

kind to which our general principle embodied in section 11 of the Code is intended to apply. My Lord the Chief Justice has pointed out that under the old Code there was a different provision; that there was a reason then, arising out of specific words appearing in section 244 of the Code, for holding that a second suit for future mesne profits would lie. That exception to a very important general principle no longer appears in our present Code, and it seems to me, therefore, to be incumbent on us to apply the general principle.

I think, therefore, that this appeal fails and must be dismissed with costs.

*Decree confirmed.*

J. G. R.

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.*

NAMDEO SATVASHET SHIMPI (ORIGINAL PLAINTIFF), APPELLANT v. DHONDU WALAD SADASHIV PATIL (ORIGINAL DEFENDANT); RESPONDENT.\*

*Sale deed—Unregistered agreement to reconvey—Mortgage by conditional sale—Construction of documents.*

The plaintiff purchased the property in suit from the defendant in 1895 and at the same time he passed an agreement to reconvey the property after five years. This document was not registered. Thereafter the plaintiff leased the land to the defendant from time to time and in 1916 sued to recover possession on the strength of the rent-notes passed to him by the defendant. The Court of first instance allowed the plaintiff's claim holding that section 10A of the Dekkhan Agriculturists' Relief Act did not apply and that the agreement to reconvey could not be looked into for want of registration. The lower appellate Court reversed the decree on the ground that the sale deed was obtained by misrepresentation and that the defendant would never

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have passed the same if the plaintiff had not assured him that his ownership was not lost and that he would be allowed to redeem. The plaintiff appealed to the High Court ;—

*Held*, decreeing the suit, (1) that the lower appellate Court's view that the transaction must be considered a mortgage, because there had been a misrepresentation at the time the document was signed, could not be upheld.

(2) that the defendant's case did not proceed upon the footing that the two documents together constituted a mortgage by conditional sale, nor was there evidence before the Court to come to that conclusion ;

(3) that the case set up by the defendant was one for specific performance of an agreement to reconvey and that defence could not succeed in law.

PER MACLEOD, C. J. :—Where the question is whether a sale deed and the agreement to reconvey make together a mortgage by conditional sale, the Court has, strictly speaking, to look to the actual contents of the documents and to construe them accordingly. But it may be that there is such extrinsic evidence and circumstances which show the relation of the written language to existing facts, that therefore, it would be possible to come to the conclusion that the documents which on the face of them constitute a sale, and an agreement to reconvey within a certain period, or after a certain period, amount to a mortgage.

SECOND appeal against the decision of H. V. Kane, First Class Subordinate Judge, A.P., at Nasik, reversing the decree passed by M. R. Chaubal, Second Class Subordinate Judge at Satara.

Suit to recover possession.

The property in suit originally belonged to the defendant. He and his brother sold the property to the plaintiff's father by a deed, dated the 2nd July 1895, for a consideration of Rs. 600. Contemporaneously with the sale deed and on the same date, plaintiff's father passed an unregistered agreement in favour of the defendant and his brother to the effect that he would reconvey the property after five years on satisfaction of the debt.

After the sale transaction was entered into, rent-notes were passed by the defendant to the plaintiff's father

and the last of such rent-note was executed on the 16th June 1913.

In 1916 the plaintiff sued to recover possession of the property basing his suit on the rent-note passed by the defendant. The defendant contended, *inter alia*, that he and his brother unwillingly passed the sale deed to plaintiff's father; that the property was worth Rs. 2,400 or Rs. 2,500 and the sale deed was got instead of a mortgage deed so that the debt might be soon satisfied; that the sale deed was passed because the plaintiff's father represented to the defendants that he would not claim ownership over the property; and that he had agreed to reconvey the property on satisfaction of the debt.

The Subordinate Judge held that section 10A of the Dekkhan Agriculturists' Relief Act did not apply as the Act was made applicable to Nasik District in the year 1903 whereas the sale deed was passed in 1895 and therefore the agreement to reconvey could not be looked into for want of registration. He, therefore, passed decree in favour of the plaintiff.

On appeal, the First Class Subordinate Judge, A.P., held that the defendant and his brother would never have executed the sale deed if the plaintiff's father had not assured them that their ownership was not lost and the rent-notes would not have been passed from time to time except on the faith of the misrepresentation. He admitted the agreement to reconvey as evidence of misrepresentation under the provision of section 92 of the Evidence Act and reversed the decree under appeal allowing the plaintiff only a charge of Rs. 600 on the properties in suit.

The plaintiff appealed to the High Court.

*A. G. Sathaye*, for *P. B. Shingne*, for the appellant  
*S. R. Bakhale*, for the respondent.

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MACLEOD, C. J.:—The plaintiff sued to recover possession of the *plaint* lands and house, together with the crops standing on the lands, and Rs. 120 for damages for the loss of rent of the lands, and Rs. 18 for damages for loss of the house-rent for three years before suit, and future profits. He based his suit on rent-notes. The defendant contended that he and his brother unwillingly passed the sale deed of the *plaint* property to the plaintiff's father; that the property was worth Rs. 2,400 or 2,500 and the sale deed was got instead of a mortgage deed so that the debt might be soon satisfied; that they passed the deed as persons in need, and because the plaintiff's father represented to them that he would not claim ownership over the property, that the plaintiff's father had given them an agreement in writing to reconvey the property to them on satisfaction of the debt so that the defendants might have confidence after passing the sale deed.

The plaintiff purchased the property in 1895. At the same time he passed an agreement to reconvey the property after five years. This document was not registered. Thereafter the plaintiff leased the land to the vendor. The trial Judge held that section 10A of the Dekkhan Agriculturists' Relief Act would not apply, and that the agreement to reconvey could not be looked into for want of registration. Therefore he passed a decree in favour of the plaintiff. This decree was reversed on appeal, the learned appellate Judge coming to the conclusion that there had been misrepresentation, that the defendant and his brother would never have passed the sale deed if the plaintiff's father had not assured them that their ownership was not lost, and that they would be allowed to redeem. I think really the learned Judge did not mean that there was misrepresentation at the time the transaction took place, but that the representation

made at the time had not been adhered to thereafter by the plaintiff, and that in reality the plaintiff's suit was in fraud of the representation made by him in 1895. However that may be, the argument that the transaction must be considered a mortgage, because there had been a misrepresentation at the time the document was signed, cannot be upheld.

The real question is whether the sale deed and the agreement to reconvey make together a mortgage by conditional sale. Strictly speaking, the Court has to look to the actual contents of the documents, and construe them accordingly. But it may be that there is such extrinsic evidence and circumstances which show the relation of the written language to existing facts, that therefore it would be possible to come to the conclusion that the documents which on the face of them constitute a sale, and an agreement to reconvey within a certain period, or after a certain period, amount to a mortgage. But the case was not treated in either of the Courts below on that footing. It was never suggested anywhere, as far as I can see, that these two documents constituted a mortgage by conditional sale. The defendant's case appears really to have been one for specific performance of an agreement to reconvey, and that defence could not succeed for many reasons. Therefore as it has never been suggested in the lower Courts that there was a mortgage by conditional sale, it would be very difficult for this Court to come to that conclusion on the evidence before it. There might be cases in which extrinsic evidence and circumstances would be so strong that we could come to the conclusion that the parties intended to effect a mortgage by conditional sale. But we do not see such extrinsic evidence in this case. Certainly not of such a strong character that we could possibly upset the decision of the trial Court. We, therefore,

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think that the appeal must be allowed, and the decree of the trial Court restored, the appellant being entitled to his costs throughout.

HEATON, J.:—I agree. I think the only way in which a conclusion in favour of the defendant could be arrived at would be by holding that the transaction of 1895 was a mortgage by conditional sale. But that is not the case made out, or dealt with, in either of the Courts below, and it would be irregular for us to re-estimate the evidence, and on our own account arrive at a conclusion that a mortgage by conditional sale was actually entered into. We cannot, I think, do that in this case. The reasoning of the lower appellate Court seems to me to be faulty mainly because the Judge has used the word "misrepresentation", when apparently he meant representation. Consequently his argument is fallacious, for the conclusions which follow from a case of mis-representation are not those which follow from a case of representation. Here undoubtedly, on the facts as stated by the lower appellate Court, there was not a misrepresentation. There was a representation that the land would be resold after five years; and that representation was in writing. That writing, however, was not registered, so it cannot form a part of the disposition of the property. We must restore the decree of the first Court with costs throughout.

*Decree reversed.*

J. G. R.