

himself bear the costs incurred in printing pages 22 to 26 and 28 to 42. FAKKERAPPA
v.
THIPPANNA.

For similar reasons the Civil Miscellaneous Appeal No. 234 of 1911 is dismissed with costs. SADASIVA
AYYAR AND
SPENCER, JJ.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

S. SRINIVASA AYYANGAR AND FOUR OTHERS (DEFENDANTS),
APPELLANTS,

1913.
November
12.

v.

RADHAKRISHNAM PILLAI (PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), ss. 60 and 98—Mortgage deed, simple and usufructuary combined—No anomalous mortgage—Redeemable—Mortgagee, to be vendee on mortgagor's failure to pay at the stipulated time—Whether mortgage by conditional sale.

Where a usufructuary mortgage deed provided that if the mortgage amount was not paid on the stipulated date, the mortgage was to work itself out as a sale for the principal amount and further contained a covenant that the mortgagor would pay to the mortgagee the costs of the construction of earth-work, etc., on the date fixed for redemption as per the accounts of the mortgagee,

Held, that it was not an anomalous mortgage as defined in section 98 of the Transfer of Property Act, the word "not" in section 98 governing equally the words "a combination of the first and third, or the second and third of such forms" in the section; and that therefore it was redeemable.

Amarchand v. Kila Marar (1903) I.L.R., 27 Bom., 600 and *Ammanna v. Gurumurthi* (1893) I.L.R., 18 Mad., 64, dissented from.

Perayya v. Venkata (1888) I.L.R., 11 Mad., 403 and *Ankinedu v. Subbiah* (1912) I.L.R., 35 Mad., 744, followed.

Per SADASIVA AYYAR, J.—It is a combination of a simple mortgage and a usufructuary mortgage clogging the equity of redemption.

A mortgage deed which begins as a mortgage transaction, cannot be called a mortgage by conditional sale, though it is a mortgage giving the mortgagee, after a certain time and on breach of certain conditions, a right to claim title as vendee.

* Appeal Against Order No. 282 of 1912.

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Per SPENCER, J.—It is either a usufructuary mortgage deed with a clog on the equity of redemption or a usufructuary mortgage combined with a mortgage by conditional sale and in either case redeemable under section 60 of the Transfer of Property Act.

Gopalasami v. Arunachella (1892) I.L.R., 15 Mad., 304, referred to.

Kangayya Gurukul v. Kalimurthi Annavi (1904) I.L.R., 27 Mad., 526, distinguished.

APPEAL against the order of remand passed by E. L. THORNTON, the District Judge of Trichinopoly, in Appeal No. 435 of 1911, preferred against the decree of V. K. DESIKACHARIAR, the Subordinate Judge of Trichinopoly, in Original Suit No. 18 of 1911.

The facts of the case are set out in the judgment of SADASIVA AYYAR, J.

A. S. Cowdell (not present), *T. Rangachariar* and *C. V. Ananthakrishna Ayyar* for the appellants Nos. 1 and 3 to 5.

N. Rajagopalachariar for the second appellant.

S. Srinivasa Ayyangar and *K. V. Krishnaswami Ayyar* for the respondent.

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SADASIVA AYYAR, J.—This is an appeal against an order of remand. The appellants are the defendants.

The plaintiff sued for redemption of a mortgage created in 1884. This mortgage document (Exhibit A) begins by calling itself a usufructuary mortgage, and, in two or three places in the course of the deed, it is expressly called a usufructuary mortgage deed. It, however, contains a clause that, if the mortgage amount was not paid on a date which is stipulated in the document at an interval of exactly nine years from the date of the document, the mortgage was to work itself out as a sale for the principal amount due on the mortgage bond. Possession was given to the mortgagee in accordance with the nature of the document and its spirit. At the end, there is a covenant to this effect. "I, the mortgagor, shall pay to you the costs of the construction of earthwork, etc., on the date fixed for redemption as per your accounts along with the mortgage money."

The question is, what is the nature of this document. It is contended by the appellants' learned Vakil that this is a combination of three kinds of mortgages, a simple mortgage, a usufructuary mortgage and mortgage by conditional sale. The plaintiff's contention on the other hand, is that it is usufructuary mortgage with a covenant at the end clogging the equity of redemption. I am inclined to think that it is a combination of

a simple mortgage and a usufructuary mortgage with a covenant clogging the equity of redemption. I think it cannot be called a mortgage by conditional sale or it was executed after the Transfer of Property Act came into force, and it does not come within the definition of a mortgage by conditional sale found in section 58, clause (c) of the Transfer of Property Act. There is no ostensible sale of the mortgaged property on the date of the document. It is what was known as the Hindu form of the mortgage by conditional sale before the Transfer of Property Act was enacted; but it seems to me that the definition given in section 58, clause (c) of the Act was expressly framed so as to exclude this Hindu form of mortgage by conditional sale from the definition of mortgage by conditional sale in the Transfer of Property Act. That Hindu form of mortgage by conditional sale which began as a mortgage and worked itself out as a sale on breach of certain conditions by the mortgagor formed the subject of several decisions of the High Courts and the Privy Council, and because much confusion resulted from conflicts between those decisions, their Lordships of the Privy Council expressly stated in *Thumbusawmy Moodelly v. Hossain Rowthen*(1). "An Act" of the Legislature "affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding and giving to the mortgagee the means of obtaining such a foreclosure, with a reservation in favour of mortgagees whose titles, under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law, without injustice to any party." I think that the Transfer of Property Act, so far as the Hindu form of mortgage by conditional sale was concerned, treated it as a mortgage either simple or usufructuary according to its terms and treated the condition as to its afterwards working out as a sale as not enforceable by enacting section 60 in the Act which gives to the mortgagors generally a right to redeem. A mortgage deed which begins as a mortgage transaction cannot, in my opinion, be called a mortgage by conditional sale—though it is a mortgage which gives the mortgagee after a certain time and on breach of certain conditions by the mortgagor a right to claim a title as vendee. It is a mortgage with a clause providing for a future conditional sale and not a mortgage by means of a present sale transaction.

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(1) (1875) I.L.R., 1 Mad., 1 at p. 23.

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If, then, this document is not a mortgage by conditional sale it is clearly a usufructuary mortgage according to the definition in section 58, clause (d) of the Transfer of Property Act. I think that as there is the covenant at the end by the mortgagor which expressly says: "I shall pay some monies along with the mortgage money on the date of redemption," the document might according to its literal construction, be treated as containing a personal covenant to pay the mortgage money; and following *Rama Brahmam v. Venkatanarasu Puntulu*(1), I would hold that, owing to the existence of that covenant, it is also a simple mortgage. Hence the document becomes a combination of a simple and a usufructuary mortgage.

It was next contended that even a combination of a simple and a usufructuary mortgage is an anomalous mortgage under the definition of section 98 of the Transfer of Property Act. That section is as follows:—"In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, or usufructuary mortgage or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and, so far as such contract does not extend, by local usage." The construction sought to be put by the appellants' learned vakil upon this section is that the words 'in the case of a mortgage being' should be understood before the words, 'a combination of the first and third.' I do not think that this is a reasonable construction of the section. I think the meaning is "or in the case of a mortgage not being a combination, etc."

Reliance was placed upon the decision in *Amarchand v. Kila Marar*(2). In that case the respondent was not represented, and I think that that case was wrongly decided. Reference was also made to *Ramayya v. Guruva*(3). No doubt, there is an observation in that case that the Subordinate Judge who decided the case in the lower Court treated the mortgage in question in that case as an anomalous mortgage; but I do not think that the learned judges of this Court intended to state that that opinion of the Subordinate Judge was correct. Again, reference was

(1) (1912) 23 M.L.J., 131.

(2) (1903) I.L.R., 27 Bom., 600.

(3) (1891) I.L.R., 14 Mad., 232.

made to *Ammanna v. Gurumurthi*(1). There is an observation there that the transaction evidenced by the document in question in that case was a mortgage by way of conditional sale as defined in section 58, clause (c) of Act IV of 1882. That observation was not necessary for the decision in that case, and with the greatest respect I dissent from that observation though it seems to be accepted without criticism by Shephard and Brown (page 238) and by Gour (section 1044) in their commentaries on the Transfer of Property Act. In the result, I hold that the mortgage deed in this case is not an anomalous mortgage as defined in section 98 of the Transfer of Property Act, but it is a combination of a simple mortgage and a usufructuary mortgage and hence that it is redeemable. That, in the case of such a mortgage, the provisions of section 60 would apply seems to me to be clear from the observations in page 707 of Macpherson in his book on the Law of Mortgage. *Perayya v. Venkata*(2), also shows that the right of redemption is not extinguished by the existence of a covenant at the end of the mortgage deed similar to the terms given in the present mortgage deed [see also *Ankinedu v. Subbiah*(3), where even less onerous terms were held not to destroy the right of redemption].

In this view, it is not necessary for me to consider the question whether the learned District Judge was right in his view that, even if it was an anomalous mortgage, section 60 of the Transfer of Property Act would allow the mortgagor to redeem the mortgage and that the terms of section 98 should be read subject to the provisions of section 60 and other sections of the Transfer of Property Act. I need only say that I would find it very difficult to hold that the express terms of section 98 which are intended to apply specially to anomalous mortgages can be controlled by the provisions of the previous sections of the Act which deal with other matters.

In the result I would dismiss the appeal with costs.

SPENCER, J.—I agree with my learned brother in the interpretation he has put on section 98 of the Transfer of Property Act. I find it quite impossible to read the words “or a combination of the first and third, or the second and third, of such

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(2) (1886) I.L.R., 11 Mad., 403.

(3) (1912) I.L.R., 35 Mad., 744.

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forms" as not being governed by the negative which comes at the beginning of the sentence. If a different construction is to be put on this section, it would be necessary to imply the words "in the case of" between the words "or" and "a combination, etc." This would be a violation of the meaning of the plain English of the sentence. I am unable to follow the statement of the learned judges, who decided *Amarchand v. Kila Marar*(1), that a combination of a simple mortgage and a usufructuary mortgage is an anomalous mortgage provided for by section 98. Mr. Gour in paragraph 1603 of his book on the Law of Transfer in British India treats this statement as an oversight and in paragraph 1606 speaks of there being six, and only six, forms of mortgage eliminated by this section from the category of anomalous mortgages.

As regards the mortgage deed (Exhibit A) as I read the document, I am inclined to treat it as either a usufructuary mortgage deed with a clause containing a clog on the equity of redemption, or a usufructuary mortgage deed combined with a mortgage by conditional sale. In either case, it will be subject to the conditions of section 60 of the Transfer of Property Act and no act of the parties other than a transaction outside the mortgage deed itself will extinguish the right of redemption—*vide Perayya v. Venkata*(2).

The words which provide for the payment of repairs, improvements, etc., along with the mortgage money are evidently intended only to take effect in the event of the mortgage being redeemed. I do not consider that they constitute a personal undertaking to pay, nor are there any other words in this document which can be construed as a personal covenant, express or implied, to pay the mortgage money—compare—*Gopalusami v. Arunachella*(3). In this respect this case may be distinguished from that of *Kangaya Gurukul v. Kalimutha Annavi*(4), in which a personal promise to pay was contained in the words. "We shall cause Rs. 200 to be paid and we shall redeem our land."

If section 58, clause (c) of the Transfer of Property Act is to be read strictly, it is necessary that there should be an ostensible sale of the mortgaged property to constitute a mortgage

(1) (1903) I.L.R., 27 Bom., 600.

(2) (1888) I.L.R., 11 Mad., 403.

(3) (1892) I.L.R., 15 Mad., 304.

(4) (1904) I.L.R., 27 Mad., 526.

by conditional sale. There are no words in Exhibit A which, by themselves, create a sale; but the document implies that if payment is not made by the stipulated date, the property shall be held and enjoyed by the mortgagee as if he had obtained it by absolute sale. In some cases, such words have been treated as a mortgage usufructuary by conditional sale. Instances are given in paragraph 1605, page 1025 of Mr. Gour's book. The next paragraph describes anomalous mortgages.

In *Tukaram v. Ramachand*(1), the document which passed the ownership of the property usufructuarly mortgaged in case of failure to pay the mortgage money on the prescribed date, was construed as an anomalous mortgage. But in that case, the usufructuary mortgage seems to have been combined with a lease and that may have led the learned judges to treat it as an anomalous mortgage. Whether the present document be treated as an usufructuary mortgage combined with a mortgage by conditional sale, as the Lower Appellate Court treated it, or a usufructuary mortgage with a clog on the equity of redemption,—in either case, the judgment of the Lower Appellate Court will have to be upheld and this appeal dismissed with costs, and I therefore agree in the order proposed by my learned brother.

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(1) (1902) I.L.R., 26 Bom., 252.