Privy Council Appeal No. 47 *of* 1922.

Raja Bahadur Narasingerji Gyanagerji, since deceased (now represented by Raja Dhanarajagirji) - - - - *Appellant*

v.

Raja Panuganti Parthasaradhi Rayanim Garu and others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 19TH JUNE, 1924.

Present at the Hearing:

LORD ATKINSON.
LORD SHAW.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD BLANESBURGH.]

This is an appeal from a decree of the High Court of Judicature at Madras, dated the 24th of February, 1921, modifying a decree of the Subordinate Judge of Nellore, dated the 5th of October, 1918, and made in the original suit No. 1 of 1917.

Issues raised by the appellant necessitated in the Courts below, and particularly in the Court of the Subordinate Judge, whose judgment their Lordships would at once observe is conspicuous for its ability, care and completeness, a prolonged investigation and examination of conflicting evidence. Concurrent findings against the appellant on every issue of fact raised by him have, however, greatly narrowed the ambit of the dispute as presented to the Board, and no more than two questions—difficult and important questions it is true—have survived for discussion before their Lordships.

Of these one only has so far been argued. But it raises the fundamental dispute between the parties, which may be described

as an issue as to the true nature of the transaction of the 4th of August, 1908, between the appellant and the late Rajah of Kalahasti (now represented by the respondents his assignees) as a result of which the properties in suit passed to the appellant. The transaction is evidenced by two documents referred to throughout the proceedings as Exhibits X and U. Did it effect as contended for by the respondents merely a mortgage by conditional sale of the properties in suit, or was it as contended by the appellant, an absolute sale of these properties to himself, with an agreement on his part to reconvey on the strict performance by the Rajah of certain defined conditions ?

In this suit the respondents, who as already indicated had succeeded as auction purchasers to the outstanding rights in the properties of the Rajah, claimed to redeem them on the footing that the transaction in question was a mortgage. Alternatively, they claimed to have the properties reconveyed to them upon payment of the purchase price on the ground, that if, contrary to their main contention, the transaction did amount to an out and out sale, the conditions entitling the Rajah to a reconveyance had been all complied with by him, and in his shoes they now stood.

In the Trial Court, the respondents succeeded on their main case. In the Court of Appeal they succeeded on their alternative case. The learned Subordinate Judge held that the transaction amounted to a mortgage by conditional sale. The High Court on appeal felt themselves constrained upon the authorities to hold that, in view of the terms of Exhibits X and U, the transaction must be held to have been an absolute sale of the properties to the appellant. But they found also, agreeing in this with the learned Subordinate Judge, that the conditions entitling the Rajah to a reconveyance on that footing had been performed and that the respondents, as his successors in interest, were entitled to have the properties assured to them on payment of the prescribed price.

From that order of the High Court the present appeal is brought. Mr. Clauson for the appellant did not ask their Lordships to review the conclusion of the High Court that all the conditions entitling the Rajah to a reconveyance had been performed. That conclusion—strenuously contested in the Courts below—now rested on concurrent findings of fact which he could not before the Board seek to displace. The appellant's sole ground of appeal, indeed, was that the right to a reconveyance reserved by Exhibit U was personal to the Rajah and did not pass to any assignee. As, however, the appellant's views on this matter raised very difficult questions of law, and as Counsel recognised that no success with them would avail him anything if the respondents were to establish before the Board, as they had done before the Subordinate Judge, that the transaction with the appellant did in truth amount to a mortgage, Mr. Clauson with the approval of the Board, confined his argument to that question on the understanding that, if their Lordships ultimately accepted upon it the view in his favour

taken by the High Court, the substantive issue raised by the appellant in his appeal would become the subject of subsequent discussion before the Board.

In accordance with that arrangement the vital question whether the transaction in question did or did not amount to a mortgage has been fully argued before their Lordships, and with that problem alone they now propose to deal.

It seems to their Lordships that they can dispose of the present case with no reference to any oral evidence, other than that of surrounding circumstances such as in Lord Davey's words in *Balkishen Das* v. *Legge*, 27 Ind. App. 58, are clearly required to show in what manner the language of the documents was related to existing facts.

To a consideration of these circumstances their Lordships now proceed.

The Rajah of Kalahasti—party to the transaction in question—succeeded in 1905 to the Taluk of Pamur. The Taluk consisted of 223 villages, and at the succession of the Rajah it was in a state of the utmost embarrassment.

It had been for some time in the hands of the Court of Wards, but earlier in the same year that Court had handed it back to the Rajah's nephew and predecessor. The property was heavily encumbered. It was subject to a mortgage of the 20th of June, 1893, in favour of Rajah Venugopal, who in 1899 had obtained a mortgage decree in respect of his debt amounting then to about 6 lakhs. In March, 1908, in pursuance of his decree, he had proceeded to a Court sale of 27 villages part of the Taluk, and had realised thereby a sum of about 3½ lakhs, but that price was being challenged by the Rajah for inadequacy, and inadequate it seems to have been. Nor was the decree holder content with his partial realization, and his purpose was to bring the remaining 196 villages to sale for the balance of his debt which, with interest, then amounted to nearly 6 lakhs, and he had actually obtained an order fixing that sale for the 8th of August, 1908.

Such was the position when the transaction now in question was entered into. It was carried out four days earlier—on the 4th of August, 1908. Six lakhs were required by the Rajah to avert a Court sale. The appellant, a rich moneylender of Allahabad, provided that sum. It was provided after very slight, if any inquiry. The transaction, whatever it was properly called, was not the result either of any bargaining as to the value of the property conveyed or as to the price to be paid. The six lakhs were required and they were found. That was all.

That sum had no relation to the value of the 196 villages comprised in the deed of assurance. On this matter the Board are in full agreement with both Courts below. As the learned Chief Justice points out, the 27 villages had in the previous March fetched as much as Rs. 3,46000 and that price was being challenged for inadequacy. There was no

evidence and no reason to suppose that the 27 villages differed materially from the 196 villages still remaining unsold, still less that they differed to such an extent as to make the value of these 27 villages equal to two-thirds of the value of the 196. The evidence as to the gross income of the 196 villages led to the same conclusion. It was the view of the learned Subordinate Judge that the value of these 196 villages amounted in 1908 to 15 or 16 lakhs at the least. The learned Chief Justice had no hesitation in concurring so far in that view as to hold that in August, 1908, 6 lakhs would have been a most grossly inadequate price and much less than could have been realised by private sale or even by a Court sale. Their Lordships have examined the evidence on this subject for themselves and they are in entire agreement with the learned Chief Justice as to its result. And that is sufficient. They desire to add, however, that had it been necessary they would have been prepared to endorse in its entirety the finding of the learned Subordinate Judge on this point.

Thus informed of the circumstances surrounding the execution of X and U, their Lordships are now in a position to examine these documents so as to ascertain from their provisions and necessary implications the real nature of the transaction to which they give effect.

Exhibit X, described as an indenture made by way of conveyance—their Lordships will refer to it as the conveyance—describes the Rajah as vendor and the appellant as purchaser. It begins with a recital of the title of the Rajah to the 196 villages in question; it goes on to recite the mortgage of June, 1893; the decree for sale and the sale of the 27 villages; and the fact that the remaining villages are proclaimed for sale on the 8th of August then current. The final recital is as follows:—

> "And whereas the vendor has, in order to prevent the property being sold in public auction and realising much less than what they are actually worth, agreed to convey by private sale the said villages to the said purchaser for Rs. 600,000."

Their Lordships will return to this recital in due course. The conveyance then witnesses that in consideration of Rs. 560,445 paid to the decree holder in satisfaction of his debt and Rs. 39,554.7 paid to the vendor, the vendor as beneficial owner grants and conveys the properties, "subject to the conditions and reservations mentioned below," to the purchaser, "his heirs, executors, administrators and assigns in fee simple absolutely." Then follow covenants for right to convey, quiet enjoyment, and further assurance and for indemnifying the purchaser, &c.

> "Against all losses, damages, expenses, claims and liabilities whatsoever if any which he or they may pay, sustain, incur, or be put to by reason or in respect of the purchase thereof."

The principal conditions and reservations are:—

1. All rents are to belong to and be enjoyed by the purchaser as from 1st July, 1908.

2. The vendor reserves to himself the sole right to the minerals and mineral rights including marble in the villages and the right

> "To repurchase the said villages as per the agreement of this day's date executed by the purchaser to the vendor, the said right to be exercised only on or after the 31st August, 1912, and on or before the 31st August, 1914, and to be in strict accordance with the terms set forth in the document above referred to."

In Exhibit U, the agreement just referred to, the appellant appears as vendor and the Rajah as purchaser. It is expressed to be made for the reconveyance of the 196 villages specified in the schedule attached to the conveyance, and cl. 1 provides that

> "The vendor agrees to sell and the purchaser to purchase the villages mentioned in the conveyance for Rs. 600,000, the said sum to be paid by the purchaser to the vendor on the 31st August, 1912, the 31st August, 1913, or the 31st August, 1914, and not earlier."

By clause 2 the vendor is to execute a deed of sale in favour of the purchaser as soon thereafter as the said sum of Rs. 600,000 is paid to the vendor, and the vendor is to be entitled solely to the possession and enjoyment of the villages . . . till such sum is paid and a conveyance in due form executed.

By clause 3 it is provided that if the purchaser fails to pay the amount mentioned in clause 2 *before* the 31st August, 1914, as above mentioned, the purchaser shall lose all his right of repurchase and that agreement shall then cease to be operative and valid. In case the purchaser pays to the vendor the said sum of Rs. 600,000 *on* the 31st August, 1912, 1913 or 1914, as above set forth, and a conveyance in due form is executed, the purchaser is to become entitled to all the rents and profits derivable from the villages as from the 1st day of July, 1912, 1913 or 1914 respectively

Clause 4 is very important. Its terms are these :—

> "If after the date of this agreement and before the sale deed is executed, the Government take up any portion of the land hereunder agreed to be conveyed under the Land Acquisition Act and award compensation therefor, any compensation so awarded shall, unless Government otherwise expressly provides, be deemed to be equivalent to 20 years' rent of the land acquired, and the vendor and the purchaser shall be entitled each to his proportionate share of the purchase money. The share of the money due to the purchaser being, if need be, given credit for towards the sale price of Rs. 6,00,000 already mentioned and agreed upon."

Their lordships do not conceal from themselves the fact that the transaction as phrased in these documents is ostensibly a sale, with a right of repurchase in the vendor. This appearance, indeed, is laboriously maintained. The words of conveyance needlessly iterate the description of an absolute interest, and the rights of repurchase bear the appearance of rights in relation to the exercise of which time is of the essence.

But a closer examination of the documents discloses their real character. Take for example the final recital of the conveyance to which reference has already been made. What is its true implication? A consideration of the facts known to both

parties makes it, their Lordships think, reasonably plain. The parties knew two things quite well. First, that 6 lakhs was an absurd purchase price. Secondly, that even at public auction the properties could be expected to realise a larger sum than that. What then was the implication ? Surely that the transaction in which they were engaging was not a sale but a loan. For notice how that principle is worked out. The Rajah has not only an option to repurchase. He is put under an obligation to buy if the appellant thinks fit to require him so to do. The appellant's 6 lakhs can be recovered by him if he chooses to sue upon the Rajah's contract to repurchase, he remaining in possession and enjoyment of the rents and profits of the properties until that price is paid.

Again, is time of the essence of the exercise by the Rajah of his rights in this matter ? Clause 4 of the agreement already set forth indicates to their Lordships that it is not. That clause seems also to be clear enough although it describes an arrangement very unusual in character. The clause is providing for the possibility of the appellant being compulsorily expropriated by Government from some part of the property in suit, and the receipt by him of the compensation in respect thereof. The compensation is to be treated as the equivalent of 20 years' rent ; it is to be treated as belonging to the appellant and the Rajah according to what would have been their rights *inter se* to possession of the expropriated lands during these years ; the money is to be received by the appellant as being in possession, but, *if need be*—these are the critical words—credit is to be given to the Rajah for his share by a deduction from the 6 lakhs otherwise payable by him on re-purchase.

These words show that in certain circumstances such credit will not be his. But what must these circumstances be. They can only be a repurchase more than 20 years after the expropriation. But if time was of the essence for such repurchase it could in no circumstances be postponed beyond six years from the date of the conveyance. Clearly, therefore, and within the intendment of the documents themselves time is not of the essence in this matter ; and so soon as that is established all pretence for holding this ostensible sale and repurchase to be anything else than a mortgage by conditional sale disappears, and its establishment reinforces several other considerations leading to the same conclusion such as the reservation of the right in the conveyance itself ; the reservation of minerals which is directed, in their Lordships' view, to a restriction on the appellant's usufructuary privileges ; the strange covenant of indemnity and the inconsistent and almost unintelligible provisions as to the actual time limited for the exercise of the Rajah's so-called right of repurchase. When all these provisions of the documents are viewed in the light of the surrounding circumstances, the inference is, in their Lordships' view, irresistible that here a mortgage and a mortgage only was in the direct contemplation and intention of both parties to the transaction.

Such was the conclusion of the Subordinate Judge. Such was apparently the belief of the learned Judges of the High Court, but they felt themselves precluded from giving effect to that belief by their hesitation to attribute, what their Lordships hold to be their real result, to the considerations emerging from the terms of the documents to which attention has here been drawn.

In these circumstances their Lordships find it unnecessary to deal with the numerous authorities upon this subject which they have examined. The case in their view is abundantly clear. They would only observe before parting with it that, as at present advised, they must not be taken to subscribe to the view that there has been introduced into the law of India such a radical change in the laws of evidence as is suggested by the learned Chief Justice, a change which would have the effect of excluding from the class of mortgages by conditional sale many transactions which before the Evidence Act would have been held to be within that class.

The present case with the shifts and devices, to which the appellant resorted to deprive the respondents of all their rights in the property, if the character of a mortgage could not be attached to the transaction, show how serious such a conclusion would be.

Without most careful consideration their Lordships would hesitate to accept a view which would bear so hardly on many mortgagors expressing their contracts of borrowing in long accepted Indian forms.

The respondents in their Lordships' judgment are entitled to a redemption decree. They are chargeable with interest at the rate of 6 per cent. per annum from the 1st of September, 1914, down to the date when the six lakhs were paid into Court. The appellant will be entitled to the interest earned by that sum since it was so paid in.

On the other hand, the appellant must account to the respondents for mesne profits of the properties as from the 1st of July, 1914, until actual delivery of possession to the respondents. The order of the High Court should be discharged and with these variations the decree of the learned Subordinate Judge should, in their Lordships' opinion, be restored.

Their Lordships will humbly advise His Majesty accordingly.

The appellant must pay all the costs of the respondents in the High Court and their costs of this appeal.

In the Privy Council.

RAJA BAHADUR NARASINGERJI GYANAGERJI, SINCE DECEASED (NOW REPRESENTED BY RAJA DHANARAJAGIRJI)

v.

RAJA PANUGANTI PARTHASARADHI RAYANIM GARU AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

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