Against this decision the third defendant again appealed.

Bhashyam Ayyangar for the Appellant.

Sundaram Sastri for the Respondent.

The Court (TURNER, C.J., AND MUTTUSAMI AYYAR) delivered the following.

Judgment :—The plaintiff and first and second defendants are the sons of Arunachalam Pillai, who is alive but not a party to the suit. The first and second defendants being minors, are represented by their mother as guardian. The plaintiff seeks to obtain his one-fourth share in the property in suit, which is found to have been ancestral, and which was sold in execution of a decree ordering a sale to satisfy a mortgage execution to Seshayyangar by Arunachellum Pillai, and purchased by the third defendant, a stranger.

The Munsif found the mortgage debt had been contracted for family purposes. As the mortgage was made by the father and the decree passed against him, this case falls within the ruling in *Girdharee Lall* (L. R., 1 I A. 321) and affirmed in *Suraj Bunsi Koer* (L. R., 6 I.A., 88), which this Court has by a majority declared to be binding on it. (I.L.R., 4 Mad , 2.) The appeal must be allowed, and the decrees of the Courts below being reversed, the claim must be dismissed ; but, in view of the doubt entertained as to the law, without costs.

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[113] APPELLATE CIVIL.

The 18th July, 1881

PRESENT :

MR. JUSTICE KINDERSLEY AND MR. JUSTICE TARRANT.

Perlathail Subba Rau and another.....(Plaintiffs), Appellants

and

Mankude Narayana and another.....(Defendants), Respondents.*

Canarese mortgage—Iladarawara—Lease—Madras Regulation XXXIV of 1802.

Madras Regulation XXXIV of 1802, which applies to usufructuary mortgages executed before the passing of Act XXVIII of 1855, does not apply in the case of an Iladarawara mortgage in South Canara, which, securing to the mortgagee the use and occupation of land for a long term, amounts to a lease of the property for the term agreed upon.

THE facts of this case appear sufficiently, for the purpose of this report, in the **Judgment** of the Court (KINDERSLEY and TARRANT, JJ.).

Mr. *Powell* for Appellants.

Ramchandra Rau Sahib for Respondents.

Mr. *Powell.*—Act XXVIII of 1855 virtually repeals the Regulation of 1802. Section 4 declares usufructuary mortgages binding on the parties. In S. A. 107 of 1880 the Regulation was held to apply to Iladarawara mortgages. Though the Regulation was repealed it applies because the vested rights of the parties

* Appeal No. 112 of 1880 against the decree of K. R. Krishna Menon, Subordinate Judge of South Canara, dated 6th March 1880.

were reserved by the repealing Acts (Madras General Clauses Act, 1867, Section 4). Madras Act II of 1869 repeals Regulation XXVIII of 1855, but does not affect rights acquired, The Regulation applies to all usufructuary mortgages. Macpherson shows that a similar Regulation (XV of 1793) applied in Bengal (p. 121, ed. vi).

Kindersley, J.—The parties agreed here that there was to be no account. The law says there is to be an account; after thirty years that seems hard.)

The definition of this kind of mortgage is given in 1 M. H. C. R., 81. It is like a Zuripeshgi mortgage (Macpherson, p. 8). The condition not to claim account does not bar the Regulation. [114] (Reference was also made to 12 M. I. A., p. 157; the *Jurist* of January 1880, p. 24; Macpherson, p. 167; and S. A. 160 of 1875 and 37 of 1879.)

Counsel was then stopped by the Court.

Ramchandra Rau Sahib.—The Regulation was never applied to a case like this, where the document is clear as to enjoyment for a term of years and loan was made on that ground.

(KINDERSLEY, J.—What do you say to Section 8? Does it apply?)

It is not redeemable before time expires (Civil Miscellaneous Appeal 209 of 1879). In the case of Otti mortgages there is no case where the Regulation was applied.

(TARRANT, J.—The question could not well arise; the term is too short.)

The Regulation is restrictive, and must be construed strictly and confined to cases clearly within the meaning of the term used. Here there is a lease as well. I cannot say what the Bengal cases were.

(TARRANT, J.—They are just such cases. Can you show anything in Section 8 which does not apply to you?)

Mr. *Powell.*—The mortgage was paid off in 16 years.

Judgment:—This was a suit to redeem two mortgages. The first plaintiff is the purchaser of the equity of redemption from the second plaintiff.

It was alleged in the plaint that the second plaintiff and her uncles had mortgaged a portion of the property with possession to the second defendant and to the third defendant's brother in 1848; and that, on the 23rd November 1850, the second plaintiff and her uncle had mortgaged the whole of the property in question to the first defendant's father, with possession of so much as was not already in the possession of the second defendant.

The plaintiffs now sue under the terms of Regulation XXXIV of 1802, alleging that the principal amount, with simple interest, has been recovered by the mortgagees from the usufruct. The first plaintiff prays for possession and that an account may be taken, and offers to pay any sum which may be found due.

The first defendant answered that this was an Iladarawara mortgage for 60 years, which his father had consented to take with the hope of improving the property; that the value of the produce did not exceed 12 per cent. on the mortgage amount; that it was [115] agreed that no accounts need be kept, but the produce was to be taken in the lieu of interest; that the produce was les sthan had been represented; that Regulation XXXIV of 1802 did not apply; and that, under the local law, the plaintiff could not redeem before the term of 60 years had expired.

The Subordinate Judge was of opinion that the Regulation did not apply to an Iladarawara* mortgage, which, like the Otti mortgage of Malabar, was essentially a tenure for a term of years, the use of the land for that term being the chief consideration for advancing the money. He observed that in Malabar there was no instance during 78 years of an Otti being held to be governed by the Regulation. He found that the mortgage amount had been recovered from the usufruct of the land. But on the ground that the mortgagee had a right to hold until the end of his term, he dismissed the suit with costs.

The plaintiffs appealed on the ground that the mortgage was governed by the Regulation, and that no custom to the contrary had been proved as obtaining in Canara in respect of an Iladarawara mortgage.

Regulation XXXIV of 1802 has been correctly described as a Regulation to enact general rules regarding the interest on money. Then the 8th section runs as follows:—"In cases of mortgages of real property in which the mortgagee may have had the usufruct of the mortgaged property, whether he shall have held it in his own possession or not, the usufruct shall be allowed to the mortgagee in lieu of interest agreeably to the former custom of the country, provided it shall have been so stipulated between the parties, and provided such agreement may have been made prior to the issue of this Regulation. In cases of such agreements bearing date subsequently to the issue of this Regulation, the same interest only shall be allowed on such mortgage bonds as is allowed on other bonds granted on, or subsequently to, such date; and all such mortgages shall be considered to be virtually and in effect cancelled, and redeemed whenever the principal sum of money, with the simple interest due upon it, may have been rceovered [116] from the usufruct of the mortgaged property or otherwise liquidated by the mortgagor."

This section is almost in the same terms as Section 10 of the Bengal Regulation XV of 1793, the principal difference being that the Bengal Regulation fixed the 28th of March 1780 as the date after which usufructuary mortgages were to be governed by the new law. In the case of Shah Mukhun Lall *v.* Baboo Sree Kishen Sing (12 M. I. A., 190) the Judicial Committee thus explain the Bengal enactment:—"As to mortgages executed before the 28th March 1780, the usufruct might be allowed even after the Regulation in lieu of interest up to that date. Then after that date, that dividing point of time, and subsequently to it the character of these mortgages suffered a change. The mortgage possession, instead of enduring by title for the stipulated time, was made liable to abridgement by satisfaction from the usufruct, and a claim to interest arose where it did not exist before. The perception of the profits in many cases did not constitute the receipt of interest, but was in lieu of any."

The intention of both of these Regulations appears to have been to limit the interest on money, and to prevent an usufructuary mortgage from being made the indirect means of securing the equivalent of a higher rate of interest than that allowed by law.

Act XXVIII of 1855 was, as appears from the preamble, enacted to repeal the laws then in force relating to usury; and the schedule shows that Section 8 of Madras Regulation XXXIV of 1802 was repealed so far as it limited the rate of interest not mortgage bonds. These words appear to us in effect to repeal so much of Section 8 as enacted that only the same rate of interest as was allowed on other bonds should be allowed on future usufructuary mortgages.

*A mortgage of land with possession, sometimes for a stipulated period, the rent taking the place of all interest on the loan as well as providing for the Government revenue; the land to be redeemable on payment of the debt—(*Wilson*). See 1 M. H. C. R., 81.

All of Regulation XXXIV of 1802, which had not been repealed already, was repealed by Madras Act II of 1859, which however does not affect any right already acquired.

As to the effect of Act XXVIII of 1855 we observe that, not only does it repeal so much of Section 8 of the Regulation as limited the rate of interest to be allowed on mortgages, but the 4th section of the Act is in these terms :—" A mortgage, or other contract for the loan of money, by which it is agreed that the use [117] or usufruct of any property shall be allowed in lieu of interest, shall be binding upon the parties." This is entirely at variance with the latter part of the 8th section of the Regulation. The only question is whether this 4th section of the Act applies to mortgages executed after the passing of the Regulation, but before the passing of the Act. Now the change effected by the Act was not merely a change of procedure. It also affected the rights of the parties to contracts; and it would be reasonable to assume, in the absence of express legislation to the contrary, that the rights of parties should be governed by the law in force at the time at which the contract was made. It appears from Macpherson on Mortgages, 6th ed., p. 161, that in the Bengal Presidency this enactment has been held to apply only to mortgages executed after the passing of the Act. And the Judicial Committee of Her Majesty's Privy Council have adopted and acted on this construction in the case of Nawab Azimut Ali Khan *v.* Jowahir Singh (13 M. I. A., 404). The case of Shah Mukhun Lall *v.* Baboo Sree Kishen Sing (12 M. I. A. 190) is not in point, because that suit had commenced before the passing of Act XXVIII of 1855.

The Subordinate Judge has pointed out that in the case of Manjanha Naik *v.* Viswadisha Tirta Swami (Special Appeal 160 of 1875), this Court applied the Regulation to an Iladarawara mortgage. But that part of the judgment which relates to this question is comprised in these few words :—" The Regulation of 1802, so far as it is unrepealed, applies to this case." As every part of the Regulation had been repealed by Act XXVIII of 1855 and by Madras Act II of 1869, the effect of the decision is not very clear. In a more recent case, Iswara Bhut *v.* Mutta Bhut (Second Appeal 107 of 1880), this Court held that the Regulation applied to an Iladarawara mortgage in South Canara. The material part of the judgment is in these words :— " The regulation applied at date of the mortgage of 1849, and the rights of the parties under the Regulation were preserved by the repealing Act." It is to be regretted that the judgment is silent as to the effect of Act XXVIII of 1855, which had been noticed in the Lower Courts.

But assuming, as we must now do, that Regulation XXXIV of 1802 still applies to usufructuary mortgages executed before the [118] passing of Act XXVIII of 1855, the question remains, whether it applies to that peculiar kind of mortgage known in Canara as Iladarawara. This kind of mortgage in Canara is said to have been originally like an Otti mortgage in Malabar, where the Otti holder has the right of pre-emption and the preferential right to make any further advances on the property. The Otti was a mortgage for not less than 12 years, and usually for a longer term (1 M. H. C. R., 261 and 356). The Otti mortgage is usually for so large a sum as to leave the landlord a mere peppercorn rent, the mortgagee becoming, for the term of the mortgage, little less than proprietor. The land being mortgaged for its full value, the patam is taken in lieu of interest. (*See* Major Walker's Report in 1801).

In the case of an Iladarawara for a long term of years, the mortgagee hopes, by careful cultivation and improvement of the soil, to make a profit, which would not represent the interest on the loan, but the return for his own

industry and expenditure on the land; and for this purpose it is essentially necessary that he should have possession till the end of the term. In such a case it should not be maintained that justice would be done to the mortgagee by repaying the loan before the expiration of the term. In the case of Moshook Ameen Suzzada *v.* Marem Reddi (8 M. H. C. R., 31), the late Chief Justice said: "If we find here that the transaction was a mortgage, then justice will be done by allowing the money to be paid. If, on the other hand, we find that it was practically a sale of the property for 55 years, then it cannot be set aside." It appears to us that in South Canara an Iladarawara is usually something more than an ordinary mortgage, which is called by another name. When, as in the present case, the Iladarawara is for a long term of years, it amounts to a lease of the property for the term agreed upon, and justice cannot be done by the repayment of the loan before the expiry of the term. But the terms of the document in each case will determine whether the intention is to create such a lease.

It is settled that in the case of an Otti mortgage for a term of years it is not competent to the mortgagor to redeem before the arrival of the appointed time, Keshava *v.* Kesbava (I. L. R., 2 Mad. 45) and in his judgment in the present case the Subordinate Judge cannot recall **[119]** a single instance in which the Regulation has been applied to an Otti mortgage. In Special Appeal 160 of 1875 and Second Appeal 107 of 1880, already referred to, the peculiar character of an Iladarawara mortgage for a term of years has not been noticed. In the case of Chandu *v.* Tayannur Chatwand, Second Appeal 87 of 1879 from South Canara, it was held that the Iladarawara mortgagee had a right to hold the land, and could not be redeemed until the end of his term. And in the case of L.Naraina Bhatta *v.* K. Naraina Bhatta (Civil Miscellaneous Appeal 209 of 1879), the Court said: "It appears to us that the intention of the parties to the contract was that the mortgagee advancing his money should have the use of the land for a period of use, and not merely that he should hold it as a security for the repayment of the sum advanced by him. He may well have desired to purchase with his money a durable interest in property. And it may be he would have been unwilling to lend his money, except in such a manner as to secure that result. The language of the instrument is sufficient to show that an enjoyment for the term claimed was stipulated.

Regard must be had in every case to the language of the instrument. And in the present case, the instrument clearly secures to the mortgagee the use and occupation of the land for 60 years. To a contract of this kind we must hold that the Regulation does not apply.

This appeal is dismissed with costs.
