APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

CHINNA MUNUSWAMI NAYUDU (PLAINTIFF), APPELLANT, 1925, March 5

v.

SAGALAGUNA NAYUDU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Contract—Specific performance—Sale of lands—Counterpart agreement by vendee on the same date as sale deed—Agreement by vendee to convey the lands to vendor on his paying the same price in the month of Ani in the thirtieth year from date of agreement—Option to vendor—Death of vendor—Assignment of option by vendor's son to a stranger—Right of assignee to inforce specific performance of agreement—Agreement, whether a standing offer or an enforceable contract—Agreement, whether void for want of consideration—Rule of perpetuity—Specific Relief Act, sec. 23 (*b*).

On the same date on which a sale-deed of certain lands was executed, the vendee agreed by a document to convey the same to the vendor on the latter wishing to have them and on his paying the same price as was paid for the sale, in the month of Ani of the thirtieth year from the date of the agreement. The vendor having died, his son assigned his rights under the document to a stranger who tendered the full amount to the vendee within the agreed time. On the latter refusing to execute a conveyance, the assignee sued the vendee for specific performance of the agreement; the latter pleaded that his undertaking was not a contract but only a standing offer and was not assignable, that even if it were a contract it was void for want of consideration and as offending the rule against perpetuities.

Held, that the undertaking by the vendee was not a mere standing offer, but was an executory contract, giving a right to the vendor to get a conveyance from the vendee, and was assignable by the vendor;

that the contract was part of the same transaction as the sale and was supported by consideration;

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that the right under the contract was not personal to the original vendor, but was assignable ;

that the contract was not void for perpetuity, as the period for the exercise of the option was definite and limited ;

and that, consequently, the assignee was entitled to specific performance of the agreement.

Helby v. *Matthews*, [1895] A.C., 471 ; and *Papa Naidu* v. *Munisamy Aiyar*, (1923) I.L.R., 46 Mad., 30, distinguished. *Venkateswara Aiyar* v. *Raman Nambudri*, (1916) 3 L.W., 435, and *Narasingerji Gyanagerji* v. *Panaganti Parthasardhi*, (1921) M.W.N., 519, referred to.

APPEAL against the decree of R. GOPALA RAO, the Subordinate Judge of Chingleput, in Original Suit No. 46 of 1920.

One Venkatasubrahmanya Ayyar, on behalf of himself and his minor son Krishnaswami Ayyar, executed a sale deed, dated 28th January 1891, of the village of Siyatti for a consideration of Rs. 10,000 to one Venkatapathi Nayudu, the father of the defendants. On the same day the vendee executed what was called a counterpart document in favour of the vendor ; the material portions of the document were as follows :

" Counterpart document executed on 27th January 1891, to Sikrala Venkatasubrahmanya Ayyar, . . . by K. Venkatapathi Nayudu, etc. As I have this day purchased absolutely for Rupees ten thousand the entire village of Siyatti, etc. . . ., I shall again convey to you only (tangalukkae) absolutely the said village of Siyatti after a period of 30 years from this date (*i.e.*) in the Ani cultivation season of the 30th year in case you wish to have the village again, and on your paying the said sum of Rupees ten thousand to me. To this effect have I consented and executed the counterpart document."

The vendor died in 1899. His son Krishnaswami Ayyar assigned his rights under the above document in favour of one Chinna Munusami Naicker, the plaintiff herein under Exhibit E, dated 12th May 1910. Exhibit E was in the form of a sale-deed for Rs. 19,200, out of which Rs. 10,000 was payable to the previous vendee Kamusetti Venkatasami Nayudu as per his counterpart

document. The assignee (plaintiff) tendered the full amount in June 1920 within the time agreed under the counterpart agreement. The vendee refused to execute a conveyance as agreed. The assignee thereupon instituted this suit for specific performance of the agreement against the sons and legal representatives of the deceased vendee. The plaintiff also prayed in the alternative for redemption in case the Court should hold the transaction to be a mortgage and also for damages in case the Court should hold that the plaintiff was not entitled either to specific performance or redemption. The defendants pleaded that the counterpart document did not amount to a completed contract which can be assigned but was only an offer which was not, and could not be, accepted before the time limited in the document, that the right to accept was personal to the original vendor and could not be assigned to anyone else, and that the alleged agreement was void for want of consideration and invalid as infringing the rule against perpetuities. The Subordinate Judge held that there was no completed agreement which could be assigned, but that there was only a standing offer to Venkatasubrahmanya Ayyar, which ceased to have operation after his death; he accordingly dismissed the suit. The plaintiff preferred this appeal.

C. V. Anantakrishna Ayyar for appellant.

S. Varada Achariyar for respondents.

JUDGMENT.

SPENCER, J. SPENCER, J.—On 28th January 1891 Venkatasubrahmanya Ayyar, on behalf of himself and his minor son Krishnaswami Ayyar, sold the village of Siyatti to Venkatapathi Nayudu for a consideration of Rs. 10,000. On the same day the parties executed what is termed a

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counterpart document, by which the purchaser Venkatapathi Nayudu agreed to reconvey the village for the same consideration of Rs. 10,000 if the vendor made an application for that purpose in the month of Ani 30 years later. Venkatasubrahmanya Ayyar died in 1899, leaving Krishnaswami Ayyar, his only son, surviving him. Krishnaswami Ayyar assigned his interest under the counterpart agreement, Exhibit B (1), to the plaintiff in this suit for a consideration of Rs. 19,200 out of which Rs. 10,000 were to be paid to get a reconveyance according to the terms of that document.

The plaintiff's suit was dismissed in the Court of the Subordinate Judge of Chingleput on the ground that there was no completed agreement, but only a standing offer, the benefit of which could not be assigned to a stranger. I am unable to agree with the learned Subordinate Judge upon this point. In my view Exhibit B (1) was a contract containing an undertaking on the part of the purchaser to accept an offer of repurchase if made by the vendor for a certain amount at a certain future time. In other words what Krishnaswami Ayyar assigned to the plaintiff was the right under an executory contract to exercise an option at a certain future date to obtain a conveyance of immovable property at a certain price. An offer or proposal cannot of course be enforced till it is accepted; but here the parties had gone beyond the stage of proposal and had entered into a contract which was supported by consideration, as was found in the trial Court. As the learned Subordinate Judge observed:

> "Siyatti village was sold by Venkatasubrahmanya Ayyar for Rs. 10,000 plus the benefit of getting back the village under the conditions mentioned in Exhibt B (1)."

The fact that Venkatasubrahmanya Ayyar had sold the village to Venkatapathi Nayudu was the consideration for executing this agreement for a reconveyance.

The terms of the agreement between the parties were as follows :

"As I have this day purchased absolutely for Rs. 10,000 the entire village of Siyatti which belongs to you in the Conjeeveram taluk, Chingleput district, and in which you hold ekabhoga mirasi right and the right to cultivate, I shall again convey to you the said village after a period of 30 years from this date, i.e., in the Ani cultivation season of the 30th year in case you wish to have the village again, and on your paying the said sum of Rs. 10,000 to me."

The translation does not exactly reproduce the Tamil. There is an emphasis on the word "you" where it occurs after the words "I shall convey to," but there is no condition to the effect that the purchaser would reconvey the village only to the vendor and no proviso that both of them should be alive on the date fixed for tendering Rs. 10,000 and writing a deed of reconveyance. In the normal expectation of human life in this Presidency it was improbable that both seller and purchaser should be alive 30 years after the date of contracting. The Subordinate Judge, who knows Tamil, was of opinion that the word தங்களுக்கே should not, in the contest where it occurs, be interpreted to mean that Venkatapathi Nayudu undertook to reconvey the property to Venkatasubramanya Ayyar personally and not to his heirs or assigns.

I agree with him. I think that there was no personal element in this transaction which would make the contract incapable of being specifically enforced under section 21 (*b*) of the Specific Relief Act.

In this Court the main contest has raged over the question whether the Exhibit B (1) was assignable before the sum of Rs. 10,000 was tendered. Under section 23 (*b*) of the Specific Relief Act the representative in interest of a party to a contract may ordinarily obtain specific performance of it, provided that no

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personal quality of any party to the contract is a material ingredient. The Subordinate Judge has been led into some confusion of thought by a consideration of the case of *Helby* v. *Matthews*(1). He has also allowed himself to be led into a discussion of "option contracts," whatever they may be, and his judgment is vitiated by a reference to American authorities, a practice which has been condemned by the Privy Council. The case of *Helby* v. *Matthews*(1) was peculiar in that it dealt with what is known as a hire purchase contract. Brewster obtained on hire a piano and, after paying a certain number of monthly instalments, he pawned the piano with the respondents who refused to give it up to the owners (the plaintiffs). It was held by the House of Lords that there was no agreement between Brewster and the appellants that he should buy the piano. Before he paid the 36th and last instalment there should be no right by purchase in the hirer, and he was not bound to keep the piano till he had paid every one of the 36 monthly instalments; and as the owners could not compel him to buy, it was neither a purchase nor an agreement to buy within the words of section 9 of the Factor's Act of 1889, until the hirer completed the conditions necessary for a sale by making the last payment and exercising his option to purchase the piano. There is no complete analogy between that case and the present one.

The case of *Papa Naidu* v. *Munisamy Aiyar*(2), to the decision of which my learned brother was a party, has been cited before us, as it was held that what was agreed upon in that case constituted not a complete agreement but a mere standing offer. The purchaser of certain lands agreed to execute a reconveyance on

(1) [1895] A.C., 471.

(2) (1923) I.L.R., 46 Mad., 30.

payment of Rs. 800 within the 30th day of Vikasi in any year whatsoever. It appears to me that that agreement was not enforceable, for the simple reason that there was no mutuality and no time fixed for performance. Apparently the promisor in that case agreed to sell upon demand before a certain date in any year, but as there was no time limit and no consideration for keeping the offer open for an indefinite time, the promisor was entitled to withdraw at any time before the promisee applied for performance.

At the end of paragraph 14 of his judgment the Subordinate Judge has confounded the tender, which was to be made in future, with the proposal or offer which must form the basis of every completed agreement. The real offer and acceptance were made on the same date as the sale. The date upon which the purchaser agreed to accept a tender of Rs. 10,000 for the purpose of reconveying the village of Siyatti to the seller is quite certain, namely, the month of Ani in the 30th year after 1891, and there is no vagueness upon the point of time for performance. It is as if Venkatapathi had said to Venkatasubrahmanya Ayyar :

"In consideration of your having sold me the village of Siyatti this day for Rs. 8,000, I undertake if you come to me in the month of June, 30 years hence and tender me a similar amount of Rs. 8,000 I will accept it and will execute to you a reconveyance of that property."

Upon Subramanya Ayyar's acceptance of this offer the contract was put in writing and the contract was then registered. Whether the suit document and the sale-deed executed on the same day should be treated as a mortgage by conditional sale or a sale with a simultaneous but independent agreement for reconveyance is not of material consequence, except upon the point of assignability. The plaintiff says he tendered Rs. 10,000 on 19th June 1920 and upon the defendant

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hiding himself, he gave him a registered notice of his willingness to pay the amount, to which the defendant replied refusing to receive it. The Subordinate Judge has found that there was a valid tender as alleged in the plaint, and there is no question of limitation, as sometimes arises when it is doubtful whether a particular transaction is a mortgage or an independent agreement for reconveyance.

The decisions in *Venkateswara Aiyar* v. *Raman Nambudri*(1), and *Narasingerji Gyanagerji* v. *Panaganti Parthasaradhi*(2), support the appellant's contention that contracts of this nature are capable of assignment. The last-named decision has recently been reversed by the Privy Council (vide I.L.R. 47 Mad., 729) but not on the question of the contract being assignable, as their Lordships found the transaction concerned to be of the nature of a mortgage rather than a sale, and there is no difficulty in treating a mortgage interest as being assignable.

The English cases of *Buckland* v. *Papillon*(3) and *Manchester Brewery Company* v. *Coombs*(4), which were quoted as good law by MCCARDIE, J., in *County Hotel and Wine Company* v. *London and North Western Railway*(5), are authorities for the proposition that in England options to purchase as well as contracts to sell are capable of assignment.

If the suit contract was a mortgage, the mortgagor's interest was unquestionably transferable.

We have therefore allowed the question to be argued whether Exhibit B-1, constituted a mortgage by conditional sale or an executory contract. A Bench of this Court has already expressed its opinion that this was a

(1) (1916) 3 L.W. 435. (2) (1921) M.W.N., 519.
(3) (1866) 1 Eq., 477. (4) [1901] 2 Ch., 608.
(5) (1918) 2 K.B., 251.

sale rather than a mortgage [see the judgment in Second Appeal No. 2180 of 1915 exhibited as Exhibit I (*b*)] but this opinion was given prior to the Privy Council decision in *Narasingerji* v. *Parthasaradhi Rayanam Garu*(1), which reversed the judgment of WALLIS, C.J., and OLDFIELD, J., in *Narasingerji Gyanagerji* v. *Panaganti Parthasaradhi*(2), upon which the Subordinate Judge relied for excluding the evidence of surrounding circumstances and deciding that Exhibit B-1 was not a mortgage. There is much to be said in favour of either view, but it is unnecessary to pronounce in favour of the view that we have here a transaction in the form of a mortgage by conditional sale.

Again the insolvency of Venkatasubrahmanya Ayyar did not affect the right of the plaintiff, seeing that the Official Assignee under an indenture of 22nd February 1916, Exhibit BB, conveyed the father's interest to Krishnaswami, the insolvent's son, and that Krishnaswami's widow under Exhibit BB released her right on 16th February 1921 in favour of the plaintiff after both the father's interest and the son's interest had become combined in the son.

The appeal must, for the above reasons, be allowed with costs throughout and the suit must be remanded. A preliminary decree will be passed directing the defendants to execute a conveyance in proper form on stamp paper and to register the same within one week from the re-opening of the lower Court after the summer vacation and providing that on their failure to do so the Court will execute a conveyance of the suit properties to the plaintiff on their behalf.

The lower Court will take evidence as to the claim for mesne profits due from date of plaint and will pass a

(1) (1924) I.L.R., 47 Mad., 729 (P.C.). (2) (1921) M.W.N., 519.

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final decree after ascertaining what is due to plaintiff on that account. The plaintiff gives up his claim for damages for cutting of trees and depreciation of buildings, etc., covered by the seventh issue. The defendant will be at liberty to draw out the purchase amount deposited in Court.

RAMESAM, J.

RAMESAM, J.—This appeal arises out of a suit to compel the defendants to execute a conveyance to the plaintiff. The Subordinate Judge dismissed the suit and the plaintiff appeals.

One Venkatasubrahmanya Ayyar and his son Krishnaswami Ayyar sold the suit village to Venkatapathi Nayudu, the father of the defendants, by Exhibit B (dated 27th January 1891) for Rs. 10,000. On the same day Venkatapathi executed the counterpart, Exhibit B-1, to his vendors agreeing to reconvey the village for the same amount in the Ani month of the thirtieth year from the date of the agreement, if they wish to have it. The month of Ani in the thirtieth year corresponds to 14th June to 14th July 1920. Venkatasubrahmanya Ayyar became insolvent in 1897 and died in 1899. His properties vested in the Official Assignee of Madras. In 1910 his son Krishnaswami Ayyar executed Exhibit E to the plaintiff conveying his rights in the suit village. Krishnaswami Ayyar also obtained a deed from the Official Assignee (Exhibit BB-1, dated 22nd February 1916) by which the latter conveyed all rights to the suit village vested in him by reason of the insolvency of Venkatasubrahmanya Ayyar. Krishnaswami Ayyar died in 1919. His widow executed Exhibit BB-1 (dated 16th February 1921) releasing her rights in favour of the plaintiff. The Subordinate Judge has found (and the finding has not been questioned before us) that the plaintiff tendered the amount of Rs. 10,000 in the month of June 1920. The present suit was filed on 12th July 1920. The

Subordinate Judge found on issue 2 (*b*) that the effect of Exhibit B-1 was that there was a standing offer to Venkatasubrahmanya Ayyar which ceased to have operation after his death and dismissed the suit.

The plaintiff appeals.

The main points argued at great length before us relate to the effect of Exhibit B-1. Exhibits B and B-1 formed part of a single transaction and Exhibit B-1 is certainly supported by consideration. The respondent contended that the right created under it in favour of Venkatasubrahmanya Ayyar and Krishnaswami Ayyar was purely personal and could not be assigned (Issue 2-b). He also contended that it was an option to accept or refuse in June 1920 and could be assigned only after the offer was accepted by the tender of the amount and thus ripened into a contract to sell and buy. He argues that before 14th June 1920 there was no agreement for sale and purchase and therefore there was nothing to assign; neither Subrahmanya Ayyar nor Krishnaswami Ayyar lived up to that date, and no one else can accept an offer made to them. In other words, the option which an offeree has to refuse or accept an offer made to him, even if it can be called a right, is not such a right as can be assigned, so as to enable the assignee to accept the offer. The two aspects of the questions are to a certain extent connected.

It is true that, in cases of sale and an agreement to resell and other similar cases such as a lease with covenant for sale or a hire with an agreement for purchase, the second part of the transaction, where the vendee has an option, does not amount to an agreement for sale and purchase (vide *Lord Ranelagh* v. *Melton*(1), which was a case of lease with an option to purchase;

(1) (1864) 2 Dr. & Sm., 278; 62 E.R., 627.

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Helby v. *Matthews*(1), which was followed and applied by AYLING, J., and myself in *Papa Naidu* v. *Muniswami Ayyar*(2), where there was no time fixed for the exercise of the option). In all these cases, such a pre-contract [see per Lord WATSON in *Helby* v. *Matthews*(1)] is, if not supported by consideration, a *nudum pactum*, but if it is supported by consideration (as in this case) it amounts to an undertaking on the part of the offerer not to withdraw the offer, i.e., it is a contract, not a contract for sale and purchase, but one not to withdraw an offer. It is a contract precedent to the agreement for sale and purchase. If the time fixed for the exercise of the option is any time within a certain date, the option may be exercised at any time within that date and will mature into a contract to buy and sell. But if the option is to be exercised at a certain stated time, i.e., after the expiration of a certain period [as in *Lord Ranelagh* v. *Melton*(3)], or between certain points of time as in this case, it would seem that the option cannot be irrevocably exercised earlier than the stated time. This seems to be the opinion of KINDERSLEY, V.C., in *Lord Ranelagh* v. *Melton*(3). But the question of assignability of the right of the optionee did not arise in any of these cases. They do not throw any light on that question.

Prima facie, the rights of the parties to a contract are assignable—*Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (4); *Tolhurst* v *Associated Portland Cement Manufacturers* (1900) (5). The same principle is embodied in section 23 (*b*) of the Specific Relief Act unless "the personal quality of such a party is a material ingredient in the contract." These words of the Indian Act seem to me exactly the same

(1) [1895] A.C., 471.
(2) (1923) I.L.R., 46 Mad., 30.
(3) (1864) 2 Dr. & Sm.278, 62 E.R., 627.
(4) [1901] 2 K.B., 811.
(5) [1902] 2,K.B., 660 at 668.

as the words used by FRY, L.J., in his Specific Performance, section 225. See also *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (1) where Lord MACNAGHTEN uses the words "personal elements." But he proceeds to state in section 229:

> "Where though the relation established by the contract may have in it nothing personal, some previous personal relation of favour or otherwise, between the contracting parties, has been a material motive to the contract, it can be enforced by that person only."

Mr. Varadachari relies on this statement of FRY, L.J., and on the previous relation between the parties to attract its application. But I do not find anything in section 23 (*b*) of the Specific Relief Act (which corresponds to section 225 of FRY, L.J., only) justifying an extension of it, so as to cover a case to which section 229 of FRY, L.J., could apply. The learned vakil referred to *Vithoba Madhav* v. *Madhav Damodar*(2), *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri*(3) and *Toomey* v. *Rama Shai*(4) as examples of the application of this principle. There is no resemblance between this case and the cases *Toomey* v. *Rama Shai*(4) *and Mohendra Nath Mookerjee* v. *Kali Proshad Johuri*(3). Even the case *Vithoba Madhav* v. *Madhav Damodar*(2) is distinguishable. The term of 30 years, in my opinion, makes it clear that the option was not intended to be personal. The parties could not have been so certain of the life of Subrahmanya Ayyar and Krishnaswami Ayyar up to the end of this time and could only have meant that the option might be exercised by them or their heirs. I may observe that the translation of Exhibit B at page 15 is not quite correct. The vernacular word "Thangalukkai" is a merely emphatic form of saying "you," and though, if it occurs

(1) [1903] A.C., 414 at 417.
(2) (1918) I.L.R., 42 Bom., 344.
(3) (1903) I.L.R., 30 Calc., 265.
(4) (1890) I.L.R., 17 Calc., 115.

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by itself, it may be translated as "you only"; in this case it represents the vernacular idiom, the emphatic form being sometimes used when the word is repeated in the same sentence. There is no word for "only." Mr. Varadachari also contended that even if there is nothing personal in the contract still the offeree only can accept an offer. This proposition is true of mere offers. But, in this case, we have an offer which is irrevocable under a contract and only the offeree has an option to accept or refuse. This does not stand in the same footing as a bare offer. To say that the rights of an offeree in a case of this kind do not descend to his heirs seems to me a repetition of the argument about personal element in another guise and the term of 30 years seems to afford an answer to this argument as well. Mr. Varadachari has conceded that the family of Subrahmanya Ayyar was the object of Venkatapathi Nayudu's bounty and the option may be exercised by the heirs, but argued that it is not assignable. But this seems to be a distinction without any principle to support it. If a right can be transmitted to heirs, it is equally assignable. I therefore think that the option can be assigned even before it matures into an agreement to sell and purchase. In England it was so held in *Buckland* v. *Papillon*(1). ROMILLY, M.R., held that it was an interest under an agreement and vested in the assigns in bankruptcy (at page 483). On appeal Lord CHELMSFORD, L.C., in *Buckland* v. *Papillon*(2) said at page 71 :

"I see no reason why an option to take a lease should not be an interest in land"

and lower down

"it cannot be contended successfully that a person who may call for a lease at his own will and pleasure may not be looked upon as entitled to an agreement for a lease."

(1) (1866) 1 Eq., 477. (2) (1866) 2 Ch. App., 67 at 71.

Under section 54 of the Transfer of Property Act an agreement to sell, by itself, cannot create an interest in land—much less can an option even if it is made irrevocable by reason of a contract. But I do not see why the interest under the contract is not assignable as a right *ex contractu* if not as a right *in rem*. The case in *Buckland* v. *Papillon*(1) was referred to with approval by Lord LINDLEY in *Tolhurst* v. *The Associated Portland Cement Manufacturers* (1900) (2) and in *County Hotel and Wine Co., Ltd.* v. *London and North-Western Railway Co.* (3) by McCARDIE, J. (see also Fry on Specific Performance section 1105, and Redman's Landlord and Tenant, page 28, and Leake on Contracts, page 919) (1901) 2 Ch., 608). In this Court the assignability of an option was recognized in *Venkateswara Aiyar* v. *Raman Nambudri*(4) and *Narasingerji Gyanagerji* v. *Panagant Parthasaradhi*(5) modified by the Privy Council on another ground in *Narasingerji* v. *Parthasaradhi Rayanam Garu*(6).

The learned vakil for the respondent also contended that the option is void as offending the rule against perpetuities. If it created an interest in land, this contention is correct. But in India it cannot create an interest in land, whatever the rule in England may be. As a right *ex contractu* intended to be exercised at a stated time (ranging within one month) by the optionees or their representative and assigns, it does not tie up the land and cannot offend the rule against perpetuities [see *Charamudi* v. *Raghavulu*(7) followed in *Raja of Karvennagar* v. *Velayuda Reddy*(8)].

The assignment to the plaintiff is therefore valid. The further question argued by the appellant's vakil that

(1) (1866) 1 Eq., 477.
(2) [1903] A.C., 414 at 423.
(3) (1918) 2 K.B., 251 at 256.
(4) (1916) 3 L.W., 435.
(5) (1921) M.W.N., 519.
(6) (1924) I.L.R., 47 Mad., 729 (P.C.).
(7) (1916) I.L.R., 39 Mad., 462.
(8) (1915) 18 M.L.T., 83.

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Exhibits B and B-1, on their true construction, amount to a mortgage does not arise. The fact of a long term is in favour of the appellant [see *Swaminatha Aiyar* v. *Appasami Aiyar*(1), *Madhab Charan Das* v. *Rajani Mohan Das*(2) and *Modhu Sudan Das* v. *Rhidoy Moni Baistabi* (3)]. The oral evidence as to the produce of the lands also seems to be in his favour, but there is no evidence as to the prices of grains in 1890. On the other hand Exhibits II, III, III(*a*) and IV suggest that the lands are of poor quality and, on a former occasion, this High Court held that the documents do not amount to a mortgage [Exhibit I (*b*)]. This judgment does not constitute *res judicata*. It is not necessary to pursue this point further.

In the result I agree with my learned brother that the appeal should be allowed and with the order proposed by him.

K.R.

(1) (1915) 27 I.C., 305. (2) (1921) 64 I.C., 583.
(3) (1901) 6 C.W.N., 192.