Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Pattabhiramier v. *Vencata Row Naiken and another, from the late Sudder Dewanny Adawlut at Madras; delivered 20th January*, 1871.

Present:

LORD CHELMSFORD.
SIR JAMES W. COLVILE.
LORD JUSTICE MELLISH.

SIR LAWRENCE PEEL.

IN this case the Appellant claims to be the absolute owner of the lands in question under several conveyances from the first and second of his co-defendants in the suit, or from those whom they represent. That the title of his vendors or their ancestor was originally a mortgage title is undisputed; and the suit out of which the appeal has arisen was brought, in October 1853, by the representatives of the mortgagor to redeem the property, alleging it to be still redeemable. The decision of the Court of First Instance was in their favour, but that was reversed by the Principal Sudder Ameen of Combaconum, who decreed in favour of the Appellant. His Decree was reversed by the late Sudder Dewanny Adawlut of Madras on special appeal; and the present appeal is against the Decree of that Court.

The Sudder Court, having no jurisdiction to determine on special appeal any question of fact, and there being no cross appeal to Her Majesty in Council against the Decree of the Principal Sudder

Ameen, their Lordships must accept his findings on the facts as conclusive.

Those findings were :—

1st. That the original contract between the mortgagor and the mortgagee was contained in the deed of conditional sale, dated the 13th of June 1808, which is at page 71 of the record, and is there called Exhibit No. 1; and that the Plaintiffs had failed to establish that there was any other instrument of mortgage.

2nd. That Exhibit No. 2, purporting to have been executed on the 16th of June, 1816, upon which the Appellant had relied either as a confirmation of the then absolute title of his vendors, or as a conveyance or release of the right of redemption to them, was not a genuine document.

3rd. That certain letters, put in by the Plaintiffs in order to prove acknowledgments by the mortgagees that the mortgage was a subsisting and redeemable mortgage as late as 1851, were also forgeries.

The conclusion of law which the Principal Sudder Ameen drew from his first finding was, that under Exhibit No. 1 the title of the mortgagees became absolute on the 10th of June, 1813, by reason of the failure of the mortgagor to redeem at that date; and the special appeal was admitted to try the correctness of that conclusion. Hence, the sole question for their Lordships' determination is whether, under the law of the Madras Presidency, the interest of a mortgagee under a deed of conditional sale does or does not become absolute, according to the terms of the contract, by the mere failure of the mortgagee to redeem at or before the time specified in the deed.

This form of security being common in India, the question is of very general importance, and on that ground the Appellant obtained Her Majesty's special leave to present this Appeal, which, after considerable delay, has, unfortunately, come on to be heard *ex parte*.

The contract embodied in Exhibit No. 1 was, that the mortgagee should hold possession of the land for five years, paying the Government revenue; that the mortgagor should repay the principal and redeem the land on the 10th of June, 1813; and that, in default, the mortgagee and his posterity should enjoy

the land as if the transaction were an absolute sale, with the right of alienating the same by gift, sale, &c.

The transaction then was one of mortgage by bye-bil-wufa or kut-kabala usufructuary; the usufruct of the property to be taken in lieu of interest. And the first question that suggests itself is, was there any rule of law to prevent the Court from giving effect to such a contract according to the intent and meaning of the parties plainly expressed by its language?

That this form of security has long been common in India is notorious. The fact is stated in the preamble to the Bengal Regulation No. 1 of 1798. That such contracts were recognized and enforced according to their letter by the ancient Hindoo law appears from several passages in Colebrook's Digest (vol. 1, pp. 183, 187, 188 and 193). That they were equally recognized and enforced between Mahommedans is shown by Mr. Baillie in his introduction to his learned work on the Mahommedan law of sale. If the ancient law of the country has been modified by any later rule, having the force of law, that rule must be founded either on positive legislation, or on established practice.

Nothing concerning such contracts is, so far as their Lordships are informed, to be found in the Statute Law relating to the Presidency of Madras except Regulation XXXIV of 1802. The 8th and 9th sections of that Regulation extended to Madras, the provisions of the 10th and 11th sections of the Bengal Regulation, No. XV of 1793. Both these regulations were passed with the object of fixing the legal rate of interest, and of preventing the taking of interest in excess of it; and both have since been wholly or in great part repealed with other usury laws, by Act XXVIII of 1855. The clauses in question affected only that part of the contract now under consideration which related to the usufruct of the property. As to that they may have made it necessary, contrary to the intention of the parties, to take upon a redemption an account of the rents and profits as between mortgagor and mortgagee in possession, compelling the latter to set what he might have received in excess of legal interest against the principal; but they neither extended the time of redemption nor imposed upon the

mortgagee, when the mortgagor had failed to redeem within the stipulated period, the obligation of taking any judicial or other proceedings in order to make his title absolute.

In Bengal there was further legislation. In that Presidency a Regulation (No. XVII of 1806) was passed which allowed a mortgagor, who had executed such a security as that now in question, to redeem at any time before the mortgagee had finally foreclosed the mortgage by taking the proceedings which the Regulation made essential to foreclosure.

It is, however, unnecessary to observe that this Bengal Regulation had of itself no force in the Presidency of Madras. And their Lordships cannot find, either in the Madras Regulations or in the Acts of the Indian Legislature subsequent to the Charter Act of 1834, any statute by which similar provisions have been enacted for Madras.

That, in cases to which Regulation XVII of 1806 does not apply the interest of a mortgagee under a deed of conditional sale becomes absolute according to the terms of the contract by the mere failure of the mortgagor to redeem within the stipulated period, has recently been decided by a full Bench of the High Court of Bengal in the case of Surreefoorissa *v.* Shaihk Enayet Hossein, 5 Weekly Reporter, p. 88. In that case the mortgage bore date the 30th of November, 1801; the mortgage was made payable on the 28th of September, 1806. The mortgagor sued for redemption, and the mortgagee admitted that there had been no foreclosure pursuant to the Regulation. The High Court, however, ruled that, if the Regulation did not apply, the interest of the mortgagee became absolute on the 28th of September, 1806, and, finding that the Regulation had not been promulgated, and therefore had not become operative in the district until the 7th of January, 1807, dismissed the plaintiff's suit. The point, so decided, is also assumed to be law in the judgment delivered at this Board in the case of Forbes *v.* Ameeronissa Begum, 10 Moore, J. A., 348; and unless it be law it is difficult to see why the Regulation of 1806 was passed.

Their Lordships have been unable to discover that there has been any course of decisions in the Court of Madras which can be set against the

authority just cited. The utmost that can be gathered from this record is that some uncertainty concerning the operation of these contracts may have crept into the Lower Courts of Madras. If the Principal Sudder Ameen was right in thinking that this afforded a reason why the Appellant had sought to strengthen his title by the production of the false deed No. 2, it is to be observed that the Plaintiffs, on the other hand, showed their sense of the uncertainty of the law by setting up the the false case that another form of mortgage had finally been substituted for the deed of conditional sale. Moreover, the Sudder Court does not rest its judgment upon decided cases. The first reason advanced in support of that judgment is clearly untenable. That a party is precluded from relying upon a title established by a deed conclusively found to be genuine, because he has foolishly and wickedly set up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title, is a proposition for which there is no foundation either in reason or in law. Nor does the second reason assigned for the judgment appear to their Lordships to be better founded. It assumes that an obligation lay on the mortgagee to do some act by way of enforcing what is not very correctly termed the penalty; and that there could be no adverse possession against the mortgagor until there had been a tender and refusal of the mortgage money. But this assumption implies that in some way or another the rights and obligations of the parties as defined by the contract had been qualified by a known rule of law. Their Lordships have already stated that, so far as they can discover, no such qualifications have been introduced, as in Bengal, by any act of legislation into the Statute Law applicable to Madras. What is known in the law of England as "the equity of redemption" depends on the doctrine established by Courts of Equity that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East Indian Company, their Lordships can find no such course of decision. In fact the weight of authority seems to be the other way. It must not, then, be supposed that in allow-

ing this appeal their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the Law of the Forum, wherever such may prevail, or to affect any title founded thereon.

Their Lordships therefore being of opinion that the decree under appeal is erroneous and ought to be reversed, and that the special appeal to the Sudder Court ought to have been dismissed with costs, will advise Her Majesty accordingly. But considering the great and unexplained delay which has taken place in the prosecution of this appeal, they do not think that they ought to give the Appellant the costs of it.

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