

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Balkishen Das and others v. Legge, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 11th November 1899.

Present at the Hearing :

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

SIR EDWARD FRY.

[*Delivered by Lord Davey.*]

In and prior to the year 1872 Hari Das and the Appellant Balkishen Das carried on business as bankers at Benares. Hari Das was the managing partner. He died on the 27th April 1889. The present Appellants are Balkishen Das and the two sons and heirs of Hari Das. The Respondent was at that time the owner of a taluka called Patilah in the district of Jaunpur and was also half-sharer of certain indigo factories known as Basharatpur and carried on the business there in partnership with one de Momet his co-sharer. By a deed dated the 8th April 1872 the taluka was mortgaged to Hari Das and Balkishen Das for Rs. 125,000 and by another deed of the same date (called a deed of estimate) the factories were also mortgaged to them as security for Rs. 60,000 which sum was to be applied partly in payment of previous debt and partly in providing for the necessities of the indigo business for the current year. At the end of the

year 1872 it was found that the business had been carried on at a loss. The debt due to the bankers was Rs. 190,000 and further advances were needed for carrying on the business. The Respondent in these circumstances bought out his partner de Momet and became sole owner of the factories and solely interested in the business. A fresh bandobast or settlement was thereupon made between him and the bankers and was carried into effect by three deeds of which two relating to the taluka were dated the 4th February 1873 and the third relating to the factories was dated the 6th April 1873.

The first deed of 4th February 1873 was on the face of it an absolute sale by the Respondent to the bankers for the price of Rs. 150,000 which was expressed to be paid in the following manner viz. the bankers retained out of the Rs. 150,000 the sum of Rs. 137,333. 6 principal with interest up to date which had by calculation been found due by the Respondent to the bankers under the mortgage deed of the taluka dated 8th April 1872 and retained the balance Rs. 12,666. 10 in part payment of the amount then due on the deed of estimate of expenses for conducting the factories of the Basharatpur concern.

The other deed of the 4th February 1873 was in the following terms :—

“ We, Babus Hari Das, and Balkishen Das, sons of Babu Padam Das, proprietors of the firm of Babu Madhuban Das and Dwarka Das, caste Gujrati, resident of mohalla Gwaldas, in the city of Benares, do declare as follows :—

“ The vendor, Mr. William Francis Legge, having, under the sale-deed, dated 4th February 1873, sold absolutely, for Rs. 1,50,000, his zamindari right and property in the entire 16 annas of taluka Patilah, pargana Ungli, in the district of Jaunpur, comprising 25 villages, original and attached, together with all the sir, sayer items, high and low lands, water and forest produce, water places and tanks, cultivated, uncultivated, saline, waste and jungle lands; village sites, ponds, kutchu and pakka wells, collection houses, tenants' quarters, bamboo clumps, groves and detached fruit and timber trees of all sorts, and stone and wooden mills, inclusive of all the zamindari rights and

" interest appertaining to the said taluka, without exclusion of
 " any right or property, to us, the executants, has caused
 " mutation of names to be effected. We, the executants,
 " therefore, of our own free will and accord, covenant and
 " declare that if the said vendor pays on 1st March 1876, the
 " amount of Rs. 1,65,000 in a lump sum, we shall sell to the
 " said vendor the whole of the said ilaka sold, as it exists at
 " present, for the said amount of Rs. 1,65,000 and we shall
 " cause everything connected with mutation of names of &c.,
 " to be done, neither we nor our heirs shall have any objection
 " thereto. If we or our heirs raise any objection to receive
 " the money and relinquish the property, the vendor shall be
 " competent to deposit the said amount in cash in the treasury,
 " by virtue of this agreement, and obtain possession over the
 " ilaka, we shall have no sort of objection to it. It has
 " further been stipulated by the executants and the vendor
 " that if the amount of the estimate money of the Basharatpur
 " concern should keep varying on account of alterations made
 " by consent of us, executants, from year to year, then the
 " vendor shall be liable to pay along with the sum above-
 " mentioned, whatever sum may be found to be due at that
 " time by him to us, executants. The sahib shall not be
 " competent to effect a sale until the payment of the estimate
 " money relating to the factories of the Basharatpur concern.
 " We shall recover from the vendor any amount of arrear that
 " may be due to us by the cultivators by making an assignment
 " thereof in favour of the vendor, and after the expiry of 1st
 " March 1876, the said vendor shall not be competent either to
 " pay the money or to make the purchase and the conditions of
 " this deed of agreement shall be deemed to be null and void."

The question between the parties in this Appeal is whether these two deeds together constituted a mortgage of the taluka or an out and out sale with a contract of repurchase.

After the execution of these deeds the bankers made further advances to the Respondent to a large amount on account of the Basharatpur concern. By the third deed dated the 6th of April 1873 the sum of Rs. 44,223. 14. 3 was found due from the Respondent up to date and he mortgaged the factories for Rs. 75,000. out of which the balance was paid off and money was provided for working the factories during the current year.

On the 3rd of March 1874 another deed of estimate was executed for that year and finally by a deed dated the 25th March 1875 the

Respondent sold and conveyed the factories to the bankers for a price which left him a debtor to them in the sum of Rs. 5,953. 4. 3. There is no deed of defeasance to this deed and it was admittedly an absolute sale.

It should be noticed that on the execution of the deeds of 4th February 1873 the necessary mutation of names was made and the bankers entered into and have ever since been in possession or receipt of the rents and profits of the taluka.

The Respondent did not buy back or redeem the property on the 1st of March 1876. But on the 5th of November 1894 he commenced the present action for redemption of the taluka alleging that the deeds of 4th February 1873 constituted a mortgage by conditional sale with possession thereof. The Defendants and present Appellants on the other hand contended that the transaction was an absolute sale with a contract of resale and the time having expired and the condition not having been fulfilled the contract had become null and void.

The Subordinate Judge held that the documents in question were deeds of mortgage by conditional sale and that the Respondent was entitled to redemption. His judgment was affirmed by the High Court.

Evidence of the Respondent and of a person named Man was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties and such evidence was to some extent relied on in both Courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By Section 92 of the Indian Evidence Act (Act 1 of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such

instrument or their representatives in interest for the purpose of contradicting varying or adding to or subtracting from its terms subject to the exceptions contained in the several provisoes. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not in the opinion of their Lordships any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

Mortgages by conditional sale under various names are a common form of mortgage in India and have come before this Board in several reported cases. It has been stated that this form of mortgage was introduced to enable Mahummedans contrary to the precepts of their religion to lend money at interest and obtain security for principal and interest. If so one would expect to find that the transaction would as far as possible be made to assume the appearance of a sale. It is not necessary in a mortgage by conditional sale "kutkubala" or "bye-bil-wufa" that the mortgagor should make himself personally liable for the repayment of the loan (*see Macpherson on Mortgages, 5th edition, p. 11*).

By Bengal Regulation 1 of 1798 intituled "a regulation to prevent fraud and injustice in conditional sales of land under deeds of bai-bil-wufa or other deeds of the same nature" provisions were made for the case of the lender refusing to receive the money on the day named. The borrower was empowered to deposit the

amount due on or before the stipulated date in the Dewanny Adawlut of the city or zillah in which the land may be situated. If the lender has obtained possession of the land the principal sum only need be deposited leaving the interest to be settled in an adjustment of the lenders receipts and disbursements during the period he has been in possession. By Regulation 17 of 1806 the mortgagor under deeds of this description was empowered to redeem the land at any time within one year after the commencement of proceedings to foreclose the mortgage or render the sale conclusive provided that payment or tender be proved or deposit be made within the time above specified in the manner specified in the previous Regulation.

In the case of *Pattabhiramier v. Vencatarow Naicken* (13 Moo. Ind. Ap. 560) it was decided that according to the ancient law of India a mortgage, by conditional sale was enforceable according to the letter or (to use the language of English lawyers) time was of the essence of the contract. The effect of the Regulation of 1806 was therefore to introduce into those parts of India to which the regulation applies the English doctrine of an equity of redemption as applicable to the class of deeds referred to in it.

Mortgages of this character are thus defined in clause (c) of Section 58 of the Transfer of Property Act 1882 "Where the mortgagor ostensibly sells " the mortgaged property on condition that on " default of payment of the mortgage money on " a certain date the sale shall become absolute " or on condition that on such payment being " made the sale shall become void or on condition " that on such payment being made the buyer " shall transfer the property to the seller the " transaction is called a mortgage by conditional " sale." The Transfer of Property Act does not

apply to this transaction but it may be assumed that the framers of it in this section intended to state the existing law and practice of India.

The Appellants argue that the language, whether of this Act or of the Regulations, shows that in order to attract their provisions there must be underlying ostensible arrangements for sale a real substantial intention to secure money advanced. They rely on the decision of this Board in the case of *Bhagwan Sahai v. Bhagwan Din and others* (L.R. 17 Ind. Ap. 98). Their Lordships decided that case on the language of the deeds then in question which they evidently considered showed that the transaction was not such a transaction as is described in the Regulation of 1806 and there was therefore no right of redemption after the expiry of the date fixed. The Appellants contend that such ought to be the conclusion in the present case, seeing that the parties did stand in the relation of lender and borrower prior to 1873, and then expressly altered it into that of buyer and seller. The Respondents on the other hand contend that a conditional sale becomes subject to an equity of redemption by force of the regulations before mentioned independently of any indications in the document that it is intended to be a mortgage. This is a question on which their Lordships are not called on to express an opinion in this case, for the documents in question contain important indications of the intention of the parties. The second deed or ikrarnama provides that if the bankers object to receive the money and relinquish the property the vendor may deposit the amount in the treasury "by virtue of this agreement" and obtain possession over the ilaka. This provision at once suggests a reference to Regulation 1 of 1798 as being in the opinion of the parties applicable to the case. It was not suggested that there was any other statutory provision or

practice by which such deposit could be made by virtue of the agreement alone without the intervention of the Court in a suit for the purpose, while on the other hand the words exactly describe the procedure under the Regulation. Again the estate was made redeemable only on payment as well of the amount which should be found due at the time of redemption on account of the Basharatpur concern as of the stipulated sum of Rs. 165,000. The practical effect of this was to consolidate the debt on the factories account with the principal sum mentioned in the deed and to give the bankers a security on the taluka for the debt of the factories. This gives the transaction the character of a mortgage so far as the factory accounts are concerned and if it is to some extent a mortgage it may well be held to be so entirely. There was also some evidence though not very precise that the property in the year 1873 was worth considerably more than Rs. 150,000. This was accepted in the Court below but their Lordships do not place much reliance upon it.

Their Lordships hold that the transaction was intended to be and was a mortgage by conditional sale and they will therefore humbly advise Her Majesty that the Appeal be dismissed. The Appellant will pay the costs of it.
