Privy Council Appeal No. 18 *of* 1915.

Allahabad Appeal No. 31 *of* 1911.

Jhanda Singh - - - - - - *Appellant,*

v.

Sheikh Wahid-ud-Din and Others - - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD ATKINSON.
SIR JOHN EDGE.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment and decree dated the 11th March, 1911, of the High Court of Judicature for the North-Western Provinces, affirming the decree dated the 27th March, 1908, of the Additional Judge for Meerut.

The question for decision is whether two instruments in writing, the first, a deed dated the 29th August, 1852, executed by the appellant's predecessors in title, and the second, an agreement dated the 5th September, 1852, executed by the predecessors in title of the principal respondents constituted when taken together a bai-bil-wafa mortgage of the property in the first-mentioned instrument described, that is, a mortgage by way of conditional sale, or an out-and-out sale of the property with a contract for repurchase. The Additional Judge of Meerut held that the documents constituted the latter. On appeal to the High Court, the two members who constituted the Court, Sir John Stanley, Chief Justice, and Mr. Justice Banerji, were divided in opinion: the Chief Justice concurring with the Additional Judge, and Mr. Justice Banerji holding that the transaction amounted to a mortgage

by way of conditional sale. Owing to this division of opinion the decree of the Court below stood, and by decree dated the 22nd March, 1910, was affirmed, and the appeal dismissed, but without costs.

An appeal was then brought from this decree of the High Court under Section X of Letters Patent of that Court to three Judges. They were unanimously of opinion that the decision of the Additional Judge was right, and by their decree of the 11th March, 1911, affirmed the decree appealed from and dismissed the appeal with certain costs. Of the six Judges, therefore, who considered the case five formed the opinion that the transaction effected by these two instruments was an absolute sale out and out of the property mentioned in the deed of the 29th August with a contract for repurchase, and one that the transaction was a mortgage. It was not disputed that the test in such cases is the intention of the parties to the instruments. That intention, however, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. The deed of the 29th August, 1852, sets forth that the vendors have sold to the vendees the entire biswas Zamindari property in Mauza Phul with all the rights and interest appertaining thereto under Mahommedan Law, for a sum of 5,500 rupees, and that the vendees have purchased this property from the vendors in consideration of that amount; that the sale is valid, legal, and enforceable; that the vendors have received the consideration for the sale and have put the vendees into the possession and enjoyment of the property with its cesses and revenues; and that they, the vendors, have no longer, as against the vendees, any right, title, or claim to this property, or to the purchase money in respect of it.

This deed upon its face purports to be an absolute deed of sale. It does not refer to any contemplated or antecedent agreement of resale or repurchase, and does not disclose any intention whatever to treat the disposal of the property mentioned in it as anything other than an absolute transfer on sale for a certain definite sum.

The next document executed by the same parties is a so-called bond, dated on the same day, the 29th August, 1852. It commences by reciting that besides receiving 5,500 rupees the consideration of Mauza Murlipur Phul Pargana, Meerut, as entered in the sale deed dated the 29th August, 1852, they had borrowed from the vendees named in that instrument a sum of 2,500 rupees, and had appropriated the same. The borrowers then covenant that they will pay this sum on demand with interest at the rate of 0·6·0 rupee per cent. per mensem. It then sets forth that to secure the debt the borrowers had hypothecated the whole Zamindari property in Mauza Jatauli, and that until the sum borrowed be paid they would not by sale, mortgage, or otherwise alienate the hypothecated property.

In the face of the provision of this bond it is idle to pretend

that any of the parties to the sale deed of the same date had religious scruples against the receipt or payment of interest on money lent, or that, when desiring and intending to create a mortgage, they would have adopted special methods of conveyancing to conceal the fact that interest for the loan was, in fact, to be given and received.

That, however, is not the only significance of this bond. The appellant's contention is, and to be effective must be, that an agreement was come to between the parties that the twenty biswas Zamindari property in the Mauza should be mortgaged to the so-called vendees for a sum of 5,500 rupees, and next that that agreement should be carried out by a deed of sale and a contract for repurchase. If no such agreement was made before the deed of sale was executed and the latter deed was an afterthought, only suggesting itself after the sale deed had been executed and delivered, it would not suffice. The execution of the deed of sale and of the contract of repurchase would then form two separate and independent transactions, not two connected and interdependent parts of one and the same transaction. Well, if the agreements for the granting of a mortgage had been arranged on or before the 29th August, 1852, it seems strange that no reference whatever should be made to it in this bond, and still more strange that the parties should have gone out of their way to represent as an unqualified sale what was, in fact, merely a conditional sale. The recital in the bond is certainly more consistent with the contract for repurchase being an afterthought than the contrary.

The sale deed and this bond were both registered at 1 o'clock on the same day, the 18th May, 1853.

Now turning to the agreement of the 5th September, 1852, seven days later in point of date than the two instruments already referred to, one finds that it begins by reciting that under the sale deed of the 29th August, 1852, the parties to it had purchased the twenty biswas Zamindari and revenue-paying property with the appurtenances in Mauza Murlipur Phul for a sum of 5,500 rupees from the so-called vendors, and then proceeds to set forth that the executants are now willing to help and treat with kindness the vendors, and that of their own free will, they (the executants) covenant in writing that if the vendors after the lapse of from nine to ten years from the date of the execution of the deed pay to the executants the purchase money mentioned in the sale deed, *i.e.*, the sum of 5,500 rupees, out of their own pocket without mortgaging or selling this property to other persons, the executants shall forthwith execute a fresh resale deed on receipt of this sum of 5,500 rupees, and get mutation of names in the revenue papers. Stopping there for the moment, it is contended that this provision as to the payment of the 5,500 rupees out of the pocket of the vendors is more consistent with the transaction being a mortgage than an agreement for resale entered into from kindly feelings. Their Lordships cannot accept that contention. The stipulation is

wholly inconsistent with the relation of mortgagor and mortgagee. It is very doubtful indeed, if it would not be illegal, as amounting to an encroachment on a mortgagor's right to redeem the mortgage property from whatever source he might procure the funds to do so. But if the executants, though *bonâ fide* and absolute purchasers for value of these lands, were yet, from kindly feelings to the vendors, themselves willing to restore the vendors to the possession and enjoyment of their property, it was quite natural that they should provide against a sale or mortgage which would result in merely putting some persons other than these former owners into the possession and enjoyment of the property purchased, substituting practically the new mortgagees or purchasers for the executants themselves. In their Lordships' view, this provision makes against the appellant's contention rather than in favour of it.

Much reliance, however, was placed upon the immediately succeeding provision of the agreement. It runs thus: "In the event of our refusal, they have power to deposit into the treasury attached to the Court the amount of the consideration in the sale deed, *and* after institution of a suit in Court to purchase their property again." It was suggested by Mr. Justice Tudball that the original document was not properly translated, and that the word *and* was improperly introduced after the words "sale deed." It may be so, but their Lordships do not think its omission would alter the sense of the passage. The wording of the first two lines leaves their meaning somewhat obscure. They may mean to confer upon the vendors the right and power to make this deposit, or they may possibly mean merely to state the fact that the vendors already possess this right and power having derived them from a source external to the agreement itself.

Their Lordships think that, having regard to the whole frame and wording of the document, the former, and not the latter, is the true meaning of this provision. Even on that view, however, it is contended on behalf of the appellant that, as the right and power thus conferred are the same or very similar to those conferred upon mortgagors by bai-bil-wafa mortgages, under the provisions of Regulations 1 of 1798 and 17 of 1806 framed under the Bengal Code, the provision clearly discloses the intention of the parties to create, in this instance, a mortgage of that character. On referring to these Regulations it will be seen that they apply to cases where there is a stipulation that unless the money borrowed be repaid, with or without interest, within a fixed period the sale should become absolute, and were designed to relieve the mortgagor from the necessity of proving that he had tendered, or was ready and willing to pay the money due within the time limited, especially in the case where the fact of the tender was denied by the lender, and also to afford the mortgagor the means of establishing before a Court of Judicature that he had in fact made the tender, or

was willing to pay the amount due within the time limited, or to have it determined whether his having omitted to do so made the sale absolute.

No doubt these provisions were intended to apply to mortgages effected by conditional sale and contracts for repurchase, and the fact that their machinery is made applicable to this case might, if the clause was properly drawn, disclose to some extent an intention that it was intended to create a mortgage; but the clause is extremely ill-drawn, and its provisions are self-contradictory. In its first portion it expressly provides that the repurchase can only take place, not during, but after the lapse of nine or ten years from the date of the execution of the deed. In its latter portion, it provides that if the vendors be not ready to purchase the property within the aforesaid time, they shall have no claim to the property after the expiry of the period of ten years, and the vendees shall then have every power in respect of the property. It is impossible to say whether the parties intended that the vendees should be secure in the possession of the property for nine or ten years, and might then be got rid of, or whether their right to possession was to be defeasible at any time during the ten years and after that to become absolute.

A clause so obscure and contradictory cannot furnish any true guide to the intention of the parties.

In the case of Balkishen Das *v.* Legge, 27 I.A. 58, a certain period was fixed by the collateral agreement, within which the vendor was to be allowed to repurchase. The vendors were indebted to the vendees, their bankers, in a sum of 1,90,000 rupees. Three deeds were executed: the first two bore date the same day, and the last of the three was a mortgage of the vendor's factory. The first was, on the face of it, a deed of absolute sale of a certain talook for a sum of 1,50,000 rupees, of which 137,333 rupees were to be retained as the amount due to the vendees under a previous mortgage of the same talook for principal and interest, the balance being retained by the vendees in part payment of a debt due to them by the vendors in respect of advances made by the former to run the vendors' factory. The second deed, dated the 4th February, 1873, provided that if the vendors should on the 1st March, 1876, pay, not the purchase money merely, but 15,000 rupees in addition, 1,65,000 rupees in all, and such further sum as might be found to be due by them to the vendees in respect of the vendors' factories they might repurchase. There was in this latter deed a provision similar to that in the present, in reference to depositing the sum to be paid to secure repurchase. Oral evidence was admitted by the Subordinate Judge for the purpose of proving the intention of the parties. This evidence was held to be inadmissible. No opinion was expressed upon the point whether a conditional sale becomes subject to an equity of redemption by force of the Bengal Regulations, independent of the intention of the parties. The real ground of the decision

appears to have been this, that the real effect of the deeds was to consolidate the debt due on the factory account with the principal sum mentioned in the first deed, and thus to give the bankers a security on the talook for the debt due on the factory accounts. This, as Lord Davey, delivering the judgment of the Board, said, "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."

The case is entirely distinguished from the present, and it does not appear to their Lordships to follow necessarily from the words of Lord Davey, just quoted, that the decision might not, despite the identity of the dates of the two deeds and the presence of the provision as to depositing the amount to be paid, have been the other way had the debt on the factories not been consolidated. The case of Bhagwan Sahai *v.* Bhagwan Den and Others (17 I.A., 98) resembles the present case much more closely. There the two documents, the deed of sale and the contract for repurchase bore the same date, the 20th February, 1835. By the first Alum Singh purported to sell his entire property to Gange Den for 4,000 rupees current coin. By the second, which recited the first, it was provided that, as a matter of favour, much kindness, and indulgence, if the vendor should, within a period of ten years from the date of the deed, pay in a lump sum and without interest the 4,000 rupees; the vendee would accept the same and cancel the sale. It further provided that during the term of ten years the vendee should remain in possession, collect the rent, enjoy the profits, and be liable for loss, the vendors having no concern whatever; they should not claim profits and the vendee should not claim interest; and in case the whole of the principal should be not paid according to the terms of the document, "the vendors not to be able to cancel the deed by repayment of principal and interest." Sir Barnes Peacock, in delivering judgment, cited and relied upon the judgment of Lord Cranworth in Alderson *v.* White (2 D.G. and J., p. 105), in which much importance was attached to the fact that the sum to be repaid on repurchase was, as in the present case, the precise amount of the original purchase money. Lord Cranworth, at p. 105 of the report, laid down the rule of law applicable to such cases as these, thus: "The rule of law on this subject is one dictated by common sense, that *primâ facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." That statement of the law by Lord Cranworth was approved of in Manchester, Sheffield, and Lincolnshire Railway Company *v.* North Central Waggon Company, 13 App. Case, 568. It may not be applicable to transactions governed by the Mahommedan Law. It was apparently held applicable by Sir

Barnes Peacock, who had vast experience of India and its people, to the case before him. In this particular case Sir Barnes Peacock decided that it was clear that the case was not one of mortgagor and mortgagee, but one of absolute sale with a right to repurchase within a period of ten years.

There is one other remark of Lord Cranworth's in Alderson *v.* White, which is particularly applicable to the present case. He said : "I think a Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be." In the present case the period of ten years fixed for repurchase terminated in 1863. Not till the 5th October, 1907, forty-four years after the lapse of that period, was this suit instituted. The judgment appealed from was delivered on the 11th March, 1911. The record was not received at the Privy Council Office till the 25th February, 1915, and the appeal not set down for hearing until June 1916. Litigation so prolonged becomes an instrument of oppression, is discreditable to any judicial system, and every effort should be made to correct the abuse.

On the whole case their Lordships are of opinion that the Decree appealed from was right and should be affirmed, and this appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

JHANDA SINGH

v.

SHEIKH WAHID-UD-DIN AND OTHERS.

DELIVERED BY LORD ATKINSON.

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