

VAIBANANDA  
NADAR  
v.  
MIRAKAN.  
ROWTER.

“in places where the Transfer of Property Act is in force, all leases for a term exceeding one year are compulsorily registrable. The order of Government was passed when the Act VIII of 1871 was in force and applied to all leases which reserved an annual rent less than Rs. 50 and extended for a term of not more than five years. When Act IV of 1882 was passed, this notification became abrogated so far as leases other than agricultural were concerned, as section 107 requires leases for terms of more than a year to be registered. What little doubt there was about registration was removed by Act III of 1885, which directs that the Transfer of Property Act shall be read as supplemental to the Indian Registration Act. In this view I am supported by the opinion expressed in ‘Field’s Evidence,’ fifth edition, page 446.”

Mr. J. Adam for plaintiff.

Ramakistna Ayyar for defendant.

JUDGMENT.—Section 107 of the Transfer of Property Act is declared to be read as supplemental to the Registration Act. It is therefore to be read with section 17 (d) of the Registration Act. The proviso to that clause must, therefore, be restricted to cases not falling under section 107 of the Transfer of Property Act, which absolutely requires the registration of the leases referred to therein. Our answer to the question therefore is that leases falling under section 107 of the Transfer of Property Act, are compulsorily registrable notwithstanding the Government notification issued under the proviso to clause (d), section 17 of the Registration Act.

## APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

KANARAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KUTOOLY AND ANOTHER (DEFENDANTS), RESPONDENTS.\*

1897.  
September  
14.  
November  
4.

*Mortgage—Agreement by mortgagor to sell the mortgage premises to the mortgagee—Fetter on the equity of redemption.*

A stipulation in a mortgage, that if the mortgage money is not paid on the due date the mortgagor will sell the property to the mortgagee at a price to be

\* Second Appeal No. 33 of 1897.

fixed by umpires, is unenforceable as constituting a fetter on the equity of redemption.

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v.  
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SECOND APPEAL against the decree of B. Macleod, Acting District Judge of North Malabar, in Appeal Suit No. 132 of 1896, confirming the decree of V. Raman Menon, District Munsif of Quilandy, in Original Suit No. 1 of 1895.

The plaintiff No. 1 was the karnavan of the tarwad to which defendant No. 1 belonged, and the plaintiff No. 2 was a lessee under plaintiff No. 1. In 1882 the predecessor of the plaintiff No. 1 mortgaged certain property to the defendant No. 1 under a document filed as exhibit I in the suit. The present suit was brought to redeem this mortgage. Defendant No. 2 was a tenant under the mortgagee. The defendant relied upon a stipulation in exhibit I to the effect that if the mortgage was not paid off within three years from the date when it was executed, the mortgage premises should be sold to her for a price to be settled by umpires, and she claimed that as the mortgage had not been discharged, she was entitled to enforce the contract to sell the properties to her. The District Munsif dismissed the suit and his judgment was confirmed on appeal by the District Judge.

The plaintiff preferred this second appeal.

*Narayanan Nayar* for appellants.

*Ryru Nambiar* for respondent No. 1.

JUDGMENT.—The most important question in the case is whether the agreement in the mortgage (exhibit I) to sell the mortgaged property to the mortgagee in default of payment of the mortgage money is binding upon the mortgagor. Neither of the Courts below has considered this question. They have proceeded to deal with the agreement of sale as if it were valid. On the question as to its validity we have no hesitation in holding against it.

It is the policy of the law that the right of redemption in a mortgagor shall not be fettered or clogged in any manner or to any extent by an agreement between mortgagor and mortgagee, saving transactions between the parties as would operate as an extinguishment of the right. (See proviso to section 60 of the Transfer of Property Act)—a transaction to have this effect must naturally be one entered into after the mortgage. (See *Perayya v. Venkata*(1)).

(1) I.L.R., 11 Mad., 403.

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The present case is no doubt not governed by the terms of the Transfer of Property Act, the mortgage being prior to it, but at the date of the mortgage the law was substantially the same. Since 1858 the principles applicable to mortgages in this Presidency are those administered by the Courts of Equity in England, according to which agreements derogating from the right of redemption are treated as unenforceable. This principle is most strongly illustrated in the case of mortgages by conditional sale where the condition is held by the Courts to be inoperative. For other instances of the application of the principle, it is sufficient to refer to the cases at *Mahomed Muse v. Jijibhai Bhagvan*(1) and *Sayad Abdul Hak v. Gulam Jilani*(2) and to two recent English cases (*Field v. Hopkins*(3) and *Salt v. Marquess of Northampton*(4)). In this case the effect of the agreement was practically to deprive the mortgagor of the right to redeem after three years. The agreement must therefore be held to be invalid, and the defendants' contention that plaintiffs are precluded by the above agreement from seeking to redeem fails. It becomes unnecessary to consider the other objections taken to the validity of that agreement.

The result is that the second plaintiff will be entitled to redeem if the lease to him by first plaintiff is binding on the tarwad, and if it is not, the first plaintiff will be entitled to redeem on an amendment of the plaint to that effect. The Lower Appellate Court has not given a finding on the fourth issue which refers to the validity of the lease to second plaintiff. The District Judge will now submit a finding upon it on the evidence on record, within one month from the date of the receipt of this order. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

[The District Judge found that the lease was valid and in the result the High Court reversed the decrees of both the Lower Courts, and ordered that a redemption decree be drawn up in favour of second plaintiff on payment by either plaintiff of Rs. 75 to first defendant.]

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(1) I.L.R., 9 Bom., 524.

(2) I.L.R., 20 Bom., 677.

(3) L.R., 44 Ch. D., 524.

(4) 1892, App. Cas., 1.