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in the case of *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1). The authorities which show that s. 28 of the Indian Limitation Act of 1877 makes limitation a matter of title to be proved by the plaintiff in suits for the possession of property are collected in the case of *Parmanand Misr* v. *Sahib Ali* (2). In the present case the District Judge had not tried, or apparently considered, the question as to whether plaintiff had proved, *primâ facie* or otherwise, title within twelve years before suit. On that point he seems to have expressed no opinion on the plaintiff's evidence at all. Before going into the question as to whether the defendants had or had not a title by adverse possession, the District Judge ought to have satisfied himself and expressed an opinion that there was *primâ facie* proof that the plaintiff had a subsisting title at the commencement of the suit. We set aside the order of remand and remand the case under s. 562 of the Code of Civil Procedure to the Court of the District Judge for him to try the issues which arise in the case and to dispose of the appeal according to law. It may be that the District Judge may find the question of limitation either way. We express no opinion on the facts on either side as to the question of limitation. Costs here and hitherto will abide the result.

Cause remanded.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

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March 10.

ALI AHMAD (PLAINTIFF) *v.* RAHMAT-ULLAH (DEFENDANT). *

Construction of document—Mortgage—Sale—Bai-bil-wafa, nature of—Act IV of 1882 *(Transfer of Property Act) s.* 58*—Pre-emption.*

The transaction known to Muhammadan law as a *bai-bil-wafa* is a mortgage within the meaning of s. 58 of Act IV of 1882, and not a sale.

The plaintiff in a suit for pre-emption had, prior to the sale of the property claimed, executed a deed in respect of his share in the village in virtue of which he claimed the right to pre-empt, the material portion of which deed was as follows:—"Thirdly, if I, the vendor, or the heirs of me, the vendor, Ali Jan, *alias* Ali Ahmad, should pay off the entire consideration money mentioned above on the Puranmashi

* Second Appeal No. 1125 of 1889 from a decree of Rai Lalta Prasad, Subordinate Judge of Ghâzipur, dated the 9th July 1889, reversing a decree of Maulvi Sayyid Zain-ul-abdin, Munsif of Korantadih, dated the 18th January 1889.

(1) I. L. R., 16 Calc., 473. (2) I. L. R., 11 All., 438.

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of Jeth Sudi 1299 fasli to the said purchaser, she should without any objection or hesitation receive the money, and, returning the property sold, described above in the document, to me the vendor, revoke the sale."

Held that this deed was a *bai-bil-wafa* or mortgage by conditional sale, and that as the conditional sale had not become absolute at the time when the right of pre-emption accrued, the conditional vendor or mortgagor was still a shareholder in the village, and therefore had still a subsisting right of pre-emption. *Bhagwan Sahai* v. *Bhagwan Din* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Majid*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

EDGE, C. J., and TYRRELL, J.—The plaintiff, who is the appellant here, brought his suit for pre-emption in the Court of the Munsif of Korantadih. The suit is based on the village *wajib-ul-arz* and a sale-deed dated the 20th of October 1887. The vendor and vendee were made defendants to the suit. The defendant, who was the vendee under the deed of the 20th of October 1887, pleaded several matters by way of defence. Amongst other defences he alleged in effect that the plaintiff had, prior to the 20th of October 1887, ceased to be a shareholder in the village. In support of that defence the defendant vendee relied upon a deed which had been executed by the plaintiff on the 30th of September 1887, and which was registered on the 19th of October 1887, and contended that that deed was a deed of absolute sale by which all the interest of the plaintiff in the village had been assigned by him to a third party. On the other hand, the plaintiff contended that the deed of the 30th of September 1887 was a conditional sale-deed, and that the transaction evidenced by that deed was a mortgage by conditional sale within the meaning of s. 58 of the Transfer of Property Act, 1882 (Act No. IV of 1882), and that as mortgagor he was and continued to be a shareholder in the village within the meaning of the *wajib-ul-arz*.

The Munsif gave the plaintiff a decree. The defendant, the vendee, appealed. The lower appellate Court holding that, under the deed of the 30th of September 1887, the plaintiff had abso-

(1) L. R., 17 I. A., 98 S.C., I. L. R., 12 All., 387.

lutely assigned his share in the village, made a decree setting aside the decree of the first Court and dismissing the suit. From that decree this second appeal has been brought. The only issue determined by the lower appellate Court was that as to the effect of the deed of the 30th of September 1887.

The material condition in the deed of the 30th of September 1887, as translated by the head of the Translating Department of this Court is as follows :—Thirdly, if I, the vendor, or the heirs of me the vendor, Ali Jan, *alias* Ali Ahmad, should pay off the entire consideration money mentioned above on the Puranmashi of Jeth Sudi 1299 fasli to the said purchaser, she should without any objection or hesitation receive the money, and, returning the property sold, described above in the document, to me the vendor, revoke the sale." The words have been translated as "revoke the sale" are "*ikala bai.*"

Wilson's Glossary of Judicial and Revenue Terms (London, W. H. Allen & Co., 1855) gives the meaning of the word *ikala* thus :—"*Ikala.* The cancelling or dissolution of a sale on condition of furnishing an equivalent for the original price of the article; breaking a contract or engagement." In the second edition of Hamilton's Hidaya by Grady "*ikala*" is thus defined :—"*Ikala* literally signifies to cancel. In the language of the law it means the cancelling or dissolution of a sale." The lower appellate Court translated "*ikala bai*" as "re-sell." Mr. *Abdul Majid* for the appellant relied upon s. 58 of the Transfer of Property Act, 1882, and the case of *Thumbusamy Moodelly* v. *Mahomed Hussain Rowthen* (1) and *Sahib-un-nissa Bibi* v. *Hafiza Bibi* (2).

Mr. *Kashi Prasad* for the respondent, cited the cases of *Musammat Chundo* v. *Hakeem Alim-ood-deen* (3); *Rajjo* v. *Lalman* (4); *Bhajan* v. *Mushtak Ahmad* (5); and *Bhagwan Sahai* v. *Bhagwan Din* (6).

(1) L. R., 2 I. A., 241 S. C., I. L. R., 1 Mad., 1.
(2) I. L., R., 9 All., 213.
(3) N.-W. P., H. C. Rep. 1874, p. 28.
(4) I. L. R., 5 All., 180.
(5) I. L. R., 5 All., 324.
(6) L. R., 17 I. A., 98.

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The decision in *Mussammat Chando* v. *Hakeem Alim-ood-deen* (1) does not appear to us to have any bearing on the question before us, as the rights of the parties here must be determined by the contract or the village custom contained in the *wajib-ul-arz* and by the construction of the deed of the 30th of September 1887, having regard to the Transfer of Property Act, 1882.

The case of *Rajjo* v. *Lalman* (2) does not apply. In that case the person who claimed to enforce a right of pre-emption under a *wajib-ul-arz* had in anticipation mortgaged to a stranger, *i.e.*, to a person who was not a shareholder in the village, the very share which he sought to pre-empt.

The case of *Bhajan* v. *Mushtak Ahmad* (3) has no possible bearing on this case. The translation there evidenced by the instrument of July 1870 was an absolute sale. Whether the vendor in that case could have enforced the subsequent agreement of November 1870, we need not consider.

Mr. *Kashi Prasad* strongly contended that the decision of their Lordships of the Privy Council in *Bhagwan Sahai* v. *Bhagwan Din* (4) governed this case, and that applying the principle of that decision we were bound to construe the deed of the 30th of September 1887, as a deed of absolute sale and not as a mortgage by conditional sale. If the facts in the two cases were the same, and if the Transfer of Property Act, 1882, was equally applicable to the two cases, we would without doubt be bound to take the law to be applied in this case from their Lordships of the Privy Council and to apply it without hesitation. It is doubtful how far, if at all, the attention of their Lordships of the Privy Council was drawn in the case of *Bhagwan Sahai* v. *Bhagwan Din* (4) to the origin and object of the *bai-bil-wafa* form of mortgage which was introduced to enable Muhammadans, contrary to the precept of the Muhammadan law against lending money at interest, to lend money at interest and to obtain security for the repayment of the principal

(1) N.-W. P., H. C. Rep., 1874, p. 28.
(2) I. L. R., 5 All., 180.
(3) I. L. R., 5 All., 324.
(4) L. R., 17 I. A., 98, I. L. R., 12 All., 387.

and interest. It may be doubted if their Lordships of the Privy Council were informed that it was possible that the *bai-bil-wafa* mortgage transaction was, at least by the people of these Provinces, before their Lordships' decision, understood as being capable of being effected in different ways, as, for instance, by a deed which purported to assign the property absolutely, but which contained a stipulation for a right of re-purchase, or by two contemporaneous deeds, one of which purported to effect an absolute and unconditional sale, and the other of which was an agreement that the apparent vendor should have a right of re-purchase, and that, as a rule, the common lump price mentioned in each of such deeds did not represent the actual price paid by the apparent vendee, but represented that price plus interest calculated, frequently at a usurious rate, for the period during which it was agreed that the right of re-purchase should subsist, an arrangement which could hardly be consistent with such a transaction being one of an absolute sale and not one in the nature of a mortgage.

In such a case it would be hardly consistent with justice, equity or good conscience to treat the transaction as other than what it in fact was, or was admitted to have been, or to construe the documents as if they had been drafted by a conveyancer of Lincoln's Inn in accordance with English decisions which might be wholly unknown to the people of this country and wholly inapplicable to the form and object of the contract as understood by the parties in India, or to deprive either party of the remedy recognized by the Indian Limitation Act.

In this part of India for many centuries conveyancing followed the Muhammadan forms.

It may also be doubted if the attention of their Lordships of the Privy Council was drawn to the passage in the judgment of this Court in which it was stated, as was the fact :—

"The plaintiffs contended that the sale was a conditional sale or a mortgage by conditional sale. The correctness of this contention was admitted on behalf of the appellant."

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The appellant was the one of the defendants who had appealed from the decree of the Subordinate Judge of Cawnpore who had held that the transaction was one of mortgage. The appellant in that case was represented by two of the most experienced lawyers then practising in this Court, who had been for years familiar with the different forms in which a *bai-bil-wafa* mortgage transaction was effected in these Provinces. Unfortunately this Court did not think it necessary to state in its judgment its reasons for agreeing with what was conceded on behalf of the parties to the appeal, namely, that the transaction was one which was intended by the parties to it to be a transaction of mortgage. Whether any of those considerations would have influenced their Lordships of the Privy Council to take a different view of the transaction, we are unable to say. As in duty bound, we accept the decision as it stands, as an authoritative exposition of the law to be administered in this country in a similar case. There is an apparent distinction between that case and this. In that case the contract which was alleged by one side and admitted on behalf of the other side in this Court to be a contract of mortgage was evidenced, if at all, by two contemporaneous documents, whilst in this case the contract is contained in one document, and is obviously a mortgage within the meaning of clause (*c*) or of clause (*e*) of s. 58 of the Transfer of Property Act, 1882. It is not necessary for the purposes of this case to decide which of those clauses of the section applies to it. Taking that view of the transaction as evidenced by the deed of the 30th of September 1887, we hold that the plaintiff had not by reason of the mortgage of the 30th of September 1887, ceased to be a shareholder in the village, and that he was not by reason of his having mortgaged his share in the village disentitled to maintain this suit for pre-emption. As the other issues in the case have not been tried by the lower appellate Court, we remand the case, under s. 566 of the Code of Civil Procedure, for the trial and determination of the other issues raised by the memorandum of appeal which was filed in the lower appellate Court. Ten days will be allowed for filing objections after the return has been received.

Cause remanded.