APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

1915.

July 26.

KASTURCHAND LAKHMAJI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* JAKHIA PADIA PATIL AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Construction of deed—Deed of sale—Contemporaneous agreement to reconvey on payment of consideration—Lease for a term of years—Sale deed amounts in effect to a deed of mortgage—Debt treated as continuing—Property treated as security for repayment of debt.

The plaintiffs executed in favour of the defendants a sale deed of lands for Rs. 2,500, a large part of which consisted of old bond-debts. Contemporaneously with it, two more documents were executed between the parties. One of them was an agreement of reconveyance executed by the defendants to the plaintiffs, agreeing to reconvey the lands (1) if the sum of Rs. 2.500 was repaid at a certain specified date; and (2) on repayment with interest of sums if any spent by the defendants upon the lands or of any further sums borrowed from them. The other document was a lease executed by the plaintiffs under which they took the lands on lease from the defendants for a period of ten years at an annual rental of Rs. 287, which seemed to have been made up of Rs. 62 the Government assessment on the lands, and Rs. 225 reserved as rent representing nine per cent. on the principal sum of Rs. 2,500. The plaintiffs filed the present suit for a declaration that the sale-deed passed by them was in reality a mortgage and for an order allowing the plaintiffs to redeem the lands on payment to the defendants of any sum that might be found due to them on accounts taken under the Dekkhan Agriculturists' Relief Act. The trial Judge was of opinion that the transaction was a sale while the District Judge on appeal held it was a mortgage by conditional sale. The defendants having appealed:—

Held, that the transaction was in reality a mortgage by conditional sale inasmuch as the apparent price, viz., Rs. 2,500, was not the real price of the sale but was treated and regarded as a continuing debt between the parties, the property being made security for the repayment of that debt.

Maruti v. *Balaji* (1) followed.

* Second Appeal No. 988 of 1914.

(1) (1900) 2 Bom. L. R. 1058.

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KASTURCHAND LAKHMAJI v. JAKHIA PADIA.

SECOND appeal from the decision of J. D. Dikshit, District Judge of Thana reversing the decree passed by B. D. Sabnis, Subordinate Judge at Alibag.

Suit for declaration.

The plaintiffs sued for a declaration that a sale transaction dated 14th August 1902 was only of the nature of a mortgage and for an order allowing them to redeem the property on payment to defendants the sum found due on accounts taken under the Dekkhan Agriculturists' Relief Act.

The deed in question was in form a deed of sale. It purported to sell lands worth about Rs. 5,000 for the sum of Rs. 2,500, of which Rs. 2,125 were old bond-debts and Rs. 375 were cash advances. The material provisions of the deed were as follows :—

After making up accounts of the above bonds and after giving credit for the receipt given to you by us the amount due today is Rs. 2,125, and the amount received today for making payments, &c., to other people and for the house expense is Rs. 375. Together with the total amount due to you is Rs. 2,500 (two thousand five hundred). In lieu of this we give you by a sale-deed property out of the land mortgaged in the above bonds, and besides that other property of the following village, lying within the limits of Tukadi and Jhilla Colaba, Sub-Tukadi and Taluka Alibag.

In all eighteen acres and twentynine gunthas field-land built and a part waste-land and with all the crop of reaped corn on the land and the house, outhouse with land—all this property as written above we have sold to you and you have taken possession and charge of it. Now we have no claim or right of heirship of any kind over it. If anybody at any time claims a right of any kind to it we shall clear it all with our expense. Our father enjoyed the property for many years. Now I enjoy it. You may now enjoy the same from generation to generation. This property is neither mortgaged nor gifted nor sold to anybody.

On the same day and as part of the same transaction two more deeds were passed between the parties.

The defendants executed in favour of the plaintiffs an agreement for reconveyance of the lands to the

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plaintiffs, on fulfilment of conditions which were thus expressed :—

In all eighteen acres and twentynine gunthas of land with a house, an out-house and land, this property we have purchased from you for a sum of Rs. 2,500 (two thousand and five hundred) on the 14th day of August of the year 1902. The property purchased will be sold to you on the following terms only. The terms are :—

If you pay us at any time between Shake 1824 to Shake 1833 a period of ten years, in the month of Margasheersha, the most busy month, the sum of Rs. 2,500 (two thousand five hundred) we shall receive them and will make a sale-deed of he above property in your favour at your cost.

2. The above property you have taken from us on a lease of ten years and have agreed to pay us every year Rs. 287 (two hundred and eighty seven); a separate lease-bond has been taken for it. That sum you must pay us from year to year in the month of Margasheersha from Shake 1824 to Shake 1833 without asking for any remission and without hesitation and excuse of want of rain, &c.

3. The right which you have obtained from us in virtue of this writing of purchasing the above property is given by us for yourself alone. You are not to transfer it to anybody. In case you do it, it will not be valid and we shall not acknowledge it.

4. With respect to the above property if we are obliged somehow or other to spend some amount after it, or if you were to borrow some money hereafter we shall receive all the amounts with interest first and then we shall pass the sale-deed of the above property in your name.

5. You shall have to bear the expense of the sale-deed registration, &c., and every sort of expense that will be necessary.

6. According to this agreement when you will change or in the same year when the amount of rent runs into arrears and on the day of Paoosh Sood Pratipada of Shake 1833 this ageement will be considered null and void and from the same day or thereafter all the management, &c., of the kind of the said property will be done by us according to our will, you will then according to this agreement have no claim of any kind over it.

7. According to the terms of agreement we are to receive from you every year in the month of Margasheersha from Shake 1824 to shake 1833 Rs. 287 (two hundred and eighty seven). In the year when the above amount will remain to be paid in time, on the Sood Pratipada of Paoosh of the same year this agreement will be considered as cancelled. We shall not only not resell the

said property to you but it will be left to our choice whether you should be allowed the whole management for the remaining term or not.

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The plaintiffs passed to the defendants a lease which recited that they had leased the lands from the latter for a period of ten years at an annual rental of Rs. 287. It appeared that the amount of Rs. 287, was made up of Rs. 62, Government assessment on the lands, and Rs. 225, interest on Rs. 2,500 at nine per cent. per annum.

The suit was filed on the 20th December 1911.

The Subordinate Judge held, on a preliminary issue raised by him, that the transaction in suit was a sale and not a mortgage, on the following grounds:—

There is no provision in the agreement about the taking of any accounts and there is nothing therein to show that the amount was treated as a debt. The case of *Vasudeo* v. *Bhau* in I. L. R. 21 Bom. 528, is an authority for the proposition that to make a mortgage there must be a debt. This proposition was accepted by the Allahabad High Court in the case of *Ghulam Nabi Khan* v. *Niaz-Un-Nissa* (I. L. R. 33 All. p. 337) where it was held that "if there be a right to redeem property from a debt, there must also be the correlative right to enforce payment of the debt." In the present case to leave no stone unturned, the plaintiffs being agriculturists, I called the books of the firm relating to the transactions between the parties and examined them, but found that the previous mortgage transactions were closed on the date of the sale-deed and new *Khatas* opened evidencing the new relationship of landlord and tenant and showing receipts of rent, the transaction being thus thenceforward treated as one of absolute sale. The plaintiffs' pleader relies upon two circumstances as showing that the parties intended the transaction to be one of mortgage and not a sale. The first is that the agreement gives the defendants power to recover the amount they may have occasion to spend on the property as also any fresh advances that may subsequently be made to plaintiffs, with interest before executing the reconveyance. The second is that the amount of rent to be paid to defendants by the plaintiffs was fixed in cash and not in kind, and that this amount is just sufficient to cover the amount of interest due on Rs. 2,500 at 9 p. c. per annum and the Government assessment which is about Rs. 62 including local cess. On a little consideration it will, however, be seen that both these circumstances are quite compatible with the nature of a sale transaction. It is difficult to see why the vendee should not try to have all his expenses on the property

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recouped in case of re-purchase by the vendor and to ensure a certain rate of interest on his outlay in the meanwhile. The amount of consideration for every sale is, as we well know, almost always fixed with due regard to the interest that the property purchased may yield in the shape of profits. As in the present case there was the stipulation as to repurchase; it is, therefore, no wonder that the vendors made sure of recovering so much interest on their outlay by fixing the rent accordingly. There are cases supporting the view that a mere stipulation as to payment of interest is not by itself conclusive to show that the transaction is not an absolute sale but a mortgage. As a mortgage is to secure a debt, we have, therefore, as already observed, to see whether there is in this case a debt, *i.e.*, whether the original purchasers have left to them the power to recover the sum named as the price of the repurchase. If there is no such power there is no mortgage (Gour's Transfer of Property Act, Vol. II, p. 646, para. 994). In the present case the defendants have clearly got no power to recover the amount fixed as the price. It is no doubt true that such a test is inapplicable to an usufructuary mortgage as observed in the case of *Tukaram* v. *Ramchand* (I. L. R. 26 Bom. 252-257), but then the present case is not one of usufructuary mortgage since ostensible vendors are not to receive the rent and profits accruing from the property and to appropriate them in lieu of interest, but that they are, as the plaintiffs admit, simply to receive so much interest and assessment and nothing more.

This decree was on appeal reversed by the District Judge, who found that the transaction in question was in reality a mortgage by conditional sale for the following reasons :—

The question then arises whether the parties intended that the consideration should be treated as a debt. It is obvious that the possession was not intended to be transferred to the ostensible purchaser. The assessment on the land including local cess amounts to Rs. 61-5-9. Deducting this from Rs. 287 the balance of Rs. 225 represents interest at 9 per cent. per annum. It was to be paid every year in the month of Margashirsha for ten years up to the Shake year 1833 without fail, irrespective of the fact whether there was a drought or failure of the crop. The right to repurchase the property was made dependent not only on the repayment of the consideration money, but also on the regular and full payment of the rent secured. Then the fourth clause stipulates that if the purchaser be required to spend any money on the property, or if any fresh advances of loan were made the plaintiffs would not be entitled to the reconveyance of the property without repayment of those sums with interest. If there was the only agreement to repurchase the property

on payment of a specific sum of money within a particular period and the amount was not to be treated as a debt payable with interest all these stipulations would have been unnecessary. Making the repurchase conditional on the full payment of the amount of rent which represented interest at 9 per cent. per annum as well as the amount spent by the defendant on the property together with interest and the other debts advanced clearly show that the property was considered to be a security for all these sums, and all these sums were to be treated as debts.

I have no doubt that the parties treated the property as security for the debt and the net amount of rent as interest.

The cases cited by Mr. Bhagwat, viz., 12 All. 387 and 33 All. 337, are distinguishable. In both these cases the purchaser was immediately put in possession as owner and the condition was to resell the property on payment of a specified amount only. The payment of rent or interest was not a condition precedent. The transaction was effected by two documents instead of three and the purchaser agreed to resell the property as an act of charity and kindness and not of right.

The defendants appealed to the High Court.

Jayakar with *G. S. Rao*, for the appellants.

Coyaji with *A. G. Desai*, for the respondents.

The following cases were cited in argument:—

Maruti v. *Balaji*[1]; *Bapuji Apaji* v. *Senavaraji Marvadi*[2]; *Abdulbhai* v. *Kashi*[3]; *Govinda* v. *Jesha Premaji*[4]; *Vasudeo* v. *Bhau*[5]; *Ayyavayyar* v. *Rahimansa*[6]; *Bhagwan Sahai* v. *Bhagwan Din*[7]; *Syed Ashgar Reza Khan* v. *Syed Mahomed Mehdi Hossein Khan*[8]; *Madhavrao Keshavrao* v. *Sahebrao Ganpatrao*[9]; *Nagindas* v. *Nanabhai*[10]; *Balkrishna* v. *Mahadeo*[11]; *Wajid Ali Khan* v. *Shafakat Husain*[12]; *Ghulam Nabi Khan* v. *Niaz-un-nissa*[13].

(1) (1900) 2 Bom. L. R. 1058.
(2) (1877) 2 Bom. 231
(3) (1887) 11 Bom. 462.
(4) (1878) 7 Bom. 73.
(5) (1896) 21 Bom. 528.
(6) (1890) 14 Mad. 170.
(7) (1890) L. R. 17 I. A. 98.
(8) (1903) L. R. 30 I. A. 71.
(9) (1914) 39 Bom. 119.
(10) (1914) 16 Bom. L. R. 774.
(11) (1896) 22 Bom. 520.
(12) (1910) 33 All. 122.
(13) (1910) 33 All. 337.

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BATCHELOR, J.:—The suit out of which this appeal arises was brought for a declaration that a certain apparent sale dated the 14th August 1902 was in reality a mortgage and for an order allowing the plaintiffs to redeem the property on payment to the defendants of any sum that might be found due to them on accounts taken under the Dekkhan Agriculturists' Relief Act.

The question, which has divided the learned Judges below, was whether the transaction of the 14th August 1902 was an out and out sale or a mortgage by conditional sale. The learned trial Judge was of opinion that it was a sale, while the learned District Judge held that it was a mortgage by conditional sale.

It may be observed that whether the transaction be regarded as a sale or a mortgage, the plaintiffs are still within time to recover their land. For, on the footing that the transaction was a sale with a right of repurchase in the plaintiffs, the plaintiffs are still entitled to repurchase. The object of the suit, therefore, seems to be on the plaintiffs' part to obtain a decree for redemption under the Dekkhan Agriculturists' Relief Act which would enable them to open their accounts with their creditors from the beginning, and it is this reopening of the accounts which the defendants resist.

The question of the true character of this transaction must be answered by reference to the three contemporaneous documents, Exhibits 55, 32 and 56, in which the transaction is embodied. Exhibit 55 is the sale deed by the plaintiffs to the defendants. Exhibit 32 is the defendants' agreement to reconvey to the plaintiffs, and Exhibit 56 is the rent note passed by the plaintiffs to the defendants. All three documents were admittedly executed on the same day at the same sitting. The important recital in the sale deed, Exhibit 55, is couched in the following words:—"After making up

accounts of the above bonds (mortgage bonds) and after giving credit for the receipt given to you by us, the amount due to-day is Rs. 2,125, and the amount received to-day for making payments to other people and for house expenses is Rs. 375. Thus the total amount due to you is Rs. 2,500. In lieu of this we give to you by a sale deed" property, which the instrument thereafter specifies. In the agreement, Exhibit 32, it is provided as follows:—"This property (described) we have purchased from you for a sum of Rs. 2,500. The property purchased will be sold to you on the following terms only. The terms are: (1) If at any time between Shake 1824 and Shake 1833 in the month of Margashirsha you pay us the sum of Rs. 2,500, we shall receive it and pass a sale deed of the property in your favour at your cost. (2) The above property you have taken from us on a lease of ten years and have agreed to pay us every year Rs. 287. A separate lease has been taken for that. This sum you must pay to us from year to year in the month of Margashirsha from Shake 1824 to Shake 1833. (3) The right which you have obtained from us in virtue of this writing of purchasing the above property is given by us to yourselves alone. You are not to transfer it to anybody. In case you do transfer it, the transfer will not be valid and we shall not acknowledge it. (4) With respect to the above property if we are obliged by any means to spend any sum upon it, or if you hereafter borrow moneys from us, we shall receive all these amounts with interest first and then only shall we pass to you a sale deed of the above property." The rent note, Exhibit 56, provides that annually for the ten years mentioned the plaintiffs shall pay to the defendants rent of Rs. 287.

It remains to determine what is the true contract to be collected from these documents. Was it a contract of sale or a contract of mortgage by conditional sale? In the

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course of the argument numerous cases were cited to us, but they were, we think, all decided on their own particular facts. The only case where the facts were substantially similar to those now before us is *Maruti* v. *Balaji* [1] where the Court pronounced in favour of a mortgage. The principle which governs the cases seems to be clear enough. The Court has to decide between an out and out sale for an agreed price and a mere transfer of the property, the subject of the sale deed, as security for a loan. Thus the principal point to be cleared up is, whether the apparent price, in this case Rs 2,500, was the real price of a sale or was treated and regarded as a continuing debt between the parties, the property being made security for the repayment of that debt. The three documents must of course be read as a whole, and the intentions of the parties must be gathered from the provisions of the documents. We begin with this that the mere agreement to reconvey does not necessarily signify that the transaction is a mortgage. It seems to us, however, that two things must be remembered in this context. One of them is the notorious reluctance of Indian peasants to sell their land, a reluctance which is judicially noticed and historically explained by Sir Michael Westropp in *Bapuji Apaji* v. *Senavaraji Marvadi* [2]. And the second thing to be remembered is that, in the case now before us, on the assumption that the parties intended an out and out sale, there is no assignable reason why the defendants should have promised the plaintiffs to reconvey the property to them if they repaid the purchase money. That is a point which, we think, is not without importance, and it was, we observe, allowed to weigh with the Court in *Patel Ranchod* v. *Bhikhabhai* [3]. As is said there by Mr. Justice Ranade, so we may say here, that on the

(1) (1900) 2 Bom. L. R. 1058. (2) (1877) 2 Bom. 231.
(3) (1896) 21 Bom. 704.

case made by the defendants there was no occasion for the covenant to reconvey on the repayment of the money within a given time. It may also be remarked that though the parties must of course be held to the contract which they have made, and the Court cannot make a new contract for them, yet in ascertaining the true nature of the contract the Court must follow the injunction so frequently laid down by the Privy Council 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": *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1).

Now from the documents which we have read it is clear, in the first instance, that although the sale deed recites that the property was sold in lieu of the payment of the debt due, the sum of Rs. 2,500, which formed the purchase price, was in its origin a debt; and that it continued as a debt seems to us to be indicated by clause 4 of Exhibit 32 which we have quoted. For, that clause, as we understand it, shows that the repayment of the Rs. 2,500 and the repayment of any fresh advances which the plaintiffs might take from the defendants were to be on one and the same footing; in other words the old relation of debtor and creditor was continued, and the Rs. 2,500 was regarded as an outstanding loan to be reckoned with any other new loans which might thereafter be made to the plaintiffs. It is also, we think, material to note that by the terms of the agreement it was provided that, within the stipulated period of ten years, whensoever the plaintiffs might elect to make to the defendants the payment due to them, the defendants would reconvey to the

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

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plaintiffs. That provision seems to us to suggest the inference that the defendant-creditors were looking only to the recovery of their money, not to the ownership of the land. It was sufficient to provide for the recovery of the principal sum, Rs. 2,500, without interest, because the interest due on that sum was already provided for under the guise of rent reserved by Exhibit 56. That rent was in the aggregate Rs. 287. It is found by the lower Court, and the finding has not been challenged, that this aggregate was made up of Rs. 62 on account of the Government Assessment and Rs. 225 net rent. Now, the Rs. 225 reserved as rent work out to exactly 9 per cent. on the principal sum of Rs. 2,500, and it was not contested before us that that was the principal upon which the sum of Rs. 225 was fixed. That circumstance seems to us to furnish yet another indication that the transaction with which we are dealing was a transaction of mortgage in which the mortgagee was interested only in securing a sufficient interest on his investment. And strong corroboration of that conclusion is supplied by the fact that the assessment due to Government on the land continued to be paid by the plaintiffs as well after, as before, this transaction of apparent sale.

The learned Judge of the lower appellate Court thus had good reason for his finding that the Rs. 2,500, was and continued to be a debt. We have given our reasons for adopting the same conclusion, because it seems to us that the question, depending as it does on the construction of documents, is open in second appeal, though we notice that in *Maruti* v. *Balaji* (1) it was said that "a finding on such a point would ordinarily be a finding of fact which would be binding on this Court in Second Appeal."

(1) (1900) 2 Bom. L. R. 1058.

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Two other circumstances may be alluded to as strengthening the conclusion which we have reached. One of them is that, in spite of the terms of the deed of sale, the possession remained with the plaintiffs, the vendors, and was not made over to the defendants. And the second circumstance is that the lower appellate Court finds as a matter of fact that the value of the mortgaged properties was Rs. 5,000, that is, exactly double the sum fixed as the consideration of the apparent sale.

In view of all these *indicia* of a mortgage we do not think that the learned Judge's conclusion is displaced by the argument that the documents, which we have before us, do not disclose any such mutuality of remedies as the Courts have held to be ordinarily characteristic of the relation between mortgagor and mortgagee. This requirement was considered by a Full Bench of this Court in *Tukaram* v. *Ramchand* [1] and it was there observed that "the *dictum* is often cited in our Courts without precise appreciation of its meaning, and in any case it has a very limited application to the ordinary mortgages with which we are familiar in the mofussil in India." These words are, we think, apt to the circumstances of the present appeal where the mortgage, if we are right in regarding it as a mortgage, falls under section 58 (*c*) of the Transfer of Property Act, being a mortgage by conditional sale. In other words, the transaction was *ex facie* a sale, and a deed of sale would clearly be an inappropriate place in which to embody the reciprocal remedies of a mortgagee as mortgagee.

Lastly, it was contended that the transaction could not be regarded as a mortgage, because there was no provision for accountability. There is, however,

(1) (1901) 26 Bom. 252 at p. 257.

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provision for accountability by the mortgagor as we have already noticed, and the circumstances of the case leave no room for accountability by the mortgagee, inasmuch as the mortgagee never went into possession of the mortgaged property, but received an annual rent in lieu of the rents and profits.

These are all the considerations which have been advanced to us on the one side and the other, and on a review of all of them we are satisfied that the weight of evidence is in favour of the view which commended itself to the learned Judge of the lower appellate Court. His decree must therefore be affirmed and this appeal dismissed with costs.

Decree affirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

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July 27.

BAI ATRANI, WIDOW OF THAKUR KUNVER SAHEB BAPU SAHEB (ORIGINAL DEFENDANT No. 1) APPLICANT, *v.* DEEPSING BARIA THAKOR (ORIGINAL PLAINTIFF) OPPONENT.*

Civil Procedure Code (Act V of 1908), section 115—High Court—Extraordinary Civil Jurisdiction—Temporary injunction restraining a Hindu widow from adopting—Application against the order—'Case' meaning of—Jurisdiction under section 5 of Bombay Regulation II of 1827—High Courts Act (24 and 25 Vic., Ch. 104), section 9—General Repealing Act (XII of 1873.)

In the course of a pending suit, the first Court granted a temporary injunction restraining defendant No. 1 from making an adoption; but afterwards dissolved it. On appeal, the District Judge granted the temporary injunction. The defendant No. 1 having applied to the High Court against the order, a

* Civil extraordinary application No. 43 of 1915.