

the respondent No. 1 had in the property mortgaged was, in the circumstances of this case, a valid sale.

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* * * * *

Upon other questions arising in the suit issues were sent down for trial, and on 7th January 1888 the decree of the lower Court was reversed by Kernan and Parker, JJ.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

PERAYYA (DEFENDANT), APPELLANT,

and

VENKATA (PLAINTIFF), RESPONDENT.*

1888.
April 5, 28.

Transfer of Property, Act 1882, s. 60.

The breach of a condition in a mortgage deed to the effect that on default of payment on a certain date, the mortgage shall be deemed an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of the proviso to s. 60 of the Transfer of Property Act, 1882.

APPEAL from the decree of J. Kelsall, District Judge of Vizagapatam, reversing the decree of K. Murtirazu, District Munsif of Yellamanchili, in Suit 317 of 1886.

Plaintiff alleged that on 24th October 1885 he borrowed Rs. 200 from defendant and executed a deed mortgaging certain land to defendant: that he retained possession thereof under a lease from defendant (which had expired) and that he tendered the amount due on the 14th April 1886, but that defendant refused to receive the amount or to return the mortgage bond. The deed contained a condition that if the amount due was not paid on the 4th April the mortgage deed was to be considered as a deed of absolute sale.

The defendant pleaded that the condition "was intentionally inserted for enforcement, and not for the purpose of fear," as alleged in the plaint.

The Munsif framed an issue as to whether it was the intention of the parties that the condition for sale should take effect absolutely on the expiry of the term fixed for payment. No evidence

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was led, and the Munsif decided in favor of the defendant, on the ground that plaintiff adduced no evidence to show that it was not the intention of the parties that the condition should take effect.

On appeal, the District Judge decreed for plaintiff, holding that s. 60 of the Transfer of Property Act was enacted to carry out the recommendations of the Privy Council in *Thumbusaamy Moodelly v. Hossain Rowthen*(1), and that the provision in the mortgage deed was not an extinguishment by act of parties.

Subba Rau and Venkata Subba Rau for appellant.

Mr. *Powell* for the respondent.

The Court (Muttusami Ayyar and Shephard, JJ.) delivered the following

JUDGMENT:—The defendant appeals against a decree for redemption of a mortgage, dated the 24th October 1885, and his contention is that the Lower Appellate Court was wrong in having granted such a decree, inasmuch as the plaintiff possessed no right of redemption, the mortgage being by way of conditional sale. It was necessarily admitted that the case was governed by the Transfer of Property Act, but the point taken was that the proviso to s. 60 was applicable to the circumstances. It was said that, if there was otherwise a right of redemption, that right was extinguished by act of the parties within the meaning of the proviso to s. 60. According to this argument the stipulation in the mortgage instrument, that if the money is not paid within the date fixed, the instrument shall itself be considered as an absolute sale-deed, coupled with the fact of failure to pay within the time fixed, must be deemed to be an act of the parties extinguishing the right of redemption. In our judgment this is not a tenable position, and the act of parties, a phrase used here and elsewhere in the Act in contradiction to "operation of law," must denote a release or other such transaction standing apart from the mortgage transaction under which the right of redemption comes into existence. There is no extinguishment of the right by act of parties when, by virtue of a stipulation contained in the very contract under which the right is created, that right ceases to exist. It was further argued that, notwithstanding the provisions of the Act, effect must be given to the decisions with regard to mortgages by conditional sale delivered before the Act came into force, *Pattabhiramier v. Vencatarow Naicken*(2), *Thumbu-*

(1) I.L.R., 1 Mad., 1.

(2) 13 M.I.A., 560.

sawmy Moodelly v. Hossain Rowthen(1), and reference was made to cases in which the Judicial Committee held that in this Presidency there was no right of redemption remaining after the sale had once become absolute by reason of default in payment of the amount due within the appointed time. In our judgment, it is to the Act, and not to these decisions with reference to the law as it stood independently of legislation, that regard must now be had. According to the Act, an instrument such as that here in question is a mortgage, and there is nothing in s. 60 to show that any distinction was to be made between one class of mortgage and another. The words "in the absence of a contract to the contrary," which are to be found in the section declaring the rights of the mortgagee (s. 67), are not to be found in this section.

Although the law with regard to conditional sale has, by the operation of this Act, been altered as far as this Presidency is concerned, by conferring on the mortgagor a right which he did not possess before, it is otherwise in the territories to which the Bengal Regulations I of 1798 and XVII of 1806 applied. Under those Regulations, the mortgagor enjoyed a right of redemption, which the common law did not allow him; and those Regulations are repealed by the Act. The result, according to the appellant's contention, would be that in Bengal a mortgagor under an instrument of conditional sale would be deprived of the right of redemption which under the above-mentioned Regulations he has hitherto enjoyed. It would be difficult to accept a view, which led to such a result, and this view of the operation of the Act has not even been suggested in the cases in which the question has been discussed whether the plaintiff-mortgagee should obtain a decree in the manner provided in the Regulations or in the terms of s. 86 of the Transfer of Property Act, a section which prescribes a form of decree wholly inappropriate to a case where the right of redemption is not recognized, *Bay Nath Pershad Narain Singh v. Moheswari Pershad Narain Singh*(2) and cases there cited. For these reasons, we hold, that the Lower Appellate Court was right in granting the plaintiff a decree for redemption, and we dismiss the appeal with costs.

(1) I.L.R., 1 Mad., 1.

(2) I.L.R., 14 Cal., 451.