paying the remaining rent."

In 1911 the plaintiffs, alleging that the sale-deed of 1904 was a mortgage, sued to redeem it on accounts being taken under the provisions of the Dekkhan Agriculturists' Relief Act.

The Subordinate Judge decreed the claim, holding that the sale of 1904 was a mortgage, on the following grounds :—

The terms about paying off Rs. 13,000 in Exhibit 25 by instalments of Rs. 650 or paying of the whole sum of Rs. 13,000 in 20 years appears to have been added later on in Exhibit 25 and a corresponding diminution in the payment of rent is provided for in Exhibit 34. These terms were added and the documents were complete on the 26th September 1904. But for the addition of these terms the deed (Exhibit 25) would have been a sale. But with the addition of the terms the deed becomes a mortgage by conditional sale, because there is a condition in Exhibit 25 that the sale shall become void on payment of Rs. 13,000 by instalments or in a lump sum within 20 years : *vide* clause (*c*), s. 58 of the Transfer of Property Act (IV of 1882). Under the circumstances it is not necessary to find out the indications which determine any transaction to be a mortgage : vide, *Maruti bin Amrita* v. *Balaji bin Babaji Patel*, 2 Bom. L. R. 1058. Hence it is not necessary to go into the question as to why defendants were content with such a low rate of interest as rupees three and annas two per cent. and why defendant left out some of the lands at the time of Exhibit 25 which were mortgaged to them

previously (Exhibits 25, 29 and 34). There is not the slightest doubt that Exhibit 25 is a mortgage although ostensibly it is a sale.

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The defendants appealed to the High Court.

Coyajee with *S. S. Patkar* (Government Pleader), for the appellants :—The deed in question is out and out sale with a condition of re-purchase. As no extraneous evidence has been adduced to show the intention of the parties, the intention has to be gathered from the document itself. The recitals and conditions therein and past transactions between the parties conclusively prove that it was a sale-deed : see *Bhagwan Sahai* v. *Bhagwan Din* [1] and *Vasudeo* v. *Bhau.*[2]

Bhandarkar with *G. P. Murdeshwar*, for the respondent :—The deed is one of mortgage. All the indications of a mortgage are present there. We are in possession ; we pay a fixed rent ; and we have all along paid the assessment : see *Kasturchand Lakhmaji* v. *Jakhia Padia* ;[3] *Madhavrao Keshavrao* v. *Sahebrao Ganpatrao.*[4]

BATCHELOR, J. :—The only question involved in this appeal is, whether the document, Exhibit 25, executed by the plaintiffs in favour of the defendants, is, as on its face it purports to be, a sale, or is in reality a mortgage in the guise of a sale. The plaintiffs' suit was brought to redeem the mortgage which, as the plaintiffs alleged, was effected by this Exhibit 25, so that admittedly the suit must fail if it should be held that no mortgage is created by this document.

The learned Judge below was of opinion that Exhibit 25 was in reality a mortgage, and the grounds of this opinion are stated by him in the following words : after referring to the terms providing for the

(1) (1890) 12 All. 387.
(2) (1896) 21 Bom. 528.
(3) (1915) 40 Bom. 74.
(4) (1914) 39 Bom. 119.

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condition to repurchase the property after the lapse of twenty years, the Judge says :—

"But for the addition of these terms the deed (Exhibit 25) would have been a sale. But with the addition of the terms the deed becomes a mortgage by conditional sale, because there is a condition in Exhibit 25 that the sale should become void on payment of Rs. 13,000 by instalments or in a lump sum within twenty years [*vide* clause (*c*), section 58 of the Transfer of Property Act]. Under the circumstances it is not necessary to find out the indications which determine any transaction to be a mortgage."

But it seems to me clear that the question, whether Exhibit 25 effects a mortgage or a sale, is not to be answered by mere reference to clause (*c*) of section 58 of the Transfer of Property Act. And, if I am not mistaken, to decide the point upon this view is to assume what is really in dispute. For, section 58 of the Transfer of Property Act defines what a mortgage is, and clause (*c*) of the section describes one method of effecting a mortgage, viz., the method of mortgaging by conditional sale. But the words of clause (*c*) are to be read not in an isolated manner, but in reference to the first paragraph of the section, and when they are so read, it will be manifest that clause (*c*) comes into play only when there is a mortgage as that term has been defined. Now from the definition itself there is no mortgage except where there is a transfer of an interest in specific immoveable property for the purpose of securing the payment of a debt, and the whole question involved in this debate is, whether the Rs. 13,000, paid for the lands transferred by Exhibit 25, was an out and out price paid for land sold or was a continuing debt secured by a transfer of the immoveable property. To decide between these two theories we must look at the intentions of the parties as those intentions have been disclosed in the documents executed. As was said by Lord Chancellor Cranworth in *Alderson* v. *White*[1]:

[1] (1858) 2 DeG. & J. 97 at p. 105.

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"In every such case the question is, what, upon a fair construction, is the meaning of the instruments?" Now the material passage in the principal instrument, Exhibit 25, after referring to the execution of prior mortgages, recites that in all Rs. 13,000 are found due to the defendants by the plaintiffs at the date of the document. Then the instrument continues :—

"It was not convenient to pay you this amount for the reasons mentioned above. Moreover excessive interest is to be paid for the said debt, and if, by reason of the inconvenience to pay it from the income of the family lands, the amount remains unpaid, it appeared that great loss might be caused to the family. So all of us who are members of the family considered this matter and decided that we should sell some lands to you and redeem the remaining lands from the mortgage encumbrance and should include in this sale-deed all the debts incurred by our family up to this time, in full satisfaction of our debts."

Now pausing there, it seems to me difficult to imagine language more clearly and unequivocably expressive of a sale as opposed to a mortgage. There is no ambiguity in the minds of the parties who themselves refer to the pre-existing mortgage and in contrast with it declare that they now effect a sale for the precise purpose of extinguishing the debt which had been secured by this mortgage. That is the contract which the parties in the plainest possible language have set their hands to. Is there anything in the rest of the case to indicate that this, the plain meaning of Exhibit 25, is not the meaning which the parties intended and which the Court should now enforce? The sole circumstance to which the respondents-plaintiffs were able to point is the last passage occurring in Exhibit 34, the permanent lease which the defendants gave to the plaintiffs on the 6th August 1904. By these words it is provided that "if we (the plaintiffs) pay any amount out of the amount in respect of the said sale-deed, we shall deduct rent in proportion to the amount paid thus and go on paying the remaining

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rent." It may be that if there were in the case any substantial consideration in plaintiffs' favour, the Court might see its way to draw an inference in their favour from this provision. But when all the circumstances are considered, it appears to me that this provision carries the case no further than it is carried by the condition that it shall be open to the plaintiffs at any time within twenty years to repurchase the land by payment of the price either in a lump sum or in instalments. Clearly, however, the mere giving of an option to the plaintiffs to repurchase the land does not of itself operate to create a mortgage. And when attention is paid to other circumstances appearing on the record, the theory of a mortgage must be set aside. Admittedly when Exhibit 25 was executed, the defendants already had a mortgage on the lands transferred by Exhibit 25. Since that mortgage the debt due to them had increased from Rs. 8,000 to Rs. 13,000. And yet if the plaintiffs' case is right, the creditor is content to take only a further mortgage on the 20 lands transferred by Exhibit 25 and give up the security which under the pre-existing mortgage he already had on seventy-two other lands belonging to the debtors.

Moreover, the documents make no provision for the payment of interest. It is said that the Rs. 412 reserved as annual rent under Exhibit 34 may properly be regarded as interest running on the Rs. 13,000. But even that theory does not assist the plaintiffs. For, upon that footing the creditor is content to receive only interest at the unusual and unusually low rate of $3\frac{1}{8}$ per cent. whereas his earlier mortgage gave him interest at 8 per cent. There is no provision in the documents for the taking of any accounts, although the documents provide that the purchasers may spend any sum they like on improving the property. The documents lay down that in the event of repurchase by the

plaintiffs, the costs of this repurchase are to be borne half and half between the plaintiffs and the defendants, and it seems to me extremely unlikely that if this transaction were in truth a mortgage, the mortgagee would consent to bear half the expenses of the re-conveyance.

I notice, lastly, that it is not suggested that the Rs. 13,000, the consideration of Exhibit 25, is not a fair price for the lands conveyed by that instrument.

On the whole, therefore, though I have not overlooked the general considerations to which I referred in *Kasturchand Lakhmaji* v. *Jakhia Padia* [1], I am of opinion that in this particular case upon these particular documents it is impossible to avoid the conclusion that the transaction must be accepted as being in reality that which in the plainest language both parties declared it to be, viz., a transaction of sale with an option to the plaintiffs to repurchase.

On these grounds, in my opinion, the appeal must be allowed and the plaintiffs' suit must be dismissed with costs throughout.

SHAH, J. :—I am of the same opinion.

Appeal allowed.

R. R.

(1) (1915) 40 Bom. 74.