[3 Mad. 26.]

APPELLATE CIVIL.

The 5th April, 1881.

PRESENT:

SIR CHARLES A. TURNER, KT., C.J., AND MR. JUSTICE INNES.

Bapirazu.....(Second Defendant) Appellant

versus

Kamarazu and another.....(Plaintiff's Representative and First Defendant) Respondents.*

Mortgage by way of conditional sale prior to 1858.

When the term of a conditional sale whether made as a security for a loan or not had expired before 1858, the rule laid down in *Thumbusawmy's* (I. L. R. 1 Mad. 1) case must be observed and effect given to the contract.

THE plaintiff and 1st defendant in this suit on May 19, 1846, entered into a Razinama, according to the terms of which a decree was passed in the same year.

The terms of the Razinama were as follows:—

The plaintiff, admitting a sum of Rupees 40 to be due to 1st defendant, promised (*a*) to pay the amount in one lump sum in March 1848; (*b*) to make over 2 veesums of his Malguzari land yielding 5 rupees per annum exclusive of Sirkar Katubadi to 1st defendant on account of interest on the loan; the 1st defendant was to be at liberty to sub-rent the land to any ryot during the next two years and appropriate the profits; in default of delivery of possession to the 1st defendant, delivery was to be given by the Court's warrant. The 1st defendant was to pay Sirkar Katubadi, and, in default of payment by the plaintiff at the expiry of the term, the 1st defendant was to enjoy the land as if sold to him on account of the balance due under the Razinama.

[27] The Lower Courts found that in 1848 the second defendant bought these lands from the 1st defendant for valuable consideration and had been in possession ever since.

The Munsif held that plaintiff was entitled to redeem the lands from 2nd defendant on payment of 40 rupees, and the Subordinate Judge confirmed this decree.

The 2nd defendant appealed to the High Court on the ground that the 1st defendant's title became absolute in 1848 under the terms of the Razinama of 1846 and that 1st defendant had conveyed the land absolutely to him.

Mr. *Michell* for Appellant.

No one appeared for the Respondent.

Innes, J.—This was a suit to redeem land placed in 1st defendant's possession by plaintiff under the conditions of a Razinama entered into in Suit 268 of 1845.

The date of the Razinama is 19th May 1846, and according to plaintiff, and as is found by the Munsif, 1st defendant, in pursuance of the Razinama

* Second Appeal, No. 692 of 1880, against the decree of the Subordinate Judge of Cocanada confirming the decree of the District Munsif of Peddapuram, dated 22nd July 1880.

obtained possession of the land which he then sold to 2nd defendant on the 14th May 1848, and *that* defendant, as is found by the Courts below, has been in possession ever since the date of the conveyance.

The District Munsif at first dismissed the suit on the ground that it was stipulated in the Razinama that plaintiff should pay 40 rupees to 1st defendant within two years and that in default the 1st defendant should enjoy the land as if sold to him from that date; that plaintiff had made default in payment and that the land had become the property of 1st defendant at the end of the stipulated time and had been made over to 1st defendant on that footing as provided for in the Razinama; and that plaintiff consequently had no title to recover. In appeal, however, the Subordinate Judge, Mr. Tirumal Row, took a different view. He was of opinion that the mere failure of plaintiff to pay the amount within the stipulated period would not be sufficient to vest the property in 1st defendant. He settled certain issues and remanded the case for retrial by the District Munsif. The District Munsif found upon the first issue that the plaintiff had not sold the property to 1st defendant, and upon the other issues that the sale of the land to 2nd defendant was without the assent of the plaintiff. He also found that the plaintiff had not proved that the 40 rupees **[28]** had been tendered to 1st defendant and refused. His decree was that 2nd defendant should deliver up the land upon payment of 40 rupees within one month.

In appeal, the successor of Mr. Tirumal Row as Subordinate Judge of Cocanada, Mr. Krishnasawmy Row, accepting the finding of his predecessor as to the construction and effect of Exhibit A, the Razi, as he felt bound to do under the ruling in *Palavarappu Muttanna* v. *Chanduri Narappa*,* found that plaintiff had not sold the land to 1st defendant on the expiration of the term; that 1st defendant had sold to 2nd defendant in 1848, but not with the assent of plaintiff, that 2nd defendant had been in possession ever since, but that by his purchase he had taken no more than 1st defendant had to give, and that 2nd defendant was not therefore a *bonâ fide* purchaser for value of the property, but only of the right of 1st defendant as mortgagee, and that plaintiff was not, as objected by 2nd defendant, barred of his right of action by Article 134 of the 2nd Schedule of the present Limitation Act. He therefore dismissed the appeal.

The question argued in this second appeal was whether the Razinama had been properly construed by the Courts below. It was contended before us that by the Razinama in 1846 and the failure of plaintiff to pay the money within the time agreed on, the land became, in 1848, the absolute property of 1st defendant, who gave a good title to 2nd defendant by Exhibit I. It appears from the Razinama that the yearly net profits of the land were 5 rupees, and there is nothing therefore outrageous or violent in the assumption that the actual intention of the parties was that on failure to pay the sum of 40 rupees (which was then equivalent to eight years' net profits of the land) within the stipulated term, the present 1st defendant (the plaintiff in the former suit) should enjoy the land "as if sold to him on account of the balance, 40 rupees, due under the Razinama." This would not constitute a sale with a condition of repurchase, but it is a mortgage which becomes a sale on the non-fulfilment of a condition and is, what in Macpherson on mortgages is styled, a conditional sale.

* 2 M. H. C. R. 349. A Court has no power to reverse an order of a co-ordinate Court which has determined the precise question after a suit has proceeded to its conclusion in pursuance of that order.

[29] In the judgment in *Pattabhiramier* v. *Venkata Rama Naick and another* (13 M. I. A., 560) the Judicial Committee, on an agreement identical in essentials with that now under consideration, reversed the decree of the Sadr Court of Madras and gave literal effect to the stipulation that in default "the mortgagee and his posterity should enjoy the land as if the transaction was an absolute sale." The Committee took occasion to condemn the practice which had grown up since 1858 in Madras of refusing to give effect to such stipulations and introducing the doctrine of the Court of Chancery of the equity of redemption and treating a mortgage so made as redeemable at any period notwithstanding the default which by the express terms of the agreement was to vest the property in the mortgagee. They went on to say, however, that they did not 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. They had in a previous part of the judgment mentioned that they were unable to find such a course of decisions.

In 1871 in *Raja Lutchmi Chellaiagaru* v. *Krishna Bhupati Devu* (7 M. H. C. R., 6) the High Court, in reference to the judgment of the Judicial Committee in *Pattabhiramier's* case, pointed out that since 1858 there had been a course of decisions establishing rules of property such as the Judicial Committee had in *Pattabhiramier's* case expressed themselves as not designing to disturb. In the case of *Thumbusawmy* (I. L. R., 1 Mad. 1) the Judicial Committee review the cases from 1858 at length and arrive at the conclusion that the Sadr and High Courts at Madras since 1858, and in Bombay since 1864, had, by judicial decisions, effected an alteration in the law upon this subject. They then consider what is the right course to follow with reference to this long-established, though erroneous, practice; whether in future cases they will adhere to the sound principles of the decision in *Pattabhiramier's* case, or the new course of decisions that has sprung up in Madras and Bombay which appeared to the Judicial Committee to be radically unsound.

They go on to say: "On a stale claim to redeem a mortgage and dispossess a mortgagee who had before 1858 acquired an absolute title, there would be strong reasons for adopting the former **[30]** course. In the case of a security executed since 1858 there would be strong reasons for recognizing and giving effect to the Madras authorities with reference to which the parties might be supposed to have contracted." It is incumbent on the Courts in India to decide cases of this nature in conformity with the views expressed by the Judicial Committee.

In the present case the contract having been entered into in 1845, the decision in *Pattabhiramier's* case must be followed. The result of the decision in that case is stated in the later case of *Thumbusawmy* (pp. 15, 16) to be that the contract of mortgage by conditional sale is a form of security which must be taken to prevail in every part of India in which it has not been modified either by actual legislation or by established practice. The essential characteristic of it was that on breach of the condition the contract executed itself and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them, and that it still has this effect in Madras.

This is what is expressly stated in *Thumbusawmy's* case to be the extent of the decision in *Pattabhiramier's* case. Since the Regulation XVII of 1806 such an agreement did not execute itself in Bengal. It was necessary for the mortgagee to pursue the procedure for foreclosure prescribed by the Regulation.

But no similar provision was enacted in the Regulations of Madras. The principle of the decision in *Patiabhiramier's* case, as explained by the case of *Thumbusawmy*, is clearly that doctrines such as that of the equity of redemption and other doctrines foreign to the ancient law of the country should not be permitted to stand in the way of giving effect to the clear intention of the parties as expressed in the written instrument. And in the judgment in *Thumbusawmy's* case the practice in Madras, as stated in *Nullana Goundan* v. *Palani Goundan* (2 M. H. C. R., 420), of resorting to oral evidence to aid the Court in the discovery of the intention of the parties is distinctly deprecated if not condemned.

The question, therefore, in contracts which have been made before 1858 is narrowed to what was the intention of the parties as gathered from the instrument itself.

[31] It appears to me that the intention clearly was that on this plaintiff's failure to pay by the stipulated term the property should pass to the first defendant. I would, therefore, reverse the decrees of the Courts below and dismiss plaintiff's suit with all costs throughout.

Turner, C. J.—I am of the same opinion.

[3 Mad. 31.]

APPELLATE CIVIL.

The 8th April, 1881.

PRESENT:

MR. JUSTICE KERNAN AND MR. JUSTICE MUTTUSAMI AYYAR.

Pallikunath Ramen Menon.....(3rd Defendant) Appellant

versus

Mullankaji Sri Kumaran Nambudri.....(Plaintiff) Respondent.*

Abatement of suit under Section 102, Act VIII of 1859—Fresh suit brought under Act X of 1877.

Where a suit was declared abated in 1868 under Section 102† of Act VIII of 1859 for non-prosecution by the representative of deceased plaintiff.

---

* Second Appeal, No. 828 of 1880, against the decree of H. Wigram, Officiating District Judge of South Malabar, reversing the decree of the District Munsif of Ernad, dated 25th October 1880.

† [Sec. 102:—In case of the death of a sole plaintiff or sole surviving plaintiff, the Court may, on the application of the representative of such plaintiff, enter the legal name of such representative in the place of such plaintiff in the Register of the suit, and the suit shall thereupon proceed; if no such application shall be made to the Court within what it may consider a reasonable time by any person claiming to be the legal representative of the deceased sole plaintiff, or sole surviving plaintiff, it shall be competent to the Court to pass an order that the suit shall abate, and to award to the defendant the reasonable cost which he may have incurred in defending the suit, to be recovered from the estate of the deceased sole plaintiff, or surviving plaintiff; or the Court may, if it think proper, on the application of the defendant, and upon such terms as to costs as may seem fit, pass such other order for bringing in the legal representative of the deceased sole plaintiff or surviving plaintiff, and for proceeding with the suit in order to a final determination of the matters in dispute, as may appear just and proper in the circumstances of the case.]

Proceeding in case of death of sole or sole surviving plaintiff.