Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bhagwan Sahai v. *Bhagwan Din and others, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered March* 11*th*, 1890.

Present:

LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Sir Barnes Peacock.*]

THIS case depends upon the construction of two documents dated February 20th, 1835. The first document is to be found at page 41 of the Record; and by it Alum Singh and others, who professed to be the proprietors of the property therein mentioned, declared that they had of their own accord absolutely sold the entire property to Ganga Din "in lieu of Rs. 4,000 of the current coin." That was an absolute sale by Alum Singh to Ganga Din. Then on the same day another document was executed, which will be found at page 10 of the Record, by which Ganga Din, reciting the deed, says that he has purchased the property for the Rs. 4,000, and adds:—"However, I have as a "matter of favour, mercy, kindness, and in- "dulgence executed this deed, and do hereby "stipulate that if all these vendors will within a "period of ten years from the date of this deed "pay in a lump sum, and without interest, the "whole amount specified above, I shall accept the "same, and cancel this valid sale. During the "aforesaid term I shall remain in possession, "collect the rent, enjoy the profits, and be liable "for loss; the vendors shal have no concern "whatever, I shall not claim interest from the "vendors, nor will they demand profits from me,

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" after the expiry of the term. In case the " whole of the principal is not paid "—and their Lordships think that the construction of that is, " In case the whole of the principal is not paid according to the terms of this document,"—" the " vendors shall not be able to cancel the sale by " payment of the principal."

Those documents having been executed in 1835, in the year 1884—nearly 50 years afterwards—a suit is commenced by the Plaintiffs, representing the vendors claiming to redeem the property upon payment of the Rs. 4,000. The Defendant in his written statement, in paragraph 3, says:— " An absolute sale deed was executed in respect " of the property in suit in favour of Ganga Din, " whose proprietary interests were then after- " wards purchased at auction by Sukh Din " Bajpai." Then he says, in paragraph 6:— " Under the deed of agreement alleged by the " Plaintiffs they have no right of redemption by " law," and in the last two lines of paragraph 9 he says:—" The two parties neither stood, nor " do now anyhow stand, in the relation of " mortgagor and mortgagee."

The first Court having held that the parties did stand in the relation of mortgagor and mortgagee, and having decreed that the Plaintiffs were entitled to redeem, an appeal was preferred to the High Court, and at page 77 of the Record the third ground of appeal is thus stated:— " Because under the terms of the agreement " the Plaintiffs cannot now sue to redeem the " property in suit." The High Court upon the hearing of the appeal affirmed the decision of the lower Court, and held that the parties stood in the relation to each other of mortgagor and mortgagee, and not in the relation of one being an absolute vendee with a right given to the vendors to repurchase within a period of ten years upon repayment of the full amount of the

purchase money. It does seem contrary to all principles of equity and good conscience that when it was stipulated that the money should be repaid within the period of ten years from 1835, the representatives of the vendors could lie by until the year 1884 and then claim that they had a right which was not barred by limitation to redeem that which they call a mortgage at any time within the period of 60 years. That this was not a mortgage, at any rate according to English law, seems clear from the decision of Lord Chancellor Cranworth in the case of *Alderson* v. *White*, reported in the 2nd De Gex and Jones, page 105. In giving judgment the Lord Chancellor says this:—"These deeds taken together "do not on the face of them constitute a mortgage; "and the only question is whether, assuming the "transaction to be a legal one, it has been shown "to be in truth such as in the view of a Court "of Equity ought to be treated as a mortgage "transaction. 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." In this case the vendors did not stipulate that they should have a right to repurchase, but the vendee, as a matter of grace and kindness, stipulated that they should have that right. The Lord Chancellor proceeded, "In every such case the question is, what "upon a fair construction is the meaning of the "instruments? Here the first instrument was "on the face of it an absolute conveyance; "the second gave a right to repurchase on "payment not of what should be due but of "the full amount of the purchase money of

" 4,739*l.* "—exactly corresponding to the terms of the two documents in the present case, whereby the vendee gave the right to the vendors to take back the property if within the period of ten years they should pay the same amount, namely, Rs. 4,000—" Was that if taken according to " its terms a lawful contract? Clearly so. What " then is there to show that it was intended to " be a mere mortgage? I think that the 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; and " I see but little evidence to that effect here." That passage was approved of in a case in the House of Lords, reported in the 13 Law Reports, Appeal cases, page 568—*The Manchester, Sheffield, and Lincolnshire Railway Company* v. *The North Central Waggon Company.* It is clear that this case was not one of mortgagor and mortgagee, but one of an absolute sale with a right to repurchase within a period of ten years.

Under these circumstances their Lordships think that the decision of the High Court ought to be reversed, and that their Lordships ought to give the judgment which the High Court ought to have given, namely to reverse the decision of the first Court, and to dismiss the suit with costs in both Courts.

Their Lordships will humbly advise Her Majesty to that effect.

The Respondents must pay the costs of this appeal.