Privy Council Appeal No. 10 *of* 1912.

Bengal Appeal No. 14 *of* 1909.

Mahomed Musa, since deceased (now represented by Mahomed Abdul Aziz and others), and others - - - - - - - *Appellants,*

v.

Aghore Kumar Ganguli and others - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER 1914.

Present at the Hearing.

LORD DUNEDIN. SIR JOHN EDGE.
LORD SHAW. MR. AMEER ALI.

[*Delivered by* LORD SHAW.]

This is an Appeal from a Judgment and Decree of the High Court of Judicature at Fort William in Bengal, dated the 16th June 1909. That Judgment was pronounced upon and reversed a Judgment and Decree of the Second Subordinate Judge of the 24-Pergunnahs dated the 31st August 1908.

The object of the suit is for the redemption of two mortgages dated 22nd July 1848 and 4th April 1871. The defence which has been sustained is that the right to redeem was extinguished many years ago, in circumstances which will now be mentioned.

Many of the facts of the case are comprised in a chapter which may be said to have

definitely closed in the year 1873; and it is accordingly unnecessary to narrate them in detail. After the 1848 mortgage was granted by one Faslul Karim, his wife Khodajanessa obtained from him a conveyance of her husband's zemindary as a gift in lieu of dower. This occurred in 1850. In 1851 she began proceedings for redemption of the mortgaged properties. Many and various legal steps took place in that decade, and from at least the year 1863 no record remains of any proceedings in the suit. It is admitted that no useful light can now be thrown upon that litigation, —which, in any view, appears never to have been determined.

In 1870 a certain agreement was executed by Khodajanessa Begum and three sons of one Ram Chund Mukerji in reference to the 1848 mortgage. A sum was fixed as the principal due and another sum as interest due, and arrangements were made for payment by yearly instalments and for management of the property and the like.

On 4th April 1871 the second mortgage was granted. In 1873 differences, however, arose between Khodajanessa and the mortgagees, and a suit was brought by Ram Chund Makerji's three sons to enforce against her the agreement come to. This suit was compromised. On 26th November 1873 Khodajanessa entered into a razinama, or agreement of compromise, which razinama was signed by the Plaintiffs. What happened under it may be expressed in Khodajanessa's own words in evidence given by her in a litigation in 1875, and printed on the record. In that suit on 30th April she testified as follows:—

> "The suit in the 24-Pergunnahs Court was settled and a solenama executed by the three brothers, a deed of compromise, what is termed a Razinama and Safinama

> On my agreeing to execute a conveyance of the 12 annas share to the three brothers, it was settled. The three brothers and myself all agreed and made the settlement. I spoke to all the three brothers on the subject of that settlement."

The razinama contains a full narrative of the transactions with the property mortgaged, and of the financial embarrassments which had occurred. It appeared, as was the fact, that after the death of the Putnidar of the property the realisation of the rents had come under the charge of the Court of Wards. And the true point, so far as the present litigation is concerned, of the razinama was this, that it was arranged that from the year 1874 onwards the realisation of malikhana profits should be as follows :—To the Plaintiffs in that case and Arun Prokash Ganguly "the malikhana profits in " respect of 12 annas, 7 gundas, 2 karas, 1 kag " share and the Collectorate revenue both " amounting to Rs. 27,386. 7. 10 as per account " given above, and I shall realise the profits " in respect of the remaining 3 annas, 12 gundas, " 1 kara, 3 kags share and Collectorate revenue " both amounting to Rs. 8,013. 8. 10 kist by " kist according to the terms of the kabuliyat." The other parties named were to get their names registered in the Collectorate. These parties, it may be mentioned, had expressly "consented " to such arrangement and released the said " taluks and all the properties covered by " the mortgage deed to me free from the " liability for the debt "

It is impossible to read this razinama without concluding that the mortgage debts were to be thenceforward for ever extinguished, that the property itself was to be divided among the parties in specific shares, and that with regard to one share—set forth as 3 annas, 12 gundas, 1 kara and 3 kags—it was to become and be

dealt with by Khodajanessa as her separate property disburdened of debt. The remainder of the 16 annas was also to be similarly and separately owned and enjoyed.

The concluding prayer of the razinama was:—

"That the Court may be pleased to decide the suit "declaring that the Plaintiffs shall get the amount "claimed to their satisfaction in the manner stated "above."

The razinama was accordingly produced to the Court, which pronounced upon it as follows: —

"It is, therefore, ordered that the suit be decided "in pursuance of the terms of the razinama, and that "the suit be struck off from the list of pending "cases."

The point which is made against giving effect to this compromise is that a conveyance was not made by Khodajanessa in completion of the contract of purchase narrated in the razinama. This is true. But no written conveyance by the Law of India was at the date of that transaction necessary, the Transfer of Property Act not being passed until the year 1882.

But even if a transfer in writing had from a conveyancing point of view been omitted, or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the Appellants in the attempt made in the present suit to redeem the mortgages. For the points against opening up the transaction are manifold, and are in their Lordships' opinion conclusive. The compromise has been acted upon by all the parties to it, and by their successors in title from that date to this. The suit was dropped, the division of shares of the property was made, and it may be said generally that from its date until the date of Khodajanessa's death in the year 1890, and, indeed, from that date until the present time, the property has been managed upon the

footing of that division, of the extinction of the mortgage debts, of the division of the disburdened proprietary interests in the shares set forth in the compromise, and of the receipt and enjoyment of rents and profits accordingly The detail need not be given.

As to Khodajanessa herself, her own view is set forth in her evidence as already given. A striking instance of her approbatory acting, or homologation, may be mentioned. In the same year, 1875, she executed a mortgage for her own 3 annas share, and in this deed she recites at length the whole transactions, the separation into shares and so forth.

Transactions of mortgage, sale, &c., have been also carried out by the other sharers with reference to their properties. And, in short, it may be said that for a period of between 30 and 40 years prior to the initiation of this suit the rights of all parties have been dealt with precisely upon the same footing as if Khodajanessa had made an express conveyance parting with the equity of redemption, and transferring allotted shares of the property itself to the mortgagees, and reserving one share to herself.

In these circumstances their Lordships are of opinion that the proposition that the equity of redemption still remains with the representatives of Khodajanessa cannot be maintained. Even if the razinama itself was insufficient, yet in their Lordships' view the Decree of the Court, to the sufficiency of which an objection was taken in argument—was obtained upon one footing, and one footing alone, *i.e.*, that the parties to the suit had in fact arranged their rights in the property in terms of the compromise.

Their Lordships, in view of the argument strongly pressed upon them, think it right

further to say that even although the razinama and the Decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the actings of parties have been such as to supply all such defects. To use language common from very early times in Scotland, and highly approved in the case of *Maddison* v. *Alderson* (8 Appeal Cases, 467), in the House of Lords, it is no doubt true that there is a *locus penitentiæ*, that is, "a power of resiling from an incomplete "engagement, from an unaccepted offer, from "a mutual contract to which all have not "assented, from an obligation to which writing "is requisite, and has not yet been adhibited "in an authentic shape." This is the situation where the parties stand upon nothing but an engagement which is not final or complete. But where the actings and conduct of parties are founded on, then in all such cases, to use the language of Professor Bell in his Principles, section 26, "*rei interventus* raises a personal "exception, which excludes the plea of *locus* "*penitentiæ*. It is inferred from any pro- "ceedings, not unimportant, on the part of the "obligee, known to and permitted by the obliger "to take place on the faith of the contract, as "if it were perfect; provided they are un- "equivocably referable to the contract and "productive of alteration of circumstances, loss "or inconvenience, though not irretrievable."

Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison* v. *Alderson*—(475)—founded on such part performance (and the part performance referred to was that of a parol contract concerning

land) the Defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. The Lord Chancellor then enumerates a series of acts referable to the parol contract, and he adds, "the matter has advanced beyond "the stage of contract; and the equities which "arise out of the stage which it has reached "cannot be administered unless the contract is "regarded." Many authorities are cited in support of these propositions from English and Scotch law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange (1 Vesey Senior 441) may be here repeated: "if confessed or in part carried into "execution, it will be binding on the parties, "and carried into further execution as such, in "equity." Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary it follows them.

A review by their Lordships of the Judgment of the learned Judges of the High Court of the case has convinced them that the facts have been correctly appreciated, and they concur with the legal result arrived at.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed with costs.

In the Privy Council.

MAHOMED MUSA AND OTHERS

v.

AGHORE KUMAR GANGULI AND OTHERS.

DELIVERED BY LORD SHAW.

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