

NACHIMUTHU
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information to the village magistrate is ordinarily the first step in setting the criminal law in motion . . . The injured person hardly ever gives information direct to the Station-house officer of police . . . He almost invariably gives information, or makes his complaint, to the village magistrate, well knowing that the latter will report the information or complaint to the Magistrate or the Station-house officer . . . The case would, of course, be different if the information or complaint was not a matter which the village headman was bound by law to pass on to the higher constituted authorities."

I agree with this view, and in the conclusion at which my learned colleague has arrived. The petition will be dismissed.

S.V.

APPELLATE CIVIL.

*Before Mr. Justice Spencer and Mr. Justice Kumaraswami
Sastriyar.*

HAKEEM PATTE MUHAMMAD (PLAINTIFF), APPELLANT,

v.

29M/2525
SHAIK DAVOOD (THIRD DEFENDANT), RESPONDENT.*

1915.
August 3, 4
and 10.

Transfer of Property Act (IV of 1882), ss. 58, 60 and 98—Possessory mortgage in 1894 for one year with a covenant to treat it as sale, in default of payment—Anomalous mortgage—No right to redeem after one year.

A document of 1894, which was described as a "Swadina Tanaka Meddatu Sharatu Pattiram" which may be translated as a possessory mortgage deed containing a condition for a period fixed, contained among others, the following terms: "within these limits a house-site together with a thatched house thereon we have mortgaged, that is, we have kept it as a possessory mortgage and have received Rs. 10 from you. So having paid the principal and interest pertaining to these Rs. 10 within the end of a year from the said date we shall take possession of our house and site. If we do not act according to the said condition we shall quit the land and house as if this is a sale."

In a suit for redemption brought after the date fixed for redemption,

Held, that the transaction was an anomalous mortgage as described in section 98 of the Transfer of Property Act (IV of 1882), that the rights of the parties were governed by the terms of the mortgage document and that

accordingly the plaintiff had no right to redeem after the period of one year fixed by the document.

The right of redemption given by section 60 of the Transfer of Property Act to every mortgagor has no application to cases governed by section 93 of that Act.

Sreenivasa Iyengar v. Radhakrishna Pillai (1915) I.L.R., 38 Mad., 667, referred to.

Usman Khan v. Dasanna (1914) I.L.R., 37 Mad., 545, distinguished.

SECOND APPEAL against the decree of F. A. COLERIDGE, the District Judge of Kistna at Masulipatam, in Appeal No. 109 of 1913, preferred against the decree of P. VENKATARAMA AYYAR, District Munsif of Bezwada, in Original Suit No. 210 of 1912.

The facts of the case appear from the judgment of KUMARASWAMI SASTRIYAR, J.

P. Nagabhushanam for the appellant.

K. G. Sarangaraja Ayyangar for *V. Ramadas* for the respondent.

SPENCER, J.—A vendee from the original mortgagors brought this suit for redemption. The suit document is termed "Swadira tanakameddatu sharatu pattiram" which may be translated as a possessory mortgage deed containing a condition for a period fixed. It recites that the mortgagors have received Rs. 10 and have mortgaged their house-site with a thatched house standing thereon, that they undertake to pay the principal and interest of these Rs. 10 within a year and take back possession of their house and site, and that, if they do not act according to these conditions, they will surrender the house and land treating the transaction as a sale.

This suit for redemption was brought seventeen years after the term expired. The District Munsif dismissed the suit on the ground that the third defendant had had adverse possession for over twelve years, following *Usman Khan v. Dasanna*(1). The facts of that case were somewhat different. The parties agreed to treat the possession of the mortgagee as the possession of a full owner after possession had been enjoyed for eight years under the mortgage, and nine years after the execution of the deed they showed by their actions that they wished to act upon that agreement. It is, of course, always open to a mortgagor and a mortgagee to enter upon a fresh transaction independent of the mortgage extinguishing the mortgage and passing the

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property to the mortgagee as a purchaser [see *Kunhayalal v. Nashar*(1)]. But here we are concerned only with the terms of the document. The District Judge has treated it as an anomalous mortgage, in which case under section 98 of the Transfer of Property Act the rights and liabilities of the parties have to be determined strictly by their contract. The appellant's *vakil* maintains that it is a usufructuary mortgage or a combination of a usufructuary and a simple mortgage with a clog on the equity of redemption, and he quotes *Sreenivasa Iyengar v. Radhakrishna Pillai*(2) in support of his argument. I am of opinion that the District Judge was right. Simple mortgages, mortgages by conditional sale and usufructuary mortgages are defined in section 58 of the Transfer of Property Act. This cannot be treated as a simple mortgage as there is delivery of the property to the mortgagee, as there is no personal covenant of the mortgagor to pay, and as there is no provision that the mortgagee may sell the property and apply the proceeds in payment of the mortgage money nor is it a mortgage by conditional sale as there is no ostensible sale: nor is it a usufructuary mortgage as there is no condition that the mortgagee should receive the rents and profits and appropriate them in lieu of interest. In fact, the document does not provide any rate of interest. Moreover the possession of the mortgagee is not to continue until payment of the mortgage money, but for a fixed period of one year after which the transaction is to become a sale. In *Visvalinga Pillai v. Palaniappa Chetti*(3) a mortgage for a fixed period was treated as an anomalous mortgage.

It is argued that, if the document be treated as a combination of two forms of mortgage, such, for instance, as a simple mortgage and a usufructuary mortgage combined, all the distinguishing features, such as possession by the mortgagee, necessarily cannot be retained, but, at least, we may expect to find such features present as are not contradictory to the features of the other kind of mortgage with which it is combined. But that is not the case here. Taking the document to be an anomalous mortgage the parties must, by the provisions of section 98, be strictly bound by the terms of their contract, and

(1) (1903) I.L.R., 27 Bom., 297.

(2) (1915) I.L.R., 38 Mad., 667.

(3) (1898) I.L.R., 21 Mad., 1.

neither the conditions of section 60 as to the survival of the rights of redemption, nor the English principles of equity can be applied: *vide Gopala Nair v. Kumban Menon*(1).

A number of other decisions have been cited in which by applying the principles of English equity the right of redemption has been held to subsist even after the document declares it to have ceased. Such are the decisions in *Thumbusawmy Moodely v. Hossain Rowthen*(2), *Ramasami Sastrigal v. Samiyappa Nayakan*(3) and *Kola Venkatanarayana v. Vuppala Ratnam*(4) in which the document was described as *meddatu krayam* and contained terms similar to those in the document before us. These decisions relate to documents executed before the year 1882, when the Transfer of Property Act was introduced and settled the law on the subject of mortgages. Between 1858 and 1882, the Courts of this Presidency and of Bombay applied doctrines which the English Courts of Equity applied to mortgages in England; but in dealing with documents executed since 1882 the Courts are bound to apply the provisions of the Transfer of Property Act: see *Neelakantam v. Ananihakrishna Aiyar*(5) and *Ramayya v. Guruvai*(6).

The Second Appeal must be dismissed with costs.

KUMARASWAMI SASRIYAR, J.—The plaintiff is the appellant. He sued to redeem a mortgage dated 20th March 1894. The material portion of the document runs as follows "Within these limits a house-site together with a thatched house thereon we have mortgaged, that is, we have kept it as a possessory mortgage and have received Rs. 10 (ten rupees) from you. So having paid the principal and interest pertaining to these ten rupees within the end of a year from the said date we shall take possession of our house and site. If we do not act according to the said condition, we shall quit the land and house as if this is a sale." The deed purports to be a "Meddatu sharatu tanaka".

Both the lower Courts dismissed the suit on the ground that the suit was barred as the mortgagee became the owner and was in possession as owner of the property from 1895 and that there was consequently no mortgage to redeem. It is argued by

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(1) (1907) I.L.R., 10 Mad., 300 at p. 305. (2) (1-75) I.L.R., 1 Mad., 1.
(3) (1881) I.L.R., 4 Mad., 179. (4) (1906) I.L.R., 29 Mad., 531.
(5) (1907) I.L.R., 30 Mad., 61 at p. 66. (6) (1891) I.L.R., 14 Mad., 282.

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Mr. Nagabhusanam that the rule of law "Once a mortgage always a mortgage" applied to the present case and that it was not competent to the parties to contract themselves out of the rule by a stipulation which is invalid as a clog on the equity of redemption.

Reference has been made to section 60 of the Transfer of Property Act and to *Samuel v. Jarrah Timber and Wood Paving Corporation*(1), *Perayya v. Venkata*(2), *Ramasami Sastriyal v. Samiyappa Nayakan*(3), *Kola Venkatanarayana v. Vuppala Ratnam*(4), *Sreenivasa Iyengar v. Radhakrishna Pillai*(5), *Neelakantam v. Ananthakrishna Aiyar*(6), *Bapuji Appaji v. Senavori Murwadi*(7). Whatever doubts may exist, when the position of mortgagee was converted into that of a purchaser by a distinct subsequent contract between the parties, the decisions referred to above show that a clause covenanting for an absolute title in default of redemption within the stipulated period in a deed of mortgage falling within any of the kinds of mortgages defined in section 58 of the Transfer of Property Act or a combination thereof referred to in section 93 is governed by section 60 of the Transfer of Property Act, is invalid and does not prevent the mortgagee from redeeming. The following observations of MUTTUSWAMI AYYAR and SHEPPARD, JJ., in *Perayya v. Venkata*(2) are clear and in point: "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 contradistinction to 'operation of law' must denote a release or such other 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."

(1) (1904) A.C., 326.

(2) (1888) I.L.R., 11 Mad., 403 at p. 404.

(3) (1881) I.L.R., 4 Mad., 179.

(4) (1906) I.L.R., 29 Mad., 531.

(5) (1915) I.L.R., 38 Mad., 667.

(6) (1907) I.L.R., 30 Mad., 61 at p. 66.

(7) (1877) I.L.R., 2 Bom., 234.

Reference has been made by Mr. Ramadas for the respondent to *Usman Khan v. Dasanna*(1) [first reported in (1912), M.W.N., 995] and referred to by the lower Appellate Court and it is argued that possession by the mortgagee, for twelve years after the date referred to in the deed of mortgage confers on him title as purchaser. It appears from the facts reported that there was a separate release deed for a fresh consideration. Their Lordships SUNDARA AYYAR and SADASIYA AYYAR, JJ., were of opinion that though the release deed owing to want of registration would not confer immediate ownership yet it operates or changes the character of possession of mortgagee into possession as owner. There is nothing in the judgment to indicate that their Lordships were overruling the decision in *Perayya v. Venkata*(2) or laying down the rule that a recital in the mortgage deed itself would alter the nature of the possession. I am of opinion that if the mortgage in question can be brought under any of the classes defined in section 58 of the Transfer of Property Act or can be said to be a combination referred to in section 98 of the Transfer of Property Act, the clause in the deed of mortgage to the effect that it shall operate as a sale is invalid as being a clog on the equity of redemption and that the plaintiff's right to redeem is not affected.

The next question is whether the mortgage in question can fall under any of the above classes.

It has been argued by Mr. Nagabhushanam for the appellant that the mortgage is one by conditional sale or at least a combination of a simple and usufructuary mortgage and reference has been made to *Kola Venkatanarayana v. Vuppala Ratnam*(3) and to *Sreenivasa Iyengar v. Radhakrishna Pillai*(4). 'Meddatu-krayam' has been defined by Wilson in his Glossary as land mortgaged with the option to the lender to consider it as his property if the mortgage is not redeemed within a stipulated period and the words "Meddatu sharatu tanaka" in the suit document mean the same thing. In *Kola Venkatanarayana v. Vuppala Ratnam*(3) above referred to, the terms of the document were similar to those of the suit bond. Their Lordships, the CHIEF JUSTICE and Justice BENSON held that there was a mortgage by conditional sale, though the document was

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(1) (1914) I.L.B., 37 Mad., 545.

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

(3) (1905) I.L.B., 29 Mad., 591.

(4) (1915) I.L.B., 88 ad., 667.

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executed before the Transfer of Property Act came into force. Their Lordships were inclined to the view that the instrument in question which provided for the payment of the sum due within a fixed date and in default constituted the mortgagee owner fell within the definition of a mortgage by conditional sale in section 58 of the Transfer of Property Act. If the definition given in section 58 is strictly applied it is doubtful whether a transaction which at its inception is a deed of mortgage with possession and which is to ripen into a sale in the happening of a certain contingency can be said to be a mortgage whereby mortgagor ostensibly sells the property with a covenant for redemption or reconveyance if the mortgage money is paid. In *Sreenivasa Iyengar v. Radhakrishna Pillai*(1) SADASIVA AYYAR, J., was of opinion that such a mortgage was not a mortgage by conditional sale but "a mortgage with a clause providing for future conditional sale." Though *Kola Venkatanarayana v. Vuppala Ratnam* 2) was referred to during the course of the argument, it has not been referred to and distinguished. SPENCER, J., was not disposed to place a strict interpretation on section 58, clause 6, and refers to cases where mortgages like those in question are described as mortgages by conditional sale. All the cases where mortgages like the present were treated as mortgages by conditional sale were cases of mortgages created before the passing of the Transfer of Property Act. I agree with SADASIVA AYYAR, J., in thinking that a mortgage like the present one is not a mortgage by conditional sale. It also does not fall within the definition of either a simple or usufructuary mortgage. It is not a simple mortgage as possession has been given and there is no covenant to pay or a right given to the mortgagee to bring the property to sale; nor is it a usufructuary mortgage as there is no provision for the appropriation of the rents and profits towards the principal or interest due and possession as mortgagee is to be only for a year. I do not think that the mortgage can be said to be a combination when the *essential* ingredients of each of the classes are wanting, at least when such elements do not contradict each other and so can find place in the document.

I am of opinion that the mortgage in question is an anomalous mortgage falling within the provisions of section 98 of the

(1) (1915) I.L.R., 38 Mad., 667.

(2) (1906) I.L.R., 20 Mad., 531.

Transfer of Property Act. It has been argued that the principles of equity which form the basis of a series of decisions between 1858 and the date of the passing of the Transfer of Property Act whereby any agreement entered into at the time of the mortgage having the effect of clogging the right of redemption was declared inoperative should be applied to anomalous mortgages even though section 98 of the Act enacts that in cases of anomalous mortgages the rights and liabilities of the parties shall be determined by their contract as evidenced by the mortgage deed. It is contended that the Court ought not to enforce illegal or invalid stipulations.

I do not see any sound reason for departing from the language of section 98 and importing an exception not mentioned therein. As pointed out by their Lordships of the Privy Council in *Pattabhiramier v. Venkata Rao*(1) mortgages like the mortgage in question were long common in India and were recognized and enforced according to their letter both by Hindu and Muhammadan jurists and that what is known in English law as the equity of redemption was unknown to the ancient law of India. In *Thumbusawmy Moolely v. Hossain Rowthen*(2) their Lordships of the Privy Council observe that the decision in *Pattabhiramier v. Venkata Rao*(1) was based on sound principles and that the course of decisions which imported into the consideration of Hindu mortgage's principle founded on the maxim, once a mortgage always a mortgage of the English Court of Equity were radically unsound and involved very mischievous consequences. It is then clear that there is nothing opposed to the Hindu law or to the general principles of equity or good conscience in giving effect to the terms of the contract and it seems to me that the legislature in enacting section 98 intended to take such mortgages as did not fall within the classes specified therein out of the rule which prevents clogs on the equity of redemption, a rule which their Lordships of the Privy Council thought was erroneously imported into Hindu mortgages. *Neelakantam v. Ananthakrishna Aiyar*(3) and *Ramayya v. Gurwal*(4) support the view that the terms of the contract ought to be strictly enforced in cases of anomalous mortgages.

I would dismiss the appeal with costs.

N.R.

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(1) (1870) 13 M.L.A., 560.

(2) (1875) I.L.R., 1 Mad., 1 (P.C.).

(3) (1907) I.L.R., 30 Mad., 61.

(4) (1891) I.L.R., 14 Mad., 232.