Privy Council Appeals Nos. 21, 31 *and* 32 *of* 1923.

Baijnath Singh - - - - - - - *Appellant*

v.

Hajee Vally Mahomed Hajee Abba - - - - - *Respondent*

Baijnath Singh - - - - - - - *Appellant*

v.

Hajee Vally Mahomed Hajee Abba - - - - *Respondent*

Hajee Vally Mahomed Hajee Abba - - - - *Appellant*

v.

Baijnath Singh - - - - - - - *Respondent*

(*Consolidated Appeals*).

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 5TH DECEMBER, 1924.

Present at the Hearing:

LORD SUMNER.
LORD PHILLIMORE.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

These are consolidated appeals from two decrees of the Chief Court of Lower Burma, dated the 23rd of May, 1919, varying two decrees of that Court in its original jurisdiction, one dated the 28th of February, 1917, in suit No. 62 of 1916, and the other dated the 15th of March, 1917, in suit No. 60 of 1916.

Both suits were bought by Baijnath Singh for the redemption of shares alleged to have been mortgaged by him

Suit No. 60 of 1916 is against Hajee Vally Mahomed Hajee Abba. Suit No. 62 of 1916 was originally against Hajee Mahomed Jamal, but the plaint was amended by adding the defendant Abdul Kareem Abdul Shakoor Jamal. Later, during the pendency of the suit Hajee Vally Mahomed Hajee Abba was substituted as defendant in their place, and he is now the sole defendant in both suits.

The plaintiff's right to redeem is denied on the ground that the several transactions on which the plaintiff relies were not mortgages, but sales with a right of repurchase that has expired.

The Trial Judge upheld the plaintiff's contention in both suits. On appeal, the Chief Judge decided that the transactions were mortgages. Ormond J., held that they were sales with contracts for repurchase, but that time was not of the essence of the contracts. In the result a decree was passed by the Appeal Court in each suit that on payment by the plaintiff of the sum found due the shares claimed should be transferred to the plaintiff.

Of the disputed transactions one (which will be called the Abba transaction) is the subject matter of suit No. 60 of 1916, the others (which will be called the Jamal transactions) are the subject matter of suit No. 62 of 1916.

They have been conveniently tabulated in the judgment of the Chief Judge in the following form :—

No. of shares transferred.	To—	On—	Amount paid by transferee.	Series.
			Rs.	
30,000	Abba	16th January, 1912 ...	60,000	J series of exhibits.
70,000	Jamal	15th November, 1912	130,000	A do.
10,000	do.	10th December, 1912	20,000	B do.
17,000	do.	31st January, 1913 ...	42,500	C do.
30,000	do.	18th March, 1913 ...	75,000	D do.
8,520	do.	6th January, 1914 ...	21,000	E do.

The first transaction, it will be seen, was in January, 1912.

At that time, Baijnath owned 181,020 fully paid shares of Rs. 10 each in the Nath Singh Oil Company, Ltd. The certificates of these shares had been lodged with the Bank of Bengal as security for a cash credit account, and in November, 1911, the shares had been transferred, still by way of security, into the names of two nominees of the Bank. In January, 1912, the sum due from Baijnath to the Bank was two lacs and ten thousand rupees, and the Bank was pressing for reduction of this debt.

The case alleged in the plaint is that Baijnath approached Abba for a loan and Abba offered to lend and advance to Baijnath for payment to the Bank a sum of Rs. 60,000 on the security of 30,000 of the Oil Company's shares, with interest at the rate of 75 per cent. per annum up to 17th May, 1912. It is further alleged that Baijnath agreed to these terms; that Abba at Baijnath's request paid a sum of Rs. 60,000 to the Bank of Bengal in part payment of Baijnath's indebtedness to the Bank; and that as security for the loan the Bank on the 17th January, 1912, handed over the certificates for the shares to Abba and executed a transfer of them in his favour. In the 5th paragraph of the plaint it is said that prior to the transfer Abba represented to Baijnath that being a Mohammedan it was contrary to the precepts of his religion to lend money at interest, and that as he was anxious it should not be known that he was charging interest at the rate of 75 per cent. per annum, Baijnath and Abba should execute bought and sold notes by which it would be made to appear that Abba had sold and Baijnath had bought 30,000 fully paid up shares for Rs. 75,000, delivery on or before the 17th of May, 1912. Though Abba does not admit the correctness of this version, it is not disputed that there was an arrangement between him and Baijnath which resulted in the first transaction of January, 1912. In performance of it the sum of Rs. 60,000 found by Abba was paid to the Bank on Baijnath's account; 30,000 of the Oil Company's shares held by the Bank's nominees as security for Baijnath's cash credit were transferred to Abba, who knew that the shares were mortgaged to the Bank; and the bought and sold notes were executed.

These notes purported to be a sale by Abba and a purchase by Baijnath of the 30,000 shares at the rate of Rs. 2/8 cum all rights and dividends, delivery on or before the 17th of May, 1912, at buyer's option.

The rate thus stipulated came to Rs. 75,000, made up of the sum originally paid and interest thereon at 75 per cent.

On the 17th of May, Baijnath was unable to pay this sum and so a renewal was arranged at the same rate of interest, and bought and sold notes were executed for the sum of Rs. 95625 for delivery on the 31st December, 1912.

On the 14th of January, 1913, a further sum of Rs. 4375 was paid by Abba and this, with the sum alleged to be due on the 31st of December, 1912, amounted to one lac. The rate of interest was reduced to 30 per cent. and bought and sold notes were executed providing for the repurchase of the 30,000 shares on the 22nd of December, 1913, at the price of Rs. 1,30000, or in other words, a lac of rupees and a year's interest on it at 30 per cent. On the due date, fresh bought and sold notes were executed providing for the purchase on the 22nd December, 1914, at Rs. 1,78750, that is to say, the sum of Rs. 1,30000 with interest to the 22nd of December, 1914, at 37½ per cent. to which the rate was then enhanced. No further bought and sold notes were executed in

connection with this transaction. According to Baijnath, this was in consequence of an oral agreement in November or December, 1914, providing for the reduction of interest to 9 per cent. The proof of this agreement will be considered later.

In both the lower Courts it was contended by Abba that this transaction was a sale and repurchase, and that time being of the essence of the contract, Baijnath's right to repurchase had expired. The decision was against this contention and Abba appealed to His Majesty in Council. But he has withdrawn that appeal, stating that he no longer objects to the redemption of the shares. In suit No. 60, therefore, the decision that Baijnath is entitled to redeem the shares in the Abba transaction stands and cannot be controverted.

Abba maintains that this cannot affect his contention that the Jamal transactions, to which suit No. 62 relates, give Baijnath no right of redemption. The learned trial judge, however, points out that the transaction of the 16th of January, 1912, was the commencement of a series of similar transactions, that a certain course of procedure was then settled, and that this influenced and possibly accounted for the procedure adopted in the later transactions.

Having regard to the part Abba took in arranging the later transactions, and his pecuniary participation in two of them, their Lordships agree with this view.

The first of the Jamal transactions was on the 15th of November 1912, and in form, it follows precisely the lines of the Abba transaction of January, 1912.

The number of shares transferred was 70,000, the transferee was Jamal, the amount treated as paid was Rs. 1,30000, and the transfer was from the nominees of the Bank of Bengal by whom (to the transferee's knowledge) the shares were held as security for Baijnath's cash credit. Though Abba's name does not appear, he was interested in 27,500 of the 70,000 shares transferred.

Of this sum of Rs. 1,30000 the amount then advanced was one lac ; the balance of Rs. 30000 represented a sum already due from Baijnath to Jamal.

Bought and sold notes were executed as in the case of the Abba transaction, the date of delivery was the 15th November, 1913, the rate of interest was $37\frac{1}{2}$ per cent., and the purchase price was Rs. 1,78750. On renewal, further bought and sold notes were executed in November, 1913, the date of delivery being the 15th November, 1914. The price was Rs. 2,45781–4–0, which represented the previous amount of Rs. 1,78750 with interest for one year at $37\frac{1}{2}$ per cent. calculated from the expiration of the previous bought and sold notes. There were no further renewals and this is attributed, as in the Abba transaction, to the agreement for reduction of interest.

It is true, as was laid down in *Balkishan Das* v. *Legge*, L.R. 27, I.A. 58, that under section 92 of the Indian

Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties. But in the view their Lordships take of the circumstances of this case the section and the ruling have no application to it.

The preamble to the Evidence Act recites that " it is expedient to consolidate define and amend the Law of Evidence," and section 92 merely prescribes a rule of evidence ; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. To these circumstances their Lordships will briefly advert.

At the date of their transfer the shares were held, as the transferee knew, as security for Baijnath's debt to the Bank, and it does not appear that the transfer was effected in exercise of any power of sale in the Bank. The money paid on that transfer went in reduction of the Bank's debt and there is nothing to indicate that the transferee acquired a greater right than was vested in the transferor. The amount paid by the transferee was Rs. 1,30000, a sum which, as the Chief Judge remarks, had no relation to the market price of the shares, but was made up of Rs. 100000 advanced at the time at 37½ per cent. interest and Rs. 3,0000, a debt already due. The same remark applies to the purchase price in the succeeding bought and sold notes, the price being made up of that entered in the preceding notes with the addition of interest calculated in advance to the new date for delivery. Then, again, the recognition of Baijnath's claim to dividends, whether he paid the price in the notes or not, points, if anything, to the shares being held by the transferee as a security and not as a purchaser, as does the fact that the transfer fees were paid by Baijnath and that no brokerage was paid.

These are all indications of the true nature of the transaction ; they may properly be taken into consideration and their effect is to favour Baijnath's contention.

Of the other Jamal transactions, three only are now in dispute, for the 30,000 shares transferred on the 18th March, 1913, have been retransferred to Baijnath : these three need not be separately examined, for it is not suggested that they can be differentiated from the first, which has been discussed in detail.

Over and above the several matters to which attention has been drawn as indications that the Jamal transactions must, like the Abba transaction, be treated as a mortgage, in support of Baijnath's contention, great reliance is placed on two documents, Exhibits F and G.

Exhibit F is an instrument of the 12th June, 1913, made between Baijnath of the one part and Jamal and Abba of the other part. After a recital that Baijnath had transferred several wells and well sites to the Oil Company, for which he had not been allotted shares, it was agreed that in consideration of Rs. 1000 paid as earnest money, Baijnath would sell and transfer to Jamal

and Abba every share which might be allotted to him at any time thereafter in the Oil Company for any well or well sites transferred by him at the price of one rupee per share.

The genuineness of this agreement is not disputed and it is common ground that it was entered into for the purpose of preventing Baijnath from flooding the market with new shares. The draft was handed to Baijnath. He took it to his legal adviser, Mr. Halkar, who told Baijnath " that it would not be good to sign the agreement." The reason is obvious. By the terms of Exhibit F, Baijnath bound himself to transfer shares that might be allotted to him in the Oil Company at R. 1 each, though at the time he was buying back 30,000 shares at Rs. 4-5-4 per share. The agreement was unqualified and did not even contain a provision for repurchase, though, admittedly, the object was merely to protect the value of the shares that had been transferred in the several transactions. In accordance with his advice, Mr. Halkar prepared another draft. Baijnath deposes that it was given to Abdul Sattar, and after being kept by him for a day was returned with the assurance that it was all right and could be typed. The draft was accordingly typed by Mr. Halkar and the typed copy is Exhibit G.

It is expressed to be dated the 12th June, 1913, and to be between Jamal and Abba of the one part and Baijnath of the other. After recitals that Baijnath had transferred his 1,57000 shares of the Oil Company to the names of Jamal and Abba as security for a loan on account, and that the shares were in their possession and names on which they had a lien for the amount advanced, and that Baijnath was to get a further allotment of shares in the Company which were to be sold by him to Jamal and Abba, in the witnessing part it is declared that Jamal and Abba had a mere lien on the shares and were not the owners of the shares, and that they should retransfer the shares to the name of Baijnath on his repaying the loans.

On the document are what purport to be the signatures of Jamal and Abba as executants and of A. H. N. Jamal, otherwise known as Abdul Sattar, as an attesting witness, and their close resemblance to the genuine signatures of these three persons is not contested. Baijnath swears to the execution of the document, but Jamal and Abba declare it is a forgery. Abdul Sattar, whose name appears as the attesting witness, is a son of Jamal, and though he came with his father to Court, he did not go into the witness box to deny his signature.

The Trial Judge held the signatures of Jamal and Abba and of the attesting witness to be genuine.

The learned Judges on appeal came to a different conclusion. The Chief Judge was not satisfied that Jamal and Abba signed Exhibit G and thought it probable that the document was concocted not long before the filing of the suit in 1916. Ormond, J. thought it was prepared after Jamal had taken up the position

that the shares could no longer be redeemed or repurchased because the due dates had expired.

In their Lordships' opinion the view of the Appellate Court as to the time at which the document was prepared is disproved by the evidence of Mr. Halkar. He deposes that he prepared the document in June, 1913, in the circumstances already stated, and he is able to identify it by a correction in it initialled by him at the time. In suit No. 60, he gave evidence to the effect that he actually had a conversation with Abba about this agreement in June, 1915. Their Lordships are satisfied that Exhibit G was prepared in June, 1913, and that the Appellate Court's view as to the date and purpose of its preparation is erroneous.

The Chief Judge, in arriving at his conclusion, adverse to the execution of Exhibit G, remarks on the fact that while in Exhibit F the signature of Abba has the word Mohamed in full, in Exhibit G it has only the first syllable. But it has been shown in the argument that on other documents Abba has written his signature as in Exhibit G, so that the Chief Judge's comment loses its force.

The learned Trial Judge examined the evidence given before him with critical care. After commenting on the manner in which it was given and weighing the probabilities, he came to the conclusion that the denial before him of the signatures was not true, with the result, as he expresses it, that he was entirely satisfied that Jamal and Abba did execute G. The judgments in the Appellate Court disclose no sufficient ground for disturbing the first Court's appreciation of the evidence, and the finding that Exhibit G was duly executed will therefore stand.

Apart from Exhibit G their Lordships would be prepared to hold that the transactions in suit are mortgages ; if this document be accepted this conclusion is placed beyond controversy.

But then it has been contended that even if the transactions were mortgages the English rule of law that a mortgage is redeemable after default has no application to mortgages of chattels or choses in action by Hindus and Mohammedans and that consequently the right of redemption was lost. Even if this were a correct statement of the law in Burma (a point on which their Lordships express no opinion), the Lower Courts have rightly held that in the circumstances of this case the period for redemption cannot be held to have expired.

The only other point is as to the rate and period of interest to be allowed. Paragraph 26 of the plaint in suit No. 62 of 1916 alleges that about the end of 1914 Baijnath was desirous of paying off the amount of his indebtedness by borrowing from other persons ; that the defendant requested Baijnath not to make any definite arrangement to raise loans as the Company had commenced to pay large dividends, and that the amount due would shortly be repaid out of the dividends ; but the defendant undertook to charge Baijnath after the periods agreed to between the parties interest at 9 per cent. per annum for further interest and agreed

to credit all interest received by him towards the amount due; and that Baijnath agreed to the defendants' proposal and consented to allow the amount due to be repaid at Baijnath's convenience.

The plaint in suit No. 60 of 1916 contained allegations to the same effect. In both suits there was an issue as to whether there was any such agreement, and, if so, what was its effect. The first Court decided this issue in Baijnath's favour: the Appeal Court decided against him.

The Judge of the Trial Court on the evidence found that Baijnath could have raised the money at 9 per cent. per annum, and he gives an account of how this part of the case was treated before him, which leaves no doubt as to the correctness of his finding.

Accepting it as their Lordships do, it is inconceivable that Baijnath would have continued his liability for the extortionate interest payable under the original transactions, and the finding of the first Court must prevail.

Baijnath has objected that as the delay in payment off of the mortgages was due to the wrongful repudiation of his right to redeem, Abba is not entitled to subsequent interest. The answer is that this objection is opposed to the decision of the First Court, and from that decree no appeal was preferred by Baijnath. Therefore, the objection cannot now be entertained.

The result, then, is that Abba has failed in his contention that the transactions in suit No. 62 are not mortgages, and also so far as interest in excess of 9 per cent. per annum was awarded from the date of the agreement for reduction of interest. Payments have been made into Court by Baijnath under the decrees of the Lower Court, but it does not appear clearly how the money has been dealt with or whether any further account or payment by way of restitution or otherwise is necessary. These are matters for determination (if necessary) by the Court in Burma.

Their Lordships are of opinion that the decrees of the Appellate Court must be set aside and that the appeals from the Court of first instance ought to have been dismissed with costs by the Appellate Court, and they will humbly advise His Majesty accordingly. Abba will pay the costs of these consolidated appeals.

In the Privy Council.

BAIJNATH SINGH

v.

HAJEE VALLY MAHOMED HAJEE ABBA

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DELIVERED BY SIR LAWRENCE JENKINS.

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